Health Care
Attorneys Highlight DOMA's Effects On Pretax Treatment of Health Benefits

By Florence Olsen

Certain rights and benefits are available under the law only to opposite-sex spouses, even if an employer wants to extend them to same-sex spouses, said a benefits attorney who spoke Sept. 24 about the Defense of Marriage Act.

A cafeteria plan may cover same-sex spouses, for example, but an employee with a same-sex spouse generally cannot pay health insurance premiums for the spouse on a pretax basis unless the same-sex spouse is the employee’s “tax dependent” under the tax code, said Lisa G. Pelta, an attorney at Harter Secrest & Emery in Rochester, N.Y. Pelta spoke during a webcast sponsored by the American Law Institute Continuing Legal Education.

Flexible Benefits

Same-sex spouses also are treated differently under tax code rules for flexible spending accounts, health reimbursement arrangements, and health savings accounts, which generally provide tax-favored health care reimbursement benefits to employees, their spouses, and dependents. An employee may not receive tax-free reimbursement for the expenses of a same-sex spouse and may not pay for coverage on a pretax basis, unless the same-sex spouse qualifies as a tax dependent of the employee, Pelta said.

“If dependent status is lost midyear, the employer will need to recoup the reimbursement by withholding from future taxable wages, offsetting future reimbursements, or reporting the reimbursements as taxable income on the employee’s W-2,” she said.

To qualify as tax dependents, same-sex spouses must be “qualifying relatives” of plan participants, which means they must receive more than half of their support from the participant for the entire year and must share the same principal home address for the full year, Pelta said.

Employers must become familiar with the federal and state laws that govern their employee benefit plans so they know which benefits they must, can, or cannot offer to same-sex spouses, Pelta said.

Employers also should review plan documents, summary plan descriptions, benefit and insurance policies, and all related documentation to determine whether and how the term “spouse” is defined in those documents, she said.

Section 3 of DOMA provides that, for all federal laws, marriage means a legal union between one man and one woman, and spouses are treated as unmarried for all provisions of the Employee Retirement Income Security Act and the tax code that refer a person’s marital status, Pelta said.

Although benefit plans frequently use the term “spouse,” they often do not define the term, Pelta said. ERISA and the tax code do not define the term either, and before the passage of DOMA in 1996, the meaning of spouse was left to state law, she said.

Supreme Court Appeal

BNA Snapshot

ALI CLE Webcast:
DOMA and Its Impact on Employee Benefit Plans

Key Topic: Employers are prevented by law from offering certain rights and employee benefits to same-sex spouses.

Key Takeaway: Unless a same-sex spouse qualifies as an employee’s dependent, that employee may not receive tax-free reimbursement for the health care expenses of the same-sex spouse.
The U.S. Court of Appeals for the First Circuit ruled in May that DOMA is unconstitutional, finding that provisions in the act, which denies numerous benefits to same-sex couples lawfully married in Massachusetts, impermissibly undercut choices made by same-sex couples and the states in deciding who can be married to whom (105 DTR K-1, 6/1/12). However, citing a likely appeal of its ruling in Massachusetts v. HHS (1st Cir., No. 10-2204), the First Circuit stayed enforcement of its decision until the Supreme Court has an opportunity to issue its own ruling in the case.

An appeal to the Supreme Court has been filed in Massachusetts, and the high court is likely to accept certiorari, said Erika N.D. Stanat, a partner at Harter Secrest & Emery in Rochester, N.Y., who also spoke during the webcast.

Senate Majority Leader Harry Reid (D-Nev.) has said he backs the repeal of DOMA and did not rule out an attempt to bring legislation to the floor later this year.