Beneficiary Designations and Spouse Definitions Need to be Updated-16th State Approves Same Sex Marriage While 3rd Circuit Wrestles With Which Spouse to Recognize

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Yesterday Hawaii adopted the Hawaii Marriage Equity Act of 2013 recognizing same sex marriages as of December 2, 2013 and permitting persons in civil unions in Hawaii to apply to be married without first requiring dissolution of the civil union. There are 16 states that recognize same sex marriages in addition to the District of Columbia (Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Washington, Hawaii, Maine, Minnesota, Rhode Island, Maryland, Delaware, California, Illinois, New Jersey and certain counties in New Mexico). This list only identifies the states that marriages which were initiated by the individuals as marriages and does not address the four states that automatically convert certain statuses into marriages. Employers need to keep track of the states in which same sex marriage has been recognized either in the courts or via legislation to know when marriages were recognized in such states:

- for federal tax withholding purposes for benefit coverage elections under cafeteria or flexible benefit plans;
- for the impact state income tax withholding for individuals whose marital status is now recognized in certain states (this warrants careful consideration because some states for state income tax purposes merely pick up federal income tax definitions and may pick up the same sex marital status that is recognized under federal law for federal income taxes even though the state law does not recognize same sex marriage for state income tax withholding purposes);
- for recognizing beneficiary designations as being appropriately made with the required spousal consent;
- for determination of who is the beneficiary upon death of an employee;
- for determining to whom the COBRA initial or qualifying event notices must be provided;
- to determine who has statutory COBRA rights to elect coverage and statutory COBRA obligations to notify the employer of a qualifying event of divorce, loss of dependent status or the cessation of a disability;
- to determine to whom a retirement plan may be required to pay a death benefit or to provide a qualified joint and survivor annuity notice or a qualified pre-retirement survivor annuity notice;
- to determine who is eligible to waive a qualified joint and survivor annuity;
- to determine whom the employer may have obligations to notify in case of an emergency under the employer's policies;
- to determine FMLA rights of the employee with respect to the same sex spouse (FMLA currently recognizes a spouse based on the state of the individual's residence, but there are initiatives to conform this to the recognition of spouses for tax purposes);
- to determine whether to include the individual's ownership of company stock in the section 16 Beneficial Ownership test for Rule 16a-1 of the '34 Act;
- to determine if an individual is a spouse under Rule 144(a)(2)(i) and thus a related person;
- to determine if an individual is an accredited investor;
- to determine to whom stock options may be transferred as "family members" under the terms of specific grants and plans;
- in determining how to add or amend your plans and policies; and
- to determine from whom an employee must be divorced before another marriage is recognized for purposes of the above.

The definition of spouse in your benefit plans needs to be carefully drafted. Plans have long seen unique real life situations of serial marriages without divorces when an employee passes away leaving multiple persons claiming as the

surviving spouse (this is not a situation that is unique to any particular state or employer- these real life situations help to demonstrate why employee benefits is not boring). The Third Circuit recently had to wrestle with which spouse of a former NFL player was the real spouse entitled to the death benefit under the NFL retirement plan. Hill v. Bell/Rozelle NFL Player Retirement Plan (Nov. 26, 2013). The two spouses had relationships in overlapping periods and while the player left the first spouse, he never took the legal steps necessary to legally end the marriage with a divorce, and yet he allegedly married the second woman in another state. Both spouses claimed his death benefit. The Court determined that the second marriage was never legal since the first marriage had never ended. The end result was his first marriage was still valid under the plan because the plan defined the spouse "according to applicable state law." The plan's reliance on applicable state laws led to analysis of the various arguments under state laws for alternative ends to marital status other than a divorce decree. One statute provided the second spouse with the argument that the marriage ended because the player had the ability to allege that he relied on a presumption of death of the first spouse; however, because the player never had fulfilled the state's statutory requirements to be able to presume his first spouse was dead , this law did not save the second marriage as valid. The end result was that the player's first marriage was still the valid marriage and the first spouse was entitled to the benefits.

The key takeaway from the decision and legal changes in the recognition of marriage and spousal relationships is that one must carefully draft the definition of who is recognized by the plan as the spouse and which relationships are not recognized as creating a spousal relationship. In drafting the definition of spouse, drafters must take care to comply with the federal tax and ERISA requirements following the U.S. Supreme Court's decision in U.S v. Windsor striking the Defense of Marriage Act and to avoid requiring the plan to make extensive inquiries into factual proof of the existence or termination of relationships under the application of state laws regarding which spouse is the true spouse in the event of sequential or concurrent alleged marriages.

Additional guidance is expected from the Internal Revenue Service and the U.S. Department of Labor regarding the impact of the U.S. v. Windsor decision on employee benefit plans and the rights of spouses under such plans to address many of the outstanding issues, such as what do employers do regarding notices that should have been provided to spouses or consents that should have been obtained before retirement plan distributions were paid.

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