

DOMESTIC PARTNER BENEFITS

As a handful of States (California, Connecticut, District of Columbia, New Jersey Vermont, Hawaii) have moved forward with legal recognition for civil unions or domestic partnerships, and one (Massachusetts) moves towards full legal recognition of same-sex marriage, it seems an appropriate time to discuss again the issues surrounding domestic partner benefits.

TAX ISSUES

In multiple Private Letter Rulings (PLR9034048, PLR9109060, PLR9603011, PLR971708 and PLR200108010), the IRS has indicated that there is a tax consequence to the employer and employee for providing benefits under a group health plan to a domestic partner.

Employee

The basic issue is whether benefits provided to a domestic partner qualify for exclusion from wages under IRC Section 105 and 106. The IRS answer has been consistently “no,” only benefits provided to legal dependents are excludable from the employees taxable income. With the passage of the Defense of Marriage Act (DOMA) in 1996, the federal government solidified the IRS position. DOMA stated that for purposes of all federal laws, rulings and regulations the term marriage refers to only a union between one man and one woman, as husband and wife, and the term spouse refers only to a person of the opposite sex who is a husband or a wife.

The amount of taxable income to be included as wages for an employee providing benefits to a domestic partner was clearly stated in PLR9603011. In this Private Letter Ruling, the IRS indicated that the addition to wages should be calculated as:

$$\text{Wages} = \text{Fair Market Value of Coverage} - \text{Fair Market Value of Employee Only Coverage} - \text{Employee Contributions}$$

Fair market value of the coverage is defined as the premium for a fully insured plan or the premium equivalent (COBRA Rate less 2%) for a self funded plan. Benefits in the form of claim payments for a domestic partner were not to be included in the employee’s taxable income.

Employer

The increase in wages to the employee results in a corresponding increase in the employer's payroll tax, as the gross wages the employer pays tax on would increase by an equal amount.

LEGAL ISSUES

Historically, the definition of what constitutes a marriage has been an issue of State law with each State required to recognize a legal marriage from any other State. That changed with passage of DOMA as a Federal law in 1996. In addition to defining the terms marriage and spouse for purposes of all Federal laws, the Act amended the Full Faith and Credit Act to indicate that no State is required to recognize a relationship between persons of the same sex simply because another State recognizes the relationship as a marriage. Further complicating the issue are numerous local governments that have chosen to issue marriage licenses to same sex couples recently.

Legal Definitions

As it currently stands, 38 States have enacted legislation prohibiting the recognition of same sex marriages entered into in other States and, although currently being debated in the Massachusetts’ legislature and courts, no State has made same sex marriage legal. Marriage licenses issued by local municipalities to same sex couples are not considered valid unless the State in which they are issued would also recognize the marriage.

Plan Definitions

While the legal recognition of civil unions, domestic partnerships and same sex marriages in some jurisdictions may ease the burden of defining the term domestic partner for plan's that chose to provide domestic partner benefits, it will have the opposite effect on plan's that do not provide such benefits. For a plan that does not intend to provide domestic partner benefits, the plan's definition of dependent as it relates to a legal spouse will become key. A definition that simply indicates coverage is available to the legal spouse of an employee is open to interpretation. Does that include only marriages that are legal in the State the plan is in, those that are recognized by the State the plan is in, or any marriage or civil union as long as it was legal in the State or municipality it was entered into in. On the other hand, a definition of spouse that includes requirements to meet the Federal legal standard for marriage or spouse clearly is not open to such interpretation.

Discrimination

While a large part of the stated case for requiring the provision of domestic partner benefits is based on the premise of equal rights and non-discrimination, the provision of domestic partner benefits can also lead to calls of discrimination. For those employers that limit domestic partner benefits to same sex couples only, the question of discrimination based on sexual preference has been raised by unmarried, heterosexual couples that are not eligible to receive benefits as a domestic partner.

COST ISSUES

As the provision of domestic partner benefits has continued to grow over the last 10 years, research on claim cost trends has indicated that the cost of providing coverage to a domestic partner is about equal to the cost of providing coverage to an opposite sex spouse. In the aggregate, the provision of domestic partner benefits can be expected to increase the overall cost of a plan by 1%-2%.

However, as noted earlier there is an additional cost in terms of employer payroll taxes to be considered when providing domestic partner benefits.