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Banyan Consulting is pleased to present our monthly newsletter. We hope the articles in this and future editions will provide insight into an array of employee benefits topics.

We appreciate your feedback! If you have a topic for future discussion, please let us know.

Same-Sex Marriage - Employee Benefits and Taxation

What You Need to Know About: Same-sex Marriage

On 6/24/2011, Governor Andrew M. Cuomo signed into law the New York state Same-sex Marriage bill making New York state the largest state to recognize same-sex marriages. Effective on 7/24/2011, same-sex partners residing in New York could legally marry. The news of this new state law created extensive media attention; however, very little attention was given to the complexities involved with this law in regards to employee benefits and taxation.

1. How many states recognize same-sex marriages?

In 2004, Massachusetts became the first state to allow same-sex marriages. With the addition of New York, there are now 6 states plus the District of Columbia who have state laws recognizing same-sex marriages. These states are Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont. California, at one time, had a state law recognizing same-sex marriage but it was repealed on 11/4/2008.

2. Does the federal government recognize same-sex marriages?

No, and that is what adds to the complexity. Passed in 1996 and signed into law by President Clinton, the federal government follows the Defense of

Marriage Act (DOMA) which clearly defines “marriage” as “a union between one man and one woman” and “spouse” as being “a member of the opposite sex”.

As a result, any federal law or act such as the Employee Retirement and Income Security Act (ERISA), Consolidated Omnibus Budget Reconciliation Act (COBRA), Family Medical Leave Act (FMLA) and any Internal Revenue Service (IRS) code or regulation will follow DOMA and not recognize a same-sex partner as a legal spouse regardless of whether the state they reside in does.

3. So do I have to allow same-sex spouses to participate in my health plan?

Is your health plan a fully-insured health plan or a self-insured ERISA plan? Just like with any other state law, if your health plan is fully-insured, you are subject to the state laws. As a self-insured ERISA plan, you are not required to comply with state laws.

This contributes to the level of complexity as many employers may self-insure their medical and drug plans, but, fully-insure a dental and/or vision plan. Some employers may find that they can prohibit the same-sex spouse from participating in the self-insured medical/drug plan but will be adding the same-sex spouse to the dental and/or vision plan.

4. Do I have to offer a same-sex spouse COBRA?

Well, COBRA does follow the DOMA definition of marriage; however, federal laws tend to establish minimum requirements. Plan sponsors do have the option to provide a higher level of benefit provided it is consistently applied to all “similarly situated individuals”.

So, for example, a plan sponsor with a fully-insured medical/drug plan would be required to provide coverage to a same-sex spouse. If the same-sex spouse has a COBRA Qualifying Event, it could be argued that the plan sponsor is not required to extend COBRA coverage to the same-sex spouse. However, this policy might not be prudent for a number of reasons.

A plan sponsor should discuss these scenarios with their insurance carrier and/or COBRA administrator to document a clear understanding of the administrative procedures that will be applied.

5. Do I have to offer a special enrollment period for same-sex spouses?

You should address this topic with your insurance carrier or third party administrator. The IRS Section 125 rules allow for mid-year election changes due to marriage. However, remember that the IRS follows DOMA and does not recognize same-sex marriages. For this reason, it might not be possible for the same-sex spouse to be enrolled into the plan until the next open enrollment period.

6. If the IRS does not recognize same-sex marriages, what are the tax implications?

This is an important question for your tax advisor and/or payroll administrator. If you sponsor a Section 125 plan, the employee can make pre-tax contributions to the cost of coverage. For an employee who enrolls his same-sex spouse during an open enrollment period and now has Two-Party coverage instead of Individual coverage, what amount of his contribution will be pre-tax? The IRS does not recognize the same-sex partner as a “spouse” and does not allow the same tax benefits that are automatically provided to an opposite-sex spouse. You may need to develop procedures for imputing income on a federal and state level.

In July, 2011, the New York State Department of Taxation and Finance issued guidance for employers on how to withhold taxes on the state level, for same-sex spouses for wages that are taxable on the federal level. If you have employees residing in New York state, you should refer to that guidance.

7. What about any children from a same-sex marriage?

That is a question you may want to address with your legal counsel and whether the child should qualify for coverage and possibly favorable tax treatment as a legal dependent of the employee.

In many cases, self-insured plan sponsors are choosing to prohibit the same-sex spouse from enrolling in the plan, but, are allowing any children from the same-sex marriage to participate.

8. What about common-law marriages between opposite-sex spouses? Are any of these issues applicable?

Not directly, but, it is a good idea while analyzing your plan’s rules and definitions on same-sex marriages to also review those rules and definitions for common-law marriages.

Currently, there are 11 states plus the District of Columbia who allow common-law marriages. These states are Alabama, Colorado, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas and Utah. Pennsylvania did recognize common-law marriage until 1/1/2005.

Typically, a common-law marriage entered into these states will also meet the DOMA definition and all federal laws and acts will recognize the union as a marriage. However, Iowa and New Hampshire recognize both same-sex and common-law marriages so it may be possible you could have an employee in one of those states wanting to enroll his same-sex, common-law spouse.

9. What do I need to do now?

- Determine what employee benefit programs you offer are subject to same-sex marriage and common-law marriage state laws.
- Review all of your plan documents such as your Section 125 document, Summary Plan Description, and any other document that addressed plan eligibility and definitions of “spouse” and “dependent” and whether they are in compliance with the state laws and/or clearly define your plan’s intent as to who meets the definitions.
- Discuss administrative procedures with all of your insurance carriers, third party administrators, payroll administrator, etc., to develop processes and ensure compliance.
- Review your plan’s communication materials to ensure the message is clear and not subject to misinterpretation.

We will continue to update you as additional guidance is released. In the interim, if you have any questions on this or any other state/federal law or regulation, please contact a member of your Banyan Consulting team.

Does 401(k) Automatic Enrollment Really Benefit Savings?

Many 401(k) experts were upset by a recent article published in the Wall Street Journal. The article suggested that enrolled individuals automatically faced a decrease instead of increase in retirement savings rates. To clarify the point, the article’s author wrote that this is because most participants don’t change their contribution rate from the default level. The default rate is lower than the contribution rate most people choose with active enrollment. This question was added to provide a thought: What should 401(k) sponsors do when they start offering plans featuring a default contribution percentage for automatic enrollment? Although most people wouldn’t deny the importance of enrolling in one of these plans, it is clear that workers need to save more money for retirement.

Escalation Rates

The design of plan features is being blamed more frequently for the problem relating to low contributions after automatic enrollment. A survey conducted by Vanguard Investments showed that the most popular default contribution for automatic enrollment plans was 3% of total pay. Nearly 58% of the plans surveyed used this percentage rate. This survey studied over 2,000 contribution plans.

The same survey also showed that 73% of plans use a 3% default contribution. However, only 27% chose a default rate of 4% or higher. One of the most

intriguing pieces of information in this study was that the 3% rate seems to be chosen simply because the IRS used it as an example in its governing regulations for these types of plans. Whether or not this is every party's reason for choosing the 3% default rate, financial planners definitely agree that this percentage is inadequate for a secure retirement. Jean Young, a Senior Research Analyst for Vanguard's Center for Retirement, said that the majority of their plans use a default rate between 1% and 3%. She said this shows that most plans would benefit from a higher default rate.

To remedy this matter, most employers begin an automatic escalation feature. This increases the contribution percentage from each participant who automatically contributes to the plan at specific times. The same Vanguard study showed that most large companies have an automatic escalation feature. For example, a plan that has a low default rate may add an automatic increase of up to two percentage points annually until all contributors reach a cap amount or percentage of pay.

However, there is significant proof that the default plans are not sufficient to secure retirement. This is also true of plans that include an escalation provision. Vanguard's research shows that employees need contributions that total between 12% and 15% of pay each year. In summary, employers usually set default contribution rates too low and provide insufficient escalation rates. The combination of these factors show that many participants likely won't have the amount of money they should when they retire.

Further Contribution Rate Issues

In a different research study, Vanguard surveyed overall contribution levels to see if they were sufficient for retirement needs. At least 40% of the plans they studied had inadequate rates. Participants in the study had overall contributions, which included those from the employer and themselves, of less than 9% of total pay. Young suggests that sponsors should set higher default and escalation rates. She suggests a default rate of 6% in conjunction with an annual escalation rate of two percentage points. This remedy brings the savings rate higher than 12% within three years.

Continuing Education

While remedying the situation of insufficient contribution rates is essential, it's also important for 401(k) plan sponsors to stay current with communication and education programs. Knowledge is the key to preventing such problems. To gain that knowledge, sponsors need to be thoroughly educated and have a firm understanding. For example, obtaining adequate training gives sponsors enough knowledge to understand why a default rate of 3% will not work. By learning how to analyze gaps over time, sponsors who receive continuous training are able to make changes that benefit participants in the future.

Matching Contributions

One of the most vital ways plan sponsors can help employees is to match contributions. During the recession, many sponsors eliminated or greatly reduced their matching contributions. In addition to having an adverse effect on participant savings rates, this reduction also hurt overall participation levels. When companies imposed this reduction, there was a significant decline in participation. Smaller companies avoided automatic plan features, such as contribution escalation and automatic enrollment. Experts believe that, due to their personalized approach toward benefits and interaction, small companies don't require automatic features.

To put the entirety of this information into perspective, it's important for sponsors to recognize issues and have the knowledge to properly correct them. They must also understand engagement and behavior of both types of enrolled participants.

Understanding Employer Responsibilities for Group Benefits Under ERISA

The Employee Retirement Income Security Act, commonly shortened to ERISA, is a federal law enacted to set minimum standards for the majority of voluntary pension and health plans in the private industry to protect involved individuals. This federal statute went into effect on September 2, 1974. ERISA requires plan sponsors to provide participants with thorough information about features and funding. In addition to this, the statute mandates fiduciary responsibilities for managers and controllers of plan assets. The statute also requires plans to have an established grievance and appeals process that is easy for participants to use in order to get benefits from their plans. Participants who are the victims of fiduciary duty breaches have the right to sue under this statute's provisions.

Important ERISA Changes To Be Aware Of

Over the years, there have been several amendments made to the ERISA statute. These changes were made to further the protections offered to health benefit plan participants and beneficiaries. One of the most important amendments is the Consolidated Omnibus Reconciliation Act, which is more commonly known as COBRA. This amendment provides selected workers and their families the opportunity to continue their health coverage for a specified amount of time following the loss of a job or other certain events.

Another important amendment to the ERISA statute is the Health Insurance Portability Act, which is commonly known as HIPAA. This provision created new protections for workers and their families with preexisting medical conditions. Such individuals would have likely faced discrimination in applying for health

coverage prior to this act. The Mental Health Parity Act, Newborns' & Mothers' Health Protection Act and the Women's Health & Cancer Rights Act are also important changes made to ERISA.

Definition Of Responsibilities

Employers who are fiduciaries need to be familiar with the amendments made to the ERISA statute. This knowledge is helpful in understanding responsibilities. All fiduciaries have an important set of responsibilities since they act on behalf of the plan participants and beneficiaries. The following are important responsibilities to memorize:

- Act in the interest of the plan participants and beneficiaries with the purpose of providing them with their benefits.
- Follow plan documents that are consistent with ERISA.
- Carry out all duties in a prudent manner.
- Hold the assets of plans in trusts.
- Only pay reasonable plan expenses.

Prudent action requires extensive expertise. This is one of the most important responsibilities employers have under ERISA. Fiduciaries lacking such expertise must hire a professional who has the proper knowledge to complete those functions. Prudence requires excellent skills in making fiduciary decisions. Every decision must be documented properly. It's best for fiduciaries hiring service providers to interview several candidates, make comparisons and then make a decision. Following plan terms is also a vital responsibility. This includes memorizing the plan, reviewing it regularly and keeping it current.

Employer Liability Information

It's important to know the potential liabilities that accompany employer responsibilities. Any fiduciaries who don't follow standards of conduct face personal liability for restoration of losses to the plan. They also must restore profits that were obtained through personal misuse of plan assets. Fiduciaries have the ability to limit their liability in some circumstances. Proper documentation is an essential way to reduce the likelihood of undue liability issues arising.

Fiduciaries may also hire service providers to handle their responsibilities. In doing this, it is essential to include verbiage in the service contract that places responsibility of mismanagement of the plan on the service providers. Employers are responsible for the selection of service providers. However, they're not liable for the decisions and actions of the providers they choose. It is important to remember that monitoring the service providers is essential. Keep documentation of all periodic monitoring to further reduce liability risks.

Featured Link

E-Verify: Latest Developments for Employers

By Frances P. Rayer and Christopher R. Thorn, Buchanan Ingersoll & Rooney PC

Since its establishment in 1997 as the "Basic Pilot Program", the U.S. Citizenship and Immigration Services' ("USCIS") E-Verify program has evolved significantly. It continues to be a work in progress. In recent months, USCIS has launched several outreach initiatives and system enhancements that U.S. employers enrolled in the program should be aware of. Many of these new tools and resources could save employers valuable time and money. Below are just some of the latest developments:

E-Verify Can Now Verify Driver's Licenses

E-Verify launched the Records and Information for Department of Motor Vehicles (RIDE) enhancement which adds driver's license verification capabilities to the program. So far, Mississippi is the only state to partner with USCIS for the RIDE program, but USCIS expects other states to join the program in the coming months. As of June 13, 2011, Mississippi employers had run 201,382 queries through the system in fiscal year 2011.

New Ease-of-Use Enhancements

The latest enhancements of E-Verify features many customer-focused improvements —

USCIS has added a "help text" feature that allows employers to click on any blue question mark icon to receive instructions on selecting documents, entering employee information, case status and more. In June, more than 30 new and revised help text items were added to the system.

USCIS has also modified the hire date in E-Verify so that it matches the Section 2 "Certification" date on Form I-9. Employers may now select a future hire date and use the Section 2 "Certification" date from the employee's Form I-9 as the hire date in E-Verify. Previously, if an employer created a case in E-Verify after the employee accepted a job offer but before the employee began work for pay, the employer had to select the date the case was created as the hire date because E-Verify wouldn't permit a future date.

USCIS has upgraded the user registration process. Companies will no longer need to provide a new user with his or her user ID and password. E-Verify now sends new users a confirmation email that includes the user ID, temporary password, E-Verify login website address, and steps for getting started.

New Flyer that Summarizes the E-Verify Obligations for Federal Contractors

USCIS has released a new flyer that concisely summarizes what federal contractor employers need to know about the Federal Acquisition Regulation (FAR) E-Verify clause. To view the flyer, [click here](#).

We will continue to update you with any new developments regarding the E-Verify program. In the meantime, please contact one of our immigration attorneys if you have questions about these latest developments or want to know more about the E-Verify program.

H-1B Visa Numbers Still Available for FY2012

Employers are advised that H-1B visa numbers remain available for Fiscal Year (FY) 2012. USCIS has announced that, as of July 29, 2011, approximately 22,700 H-1B cap subject petitions have been received and counted towards the 65,000 H-1B cap. USCIS has also received approximately 13,800 petitions needed to meet the 20,000 cap for foreign workers with U.S. advanced degrees. Until USCIS announces that the respective caps have been met, employers can continue to file H-1B temporary worker petitions for foreign nationals requesting an employment start date on or after October 1, 2011. While both caps are still expected to be reached, the numbers so far appear to reflect the realities of the job market.

The availability of H-1B visa numbers presents a great opportunity for employers to meet their hiring needs for the coming year. The H-1B visa is one of the few nonimmigrant visa options available to employers seeking to fill openings in “specialty” occupations. Many foreign national students who were unable to file H-1B visa petitions on April 1, 2011 because they had not yet graduated have since become eligible for H-1B sponsorship. We encourage employers to consider their hiring needs and start interviewing potential H-1B candidates and finalizing job offers immediately. Once the H-1B cap is reached, employers will not be able to obtain new H-1Bs until October 1, 2012.

It is important to remember that the cap only applies to new H-1B cases, and not to extensions of H-1B status or a transfer of an H-1B visa from one employer to another. The cap does, however, affect those foreign nationals who are in H-1B status seeking to work for new employers, but who are currently exempt from the cap based on employment with an institution of higher education or not-for-profit or governmental research organization.

If you are considering the hiring of a foreign worker who will need H-1B sponsorship, we encourage you to contact one of our immigration attorneys as soon as possible to review your hiring plans. In the meantime, we will continue to provide you with the latest developments on the H-1B numbers.

Client Spotlight

Pennsylvania Farm Bureau Earns Four National Public Relations Awards during the American Farm Bureau Federation (AFBF) Public Relations Conference.

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