ABD Brief - Compliance Alert

Impending SCOTUS Same-Sex Marriage Decision and Employer-Sponsored Group Health Plans: State Income Tax Uniformity at Stake

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Last Friday, the U.S. Supreme Court announced that it will determine whether the U.S. Constitution guarantees the right to same-sex marriage in any state, and whether all states must recognize same-sex marriages performed in another state. The case—which stems from the 6th Circuit’s decision upholding same-sex marriage bans in Michigan, Ohio, Kentucky, and Tennessee—is the logical successor to the Court’s 2013 determination in Windsor that key portions of DOMA are unconstitutional. That decision allowed the federal government to recognize same-sex marriage, but it did not require states to recognize same-sex marriage.

Federal Income Tax Treatment Already Equal for Opposite-Sex and Same-Sex Marriage

Following the Court’s decision to strike down most of DOMA, the IRS issued guidance providing that employees with a same-sex spouse do not need to reside in a state that recognizes same-sex marriage to receive the same health plan tax advantages as employees with opposite-sex spouses. The only issue is whether employee’s same-sex marriage was validly entered into in a state or other jurisdiction that recognizes same-sex marriage. It does not matter where the employee currently resides for federal income tax purposes.

For example, take an employee who resides in Kentucky but entered into a valid same-sex marriage in California. The employee covers his same-sex spouse under his employer-sponsored group health plan. Even though Kentucky does not recognize
same-sex marriage, the employee will not be subject to federal imputed income for the amount that his employer pays towards the same-sex spouse’s cost of coverage, and the employee can pay his share of the premium for the same-sex spouse’s coverage on a pre-tax basis.

*Domestic Partnership Note:* The federal government does not recognize domestic partners as spouses. Although the employee may have entered into a registered domestic partnership (RDP) in a state that provides the same state income tax treatment for RDPs as spouses (e.g., California), the employee will still be subject to imputed federal income and post-tax payment for the RDP’s coverage—unless the RDP is a tax dependent.

**State Income Tax Treatment Depends on State Recognition of Same-Sex Marriage**

The Court’s DOMA decision (and the subsequent IRS guidance, which applies only to the federal government) did not require states to provide the same state income tax advantages for same-sex spouses. There are a number of states that currently require state imputed income and post-tax payment for a same-sex spouse’s coverage.

**Court’s Decision Could Provide Uniformity in State Income Tax Treatment for Same-Sex Spouse Coverage**

If the Court holds that there is a constitutional right to same-sex marriage, all states will be required to recognize same-sex marriage. Presumably, this would also require states to recognize same-sex marriage on the same terms as opposite-sex marriage, including for purposes of state income tax treatment of health plan coverage.

In the context of employer-sponsored group health plans, such a decision by the Court would affect employees residing in a state that currently does not recognize same-sex marriage (and imposes a state income tax). *In these states, the Court’s decision finding a constitutional right to same-sex marriage would:*

1) Eliminate the requirement for employers to impute state income tax in the amount of the employer’s contribution toward a same-sex spouse’s coverage, and

2) Allow employees to pay for the same-sex spouse’s coverage on a pre-tax basis for state income tax purposes.

The Court’s decision may also lead to more state insurance mandates requiring fully insured plans to offer coverage to same-sex spouses on the same terms as opposite-sex spouses. It’s not clear whether such a decision would require self-insured plans (for which ERISA preempts state insurance mandates) to offer coverage to same-sex spouses.

The Court’s decision is expected in June.