

SAME-SEX MARRIAGE REQUIRES FEW WORKPLACE POLICY CHANGES

Although the recent legalization of same-sex marriage in several states may require employers in those states to make adjustments to some workplace policies, these moves approving gay marriage will have no effect on employers' obligations with respect to federally regulated workplace benefits, according to some attorneys.

In early April, Iowa, and Vermont joined Massachusetts and Connecticut in legalizing same-sex marriages, and lawmakers in a number of other states are picking up the pace in considering legislation that would expand to same-sex couples the same sort of benefits—including state-regulated workplace benefits—traditionally granted to heterosexual married couples. New York, New Jersey, Washington, and the District of Columbia, are considering a variety of proposals ranging from legalizing same-sex marriage, conferring on same-sex domestic partners the same rights and benefits as heterosexual marriage, or recognizing out-of-state same-sex marriages.

Many workplace benefits such as retirement plans and health benefits are regulated by the Employee Retirement Income Security Act (ERISA) and receive preferential tax treatment under the Internal Revenue Code. These laws do not recognize same-sex couples as "spouses," according to Patricia Cain, law professor at Santa Clara University School of Law.

Additionally, the federal Defense of Marriage Act (DOMA) defines marriage as a "legal union between one man and one woman as husband and wife" and limits the definition of "spouse" to "a person of the opposite sex who is a husband or a wife." The law "precludes the recognition of same-sex marriages for any federal statute, regulation, or rule that mentions spouse or marriage," says Cain, who specializes in federal taxation and gay and lesbian issues.

However, while state recognition of same-sex marriages would have little or no impact on benefits regulated under the ERISA, employers should be aware that some workplace benefits—such as health, death, and disability insurance provided through group-insured plans—are regulated by state insurance laws. Other state-regulated benefits include some disability and workers' compensation benefits, survivors' benefits, employee discounts, family and medical leave, and bereavement leave. Despite the limits on state regulation of employee benefits, the increasing numbers of same-sex marriages could build up momentum for changes to federal law and encourage employers to extend benefits voluntarily to gay and lesbian couples that are identical to those for heterosexual married employees—even in states that do not authorize or recognize same-sex marriages, according to Jon Davidson, senior legal director for Lambda Legal, a gay legal advocacy organization.

Cain says employers can offer an array of benefits to same-sex employees, but that some employers may worry they will jeopardize their plans' tax-exempt status if they recognize same-sex partners as spouses for certain benefits such as health savings accounts. Lack of guidance from the Internal Revenue Service (IRS) has "created hurdles for employers who want to do the right thing by offering benefits to same-sex partners but are worried about their plan's tax-exempt status. This has been going on since 1993 and we still do not have a single IRS publication or rule telling employers how to set up plans so they can offer benefits while retaining their plans' tax exempt status," she adds.

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