Employee Benefits for Same-Sex and Unmarried Couples: Legal Considerations
Navigating DOMA, ERISA, COBRA, FMLA, Tax Issues and Evolving State Law

TUESDAY, MAY 22, 2012
1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today’s faculty features:
Joseph S. Adams, Partner, McDermott Will & Emery, Chicago
Brian J. Tiemann, McDermott Will & Emery, Chicago
Todd A. Solomon, Partner, McDermott Will & Emery, Chicago

The audio portion of the conference may be accessed via the telephone or by using your computer’s speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 10.
Conference Materials

If you have not printed the conference materials for this program, please complete the following steps:

• Click on the + sign next to “Conference Materials” in the middle of the left-hand column on your screen.
• Click on the tab labeled “Handouts” that appears, and there you will see a PDF of the slides for today’s program.
• Double click on the PDF and a separate page will open.
• Print the slides by clicking on the printer icon.
For CLE purposes, please let us know how many people are listening at your location by completing each of the following steps:

- In the chat box, type (1) your **company name** and (2) the **number of attendees at your location**
- Click the SEND button beside the box
**Tips for Optimal Quality**

**Sound Quality**
If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory and you are listening via your computer speakers, you may listen via the phone: dial **1-866-258-2056** and enter your PIN - when prompted. Otherwise, please send us a chat or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

**Viewing Quality**
To maximize your screen, press the F11 key on your keyboard. To exit full screen, press the F11 key again.
Employee Benefits for Same-Sex and Unmarried Couples: Legal Considerations

Strafford Publications, Inc. 

Joseph S. Adams  
Partner  
jadams@mwe.com  
312.984.7790 

Todd A. Solomon  
Partner  
tsolomon@mwe.com  
312.984.7513 

Brian J. Tiemann  
Associate  
btiemann@mwe.com  
312.984.3268 

May 22, 2012
Overview

- Recent Developments in State Same-Sex Union Laws
- Effects of Recent Actions on Employee Benefit Plans
- Steps Employers Should Take Now
- Domestic Partner Benefits/“Cutting Edge” Trends and Best Practices
- Your Questions
Recent Developments in State Same-Sex Union Laws

- **Same-Sex Marriage**
  
    - Same-sex marriage was legal in California for nearly five months in 2008. In November 2008, California voters approved Proposition 8, a state constitutional amendment that defines marriage as a union between a man and a woman. The Ninth Circuit Court of Appeals ruled in February 2012 that California’s ban on same-sex marriage violates the Equal Protection Clause of the U.S. Constitution. The ruling is expected to be appealed to the U.S. Supreme Court.
  
    - Other states have marriage cases brewing in lower courts, and at least 8 states are considering same-sex marriage legislation.
  
    - Same-sex marriage is also legal in other countries, including Belgium, Canada, the Netherlands, Norway, South Africa, Spain and Sweden.
Recent Developments in State Same-Sex Union Laws (Cont.)

- Recognize Out-Of-State Same-Sex Marriages
  - California recognizes same-sex marriages performed in other states between June 17-November 4, 2008.
  - Prior to the enactment of a law in February 2012 to legalize same-sex marriage, Maryland’s Attorney General issued an opinion statement in February 2010 directing state agencies to recognize same-sex marriages performed in other states, despite marriage being defined as an opposite-sex union under state law.
Recent Developments in State Same-Sex Union Laws (Cont.)

- No Legal Prohibition to Recognizing Out-Of-State Same-Sex Marriages
  - New Jersey, New Mexico, Rhode Island
  - New Mexico’s Attorney General issued an advisory opinion in January 2011 concluding that state law permits the recognition of same-sex marriages performed in other states. It is unclear at this time what impact the advisory opinion will have.
  - Rhode Island’s Attorney General issued an advisory opinion in February 2007 concluding that the state can recognize same-sex marriages performed in other states. However, the Rhode Island Supreme Court refused to grant a divorce to a same-sex couple that same year.
Recent Developments in State Same-Sex Union Laws (Cont.)

- **Civil Unions**
  - New Jersey recognizes same-sex civil unions
  - Illinois began recognizing same-sex and opposite-sex civil unions on June 1, 2011
    - Requires insured plans to offer coverage to civil union partners
  - Delaware began recognizing same-sex civil unions on January 1, 2012
  - Hawaii began recognizing same-sex and opposite-sex civil unions on January 1, 2012
  - Other states converted civil unions to marriages (e.g., New Hampshire, Connecticut)
Domestic Partnerships
- Limited rights: Maine (2004), Maryland (2008), New Jersey (for registrations prior to February 19, 2007), and Wisconsin (2009)

Reciprocal Beneficiaries
- Hawaii (1997)

Designated Beneficiaries
- Colorado (2009)
Federal DOMA

- Provides that, for purposes of federal law, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex.
- Also allows states to refuse to recognize other states’ same-sex marriages.
- A federal District Court in Massachusetts found the federal DOMA unconstitutional under the U.S. Constitution in two separate cases in July 2010. The rulings have been stayed pending appeals to the First Circuit Court of Appeals.
- The federal government has refused to defend DOMA, but will continue to enforce it for now.
- There is also a proposed legislative repeal of DOMA called the “Respect for Marriage Act.”
State DOMAs

- A vast majority of states have also passed DOMAs, which prevent the states from recognizing same-sex marriages performed in other states.

- Currently 41 states – all except Connecticut, Iowa, Massachusetts, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont and Washington D.C.

- 19 states have DOMAs that also restrict recognition of civil unions and domestic partnerships – Alabama, Arkansas, Florida, Georgia, Kentucky, Idaho, Louisiana, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.
• Considerations for All Types of Employee Benefit Plans
  – What is the status of the relationship (same-sex marriage, civil union or domestic partnership)?
  – Where was the marriage performed? And when?
  – Where does the employee live? DOMA or non-DOMA state?
  – What is the plan’s definition/interpretation of “spouse”?
Effects of Recent Actions on Employee Benefit Plans (Cont.)

- **Health and Welfare Plans**
  - Employer response depends on whether the employee lives in a DOMA state
    - DOMA state – employer does not have to recognize same-sex marriage for plan eligibility purposes.
    - Non-DOMA state – employer may have to recognize same-sex marriage for plan eligibility purposes.
Health and Welfare Plans (cont.)

- Employer response depends on whether plans are self-insured or insured
  - Self-insured plans are governed only by federal law (Employee Retirement Income Security Act of 1974 (ERISA) (Pub. L. 93-406)), and under the federal DOMA, plans do not have to recognize otherwise valid same-sex marriages.
  - Insured plans are affected by state law benefit mandates and may have to recognize same-sex marriages.
  - Government plans are required to offer coverage. Non-electing church plans may be as well (gray area).
- Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) (Pub. L. 99-272) Continuation Coverage not required as a result of federal DOMA.
- Many states also have continuation coverage laws similar to COBRA.
Retirement Plans

- 401(k) Plans
  - Participants can name any party as beneficiary.
  - However, does a same-sex “spouse” have to consent to the naming of another beneficiary? What happens if there is no named beneficiary?
  - Pension Protection Act of 2006 (PL 109-280) provided rollover and hardship withdrawal rights for domestic partners and same-sex spouses who are named beneficiaries under the plan.
  - While the rollover provision was made mandatory beginning in 2010, the hardship withdrawal provision is optional and only takes effect if the plan sponsor chooses to implement it.
Retirement Plans (cont.)

- Defined Benefit Pension Plans

  • Generally must offer married participants payment in the form of a qualified joint and survivor annuity (QJSA) (with pre-retirement spousal death benefit (QPSA) coverage).

  • Under federal DOMA, employers are not required to offer QJSA/QPSA-equivalent rights to same-sex spouses, although some employers have added them.
Other Benefits Available to “Spouses”:

- Moving Expenses
- Adoption Assistance
- Tuition Assistance from Universities
- Participation in EAP Programs
- Bereavement Leave
- Family and Medical Leave (“FMLA”)
  - Federal DOMA governs
  - DOL Administrator’s Interpretation 2010-3 issued June 22, 2010 clarifies that non-biological parents are permitted unpaid FMLA leave for the birth or placement of a child or to care for a child with a serious health condition
  - State FMLA provisions may apply as well

Other Benefits/Perks
- Why? Because of DOMA.

- Unless the employee’s partner is a dependent, companies must tax the benefits appropriately.

- No tax-favored reimbursements from HSAs, HRAs, FSAs for non-dependent partners.

- Non-dependent domestic partners and same-sex spouses cannot enter a qualified domestic relations order (QDRO) to divide pension benefits upon dissolution.
Tax Consequences

**Federal Tax Issues**

- As a result of DOMA, same-sex spouses will not receive any federal tax advantages associated with employee benefit plans unless the same-sex spouse meets the Tax Code definition of “dependent.”
  - Income is imputed to employee for the fair market value of coverage given to the same-sex spouse.
  - Employee cannot pay for same-sex spouse’s coverage using pre-tax contributions under a Section 125 cafeteria plan.
  - Normally no reimbursement from flexible spending accounts.
  - No tax-free reimbursements from HRAs, HSAs, and MSAs.
State Tax Issues

- DOMA states – in DOMA states that do not recognize same-sex relationships, employers will impute income for state tax purposes for fair market value of coverage to same-sex “spouses” (just like federal tax result) and the same-sex spouse’s coverage must be paid with after-tax dollars.

- Non-DOMA states and many states with special recognition of same-sex relationships – in non-DOMA states that recognize same-sex marriages or that have special laws favoring same-sex couples, employers may have to, for state tax purposes, subtract any income imputed to the employee for federal tax purposes and permit the employee to pay for the same-sex spouse’s coverage using pre-tax dollars.

Steps Employers Should Take Now

- **Review Enrollment Forms and Administrative Procedures**
  - Where do your plans say “spouse”?
    - Consider requiring additional proof concerning employee marriages (e.g., sex of spouse/state of marriage/licenses).
  - Take a fresh look at your domestic partner affidavit/proof process
    - One trend is to require less proof (cohabitation? minimum duration?)
    - Another trend is parity with proof requirements for opposite-sex spouses
    - Add a dissolution form
  - Create a tax certification form
    - Tax code dependent status
    - State registration/license status
Note that well over half of the Fortune 500 and many other companies now offer domestic partner benefits, but which benefits are offered differs amongst companies.

- 60% offer domestic partner health benefits
- 19% offer transgender-inclusive health benefits
- 86% have non-discrimination policies that cover sexual orientation
- 50% have nondiscrimination policies that cover gender identity
- 10 of the Fortune 20 companies received 100% ratings on the Corporate Equality Index

Source: Human Rights Campaign 2012 Corporate Equality Index.
Domestic Partner Benefits: Cutting Edge Trends and Best Practices (Cont.)

- Health Plan Issues (cont.)
  - Try not to require too much proof of domestic partnerships.
    - Eliminate cohabitation requirements?
    - Financial interdependence requirements can have consequences upon dissolution of partnership.
    - Minimum duration requirements?
    - “Equal benefits ordinances” technically require no more proof for domestic partnerships than for spousal relationships (limited enforcement).
  - Do you offer all benefits – health, dental, vision, supplemental life, etc.?
Pension Plan Issues

- Add pension survivor annuity coverage for domestic partners (or at least same-sex spouses).
- Same-sex marriages should be treated as spousal relationships for pension plans and other benefits (e.g., 401(k) automatic beneficiary).
- Implement Pension Protection Act rules regarding non-spouse rollovers (required beginning in 2010) and optional hardship withdrawals.
Domestic Partner Benefits: Cutting Edge Trends and Best Practices (Cont.)

- Non-ERISA Plan Issues
  - Equalize parental leave policies ("primary caretaker" vs. "secondary caretaker") and add adoption leave.
  - Add FMLA-style leave for illness of domestic partner.
  - Consider adding adoption assistance.
  - Make sure all "non-ERISA benefits and policies are amended to include domestic partners (e.g., bereavement leave, moving expenses, tuition reimbursement, employee discounts, EAPs, etc.)"
■ Tax Gross-Up
  – Consider tax gross-up for health benefit coverage.
    • Tax Equity Act – proposed in 2009 and 2011. Over 60 businesses and professional organizations have joined the Human Rights Campaign’s Business Coalition for Benefits Tax Equity in support of this legislation.

■ Key Gross-Up Considerations
  – Federal tax only? State tax? Payroll tax? For loss of use of cafeteria plan?
  – What tax rate to use?
  – Each pay period or at year-end? What about mid-year departures?
  – Gross-up for non-dependent children?
  – Gross-up on the gross-up?
  – Gross-up opposite sex partners too?
Tax Gross-Up

- According to the 2010 census, there are over 650,000 same-sex partnered households raising over 250,000 children.
- On average, an LGBT employee will pay $1,069 a year in federal taxes for a same-sex spouse’s benefits.
- Employers offering domestic partner benefits pay an estimated $57 million a year in federal payroll taxes on the benefits.
- Partners who cannot claim their child as a “qualifying child” for federal income tax purposes pay up to $1,000 extra in federal income taxes each year.
- The average premium cost for a single person in the individual market is more than $2,500 a year.

Transgender Benefits Coverage

- More and more employers are adding or considering this benefit
- It is required to obtain a 100% rating on the Human Rights Campaign’s 2012 Corporate Equality Index
- It can be difficult to work with insurers/providers to add this benefit
- Some complicated considerations (e.g., whether to cover “medically necessary” cosmetic procedures)
Your Questions

Joseph S. Adams  
Partner, Employee Benefits  
312.984.7706  
jadams@mwe.com

Todd A. Solomon  
Partner, Employee Benefits  
312.984.7513  
tsolomon@mwe.com

Brian J. Tiemann  
Associate, Employee Benefits  
312.984.3268  
btiemann@mwe.com