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## New York Same-Sex Marriage Law

July 27, 2011

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On June 24, 2011, New York Governor Andrew Cuomo signed the same-sex marriage bill into law, titled the "Marriage Equality Act" which became effective on July 24, 2011, 30 days after it was signed. The Act amends New York State's Domestic Relations Law to provide that same-sex couples may obtain a marriage license in New York, and that parties to a same-sex marriage shall be treated equally to opposite-sex married couples "in all respects under the law," without any distinction. Although New York has for the past few years recognized same-sex marriages validly performed in other jurisdictions, such marriages could not be performed legally in New York, and the State only recognized the rights of same-sex married couples for limited purposes.

### Impact on Health and Welfare Benefits

With regard to insured health and other welfare benefits provided by an employer and subject to state law benefit mandates (under an insurance policy governed by New York State law), the Act does not represent much of a change. As a result of a directive issued by former Governor Paterson in 2008 (and in accordance with a Circular Letter issued by New York's Insurance Department as a result of that directive), New York State law already required that same-sex spouses (validly married in other jurisdictions) must be treated in the same manner as opposite-sex spouses.

With respect to self-insured health and other welfare benefits that are generally not subject to state law benefit mandates, the Act does not require employers to treat same-sex spouses as "spouses" for purposes of self-funded benefit plans. Under ERISA, the terms of the self-insured benefit plan (rather than the state law) would govern and, thus, employers that offer self-insured benefits and that do not wish to cover same-sex spouses should carefully craft the definition of "spouse" in the applicable plan documents to make the exclusion clear. However, employers may nonetheless wish to consider extending self-funded benefits to same-sex spouses, particularly if other benefits of the employer are provided to same-sex spouses in accordance with the Act or other state laws.

### Tax Implications

Employers that extend certain welfare benefits to same-sex spouses need to be aware of the corresponding tax implications of doing so. Because marriage is defined by the federal Defense of Marriage Act as a union between one man and one woman for all purposes of federal law, employers must impute income to the employee for federal income tax purposes equal to the fair market value of the health care coverage given an employee's same-sex spouse, unless the same-sex spouse otherwise qualifies as a "dependent" of the employee. There is no clear rule on what constitutes FMV. The FMV of coverage is determined based on the amount an individual would have to pay for the particular coverage in an arm's length transaction. FMV is usually determined by the difference between the cost of employee and employee-plus-one coverage. In addition, the employee may not make pre-tax contributions to a

section 125 cafeteria plan on behalf of the same-sex spouse (*i.e.*, contributions for the spouse must be after tax) and may not receive reimbursement for expenses of the same-sex spouse from flexible spending accounts (FSAs), health reimbursement accounts (HRAs) or health savings accounts (HSAs) unless the spouse qualifies as a federal tax dependent.

Although New York's new law will not change this rule for federal tax purposes, it is believed that income will no longer need to be imputed for New York state tax purposes for benefits provided to a spouse of the same sex. The New York State Department of Taxation and Finance is expected to issue guidance on this issue.

### Next Steps

It is important for employers and other benefit plan sponsors to review existing benefit programs and policies to determine the scope of any necessary changes or clarifications that may be required as a result of the Act. Among other things, the following actions should be considered:

- Review and analyze existing HR policies and procedures, including employee handbooks, to assess the current rights of same-sex spouses and domestic partners, and consider any required (or desired) changes;
- Review benefit plan documents, summary plan descriptions, enrollment forms and administrative procedures to assess the current rights of same-sex spouses and domestic partners, and consider any required (or desired) changes;
- Confer with insurance providers and TPAs, and work with payroll departments to address taxation issues;
- Review and update domestic partner benefit policies;
- Consider with legal counsel the potentially discriminatory consequences of imposing any eligibility requirements on same-sex partners that are not imposed on opposite-sex partners and carefully communicate the applicable rules and changes to employees and their family members.

For additional information or questions, please contact your Lawley Benefits Consultant.

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