



*A Law Firm in the People Business*

## The San Francisco Equal Benefits Ordinance

Under the San Francisco Equal Benefits Ordinance (the "EBO"), employers that do business for the City of San Francisco are required to provide the same health benefits to employees who have domestic partners as they provide to employees who are married.

ERISA preempts the EBO when San Francisco is acting as a municipal regulator (for example, when an employer is doing business for the San Francisco airport). However, ERISA does not preempt the EBO when San Francisco acts as an ordinary consumer of goods and services.

As a result, an employer who does business for San Francisco is required to provide equal health benefits to domestic partners, even when the employer maintains an ERISA plan, as long as San Francisco is not acting in its capacity as a municipal regulator.



*A Benefits Consulting Firm affiliated with Mazursky Constantine LLC*

## HOW WILL SAME-SEX MARRIAGE IMPACT EMPLOYEE WELFARE BENEFIT PLANS?

A recent ruling by the Supreme Court of California now gives same-sex couples the right to marry. This landmark decision may impact employee welfare benefit plans by expanding the meaning of the word "spouse" to include all married couples regardless of sexual orientation.

### FEDERAL LAW AND PREEMPTION

Under the federal Defense of Marriage Act (DOMA), employee benefit plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) are not required to recognize same-sex marriages. DOMA provides that for purposes of federal law, including ERISA and the Internal Revenue Code (Code), marriage is limited to a legal union between one man and one woman.

ERISA generally preempts state laws that affect employee benefit plans. However, ERISA does not preempt state insurance laws. Therefore, state laws that require insurance companies to offer benefits to same-sex partners are not preempted.

### INSURED PLANS

California law currently requires insurance companies to offer policies that cover registered domestic partners to the same extent they cover spouses. The recent California decision will likely require insurance companies to cover same-sex spouses as well. The requirement, however, is unlikely to have broad implications because employers who maintain insured plans subject to California law are already required to offer nearly all of the same benefits to domestic partners as married couples.

### SELF-FUNDED ERISA PLANS

Although coverage of same-sex spouses under self-funded ERISA plans that cover California residents is not legally required, depending on the terms of a plan document, the California decision may impact coverage in that state. Because of ERISA preemption, California law cannot require self-funded ERISA plans to extend coverage to same-sex partners. Nonetheless, many self-funded ERISA plans use the terms "marriage" and "spouse" without specifically defining them. If these terms are left undefined, employers may unintentionally extend benefits to same-sex spouses. Employers maintaining self-funded ERISA plans covering California residents will need to decide whether or not to extend coverage to same-sex couples and review their plan's definition of "marriage" and "spouse" to ensure the definitions accurately reflect the employer's intent.

## TAX CONSEQUENCES

Health benefits provided under an employer-sponsored group health plan to employees and their spouses and the cost of the employer-provided coverage are generally exempt from federal income taxation. Under DOMA, this exemption does not apply to same-sex spouses unless the spouse qualifies as a tax dependent under the Code. To qualify as a tax dependent, an employee's same-sex spouse must (i) reside with the employee; and (ii) receive over one-half of his or her support from the employee.

An employee may not pay for health coverage for a same-sex spouse who does not qualify as a tax dependent on a pre-tax basis. In addition, the employee must include in gross income the excess of the fair market value of the health coverage provided by the employer for the domestic partner, less the amount paid on an after-tax basis by the employee for that coverage. The amount includable in the employee's income is wages for purposes of income tax withholding, FICA and FUTA. Any amounts paid by the employee for the same-sex spouse's health coverage will need to be paid on an after-tax basis. These special tax implications must be administered through the payroll/tax reporting system, and may require modifications to that system.

## OTHER STATES

Same-sex marriages lawfully performed in California may not be recognized in other states. Even so, state laws relating to same-sex benefits are constantly changing. Many states have enacted laws requiring employers to provide some or all of the benefits provided to married couples to same-sex couples. Currently, these include Connecticut, Hawaii, New Hampshire, New Jersey, Oregon, Vermont, Washington, Massachusetts, Maine and the District of Columbia.

Accordingly, employers maintaining self-funded and insured plans in states other than California will also need to review their plan's definition of "marriage," "spouse" and "domestic partner" to ensure the definitions comply with state law and accurately reflect the employer's intent.

For further information or assistance, please contact Nicole Bogard at 404.888.8830 or Kelly Scott at 404.888.8838.

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