

Same-Sex Marriages, Domestic Partnerships, and COBRA

June marked the anniversaries of two noteworthy United States Supreme Court decisions concerning same-sex American couples

On June 26, 2013, the Supreme Court held in *United States v. Windsor* that Section 3 of the Defense of Marriage Act – which provided that only opposite-sex individuals could be recognized as married "spouses" for purposes of federal law - was unconstitutional. Following this, the Internal Revenue Service issued subsequent preliminary guidance¹ for applying the decision. This clarification provided direction that the term "spouse" – for federal tax purposes – would include same-sex individuals validly married in accordance with the laws of any jurisdiction that recognizes same-sex marriage (i.e., the state of celebration) instead of the state in which a same-sex couple resides. As a result of this federal recognition of same-sex marriages, group health plan coverage provided to legally married same-sex spouses was tax exempt.

Two years (to the day) later, the Supreme Court held in *Obergefell v. Hodges* that the Fourteenth Amendment requires a state to not only issue marriage licenses for same-sex couples, but also to recognize those same-sex marriages licensed lawfully outside of the state (thereby eliminating the need for employers and plan providers to consider the state of celebration).

Since these two decisions, in tandem, broadened the federal definition of the word "spouse" to include both same- and opposite-sex spouses, the increase in access to marriage can also lead to an increase in eligibility for spousal benefits under employer health plans. These legally married same-sex spouses now fall squarely into the population of individuals potentially eligible for health care continuation rights.

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) affords a "qualified beneficiary" the right to continuation coverage if group health plan coverage is lost due to certain events. This qualified beneficiary status is limited to employees, their spouses, and dependent children covered on the employer's group health plan. While the specific verbiage defining who is a qualified beneficiary has not changed, the federal regulatory phrase "...the spouse of the covered employee²" now means both opposite- and same-sex individuals who are legally married to the covered employee.

Now same-sex spouses are equally entitled to COBRA if coverage is lost due to a qualifying event (such as divorce) and are afforded every right as their opposite-sex counterparts.

As this subject gains greater attention in the months following these decisions, it is important to note the distinction between legally married same-sex couples and domestic partners, especially with respect to COBRA.

Even though same-sex couples are now able to get married in their states of residence, some states – such as California³ - still allow couples to enter into formalized domestic partnerships entitled to many of the same state rights afforded to legally married couples. These domestic partnership provisions, which were oftentimes drafted in the interest of providing parity to couples who

could not at the time receive equal benefits under federal law, created a way for certain employers to design their group health plans to enable domestic partners to be covered under the plan.

The difference between a federally recognized same-sex marriage and, for example, a same-sex domestic partnership rests in part in the newly expanded definition of "spouse." And for COBRA purposes, this difference is key.

When these domestic partners are eligible for coverage under an employer's group health plan, one must consider whether or not they would be entitled to COBRA election rights should a qualifying event occur. Remember, the term "qualified beneficiary" – a class of individual who must be offered COBRA election rights following a qualifying event – includes only the covered employee's spouse. As a result, domestic partners (of either the same or the opposite sex) or civil union partners still – even after the Windsor and Obergefell cases – do not meet the definition of a qualified beneficiary. Even if they are covered under the group health plan, they will not be qualified beneficiaries and do not have independent COBRA continuation election rights under federal law.

However, COBRA also requires continuation coverage to be the same coverage that a qualified beneficiary had on the day before the qualifying event and may not differ in any way from the coverage made available to similarly situated non-COBRA beneficiaries⁴. Therefore, if a plan offers group health plan coverage to domestic partners or their children and both the employee and covered domestic partner lose coverage due to, for example, termination of employment, the employee could argue that he or she must be given the right to elect to continue the coverage in effect before the qualifying event (which included coverage for the domestic partner.)

Furthermore, if a similarly-situated active employee can add a domestic partner to his or her coverage at annual open enrollment, a former employee on COBRA coverage has the same right to add an eligible domestic partner to his or her COBRA coverage at open enrollment.

But since these individuals are not included in the federal definition of "qualified beneficiary," there is nothing that guarantees these individuals the independent right to elect COBRA continuation for themselves. For example, while a legally recognized same-sex spouse must be offered a COBRA election following the death of the covered employee, a non-qualified beneficiary domestic partner would not be entitled to the same election rights.

While the rights of same-sex couples continues to evolve and expand, it is important to seek legal counsel and/or consult with your insurance carriers when considering if your domestic partner benefits should be revised in consideration of expanded marriage laws or if continuation coverage (even non-COBRA continuation coverage) will be afforded to these individuals to continue benefits parity amongst your benefits-eligible populations.