Same benefits for John and Harry as John and Mary?

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The topics for this month's Q&A are a mixed bag — ranging from how to handle benefits for same-sex couples to private medical information to vacation pay. They're very practical questions that you'll likely be confronted with on any given day at your office. We hope our answers provide guidance in dealing with these sometimes difficult situations.

Our lead question, as our headline suggests, deals with the complex and developing area of domestic-partner benefits and the regulatory and legal issues that can arise. The other questions present general benefits issues that can trouble you from time to time. We're confident that we've covered something here that you'll run across sooner or later.

Q: We have a few employees who have inquired if we're going to offer benefits to same-sex couples who go to Massachusetts to get married. I have advised their manager that we won't. I believe we aren't required to since Louisiana doesn't recognize those marriages as legal.

A: This seemingly straightforward and simple question presents a myriad of complex issues, many of which haven't been clearly answered by lawmakers or courts. You're correct that only a marriage between a man and a woman is legally recognized in Louisiana. In fact, a federal law enacted in 1996, the Defense of Marriage Act (DOMA), defines the terms "marriage" and "spouse" as they are used in federal laws to mean a union between a man and a woman who are married as husband and wife (i.e., only opposite-sex couples). DOMA also makes it clear that one state isn't obligated to honor another state's definition of "marriage" or "spouse."

Nearly every state has now adopted its own mini-DOMA, saying it will only recognize marriages that would be legal within its own borders. So even if a same-sex couple is legally married in the eyes of the state of Massachusetts, Louisiana (and the federal government for federal law purposes) won't see them as "married." Furthermore, neither Louisiana law nor federal law requires you to offer benefits to same-sex couples.

But none of that tells you whether your employee's "significant other," through a valid same-sex marriage in the state of Massachusetts or otherwise, is entitled to spousal benefits under your plan. The starting point for answering that question is the language of your plan. Does your plan expressly allow domestic partner benefits (i.e., benefits for homosexual couples who aren't legally married under the law of your state)? If your plan allows benefits for spouses or based on marriage, does it define the terms "marriage" and "spouse" in such a way that would include or exclude same-sex couples? If your plan is silent on those issues, does it specify whether Louisiana or some other state's law will govern the outcome of disputes if federal law doesn't apply?

Does the plan adopt the definitions of “marriage” and “spouse” set forth in DOMA or a similar state law? Will a court enforce a choice-of-law rule in your plan, or will it look to the law of some other state or federal law for the answer? And if it embarks on its own analysis of which of two or more states’ laws will apply, what facts will be important to the court in deciding that question?

The fact that the one simple question you raised leads to all of those questions means one thing — you and your benefits provider should work together to specifically and clearly state in your plan what terms like “marriage” and “spouse” mean, when a person and his “significant other” are eligible for benefits, and which law should apply to decide any disputes that might arise. Because same-sex marriages have been recognized only recently and in such limited jurisdictions, courts haven’t yet established a uniform way to address those issues. Below are some possible approaches they might use and potential outcomes.

Most employee benefit plans are governed by a federal law called the Employee Retirement Income Security Act (ERISA). ERISA doesn’t define the terms “marriage” or “spouse.” And to complicate matters, it generally overrides state laws that “relate to” benefit plans so that disputes about them are governed exclusively by federal law. So would a court look to DOMA when a plan is silent about what constitutes a marriage or a spouse for benefits eligibility purposes? While it’s certainly possible, a court may be reluctant to use that approach because DOMA defines the terms “marriage” and “spouse” as they are used in federal laws, not necessarily in plans or other documents that are simply governed by federal law. Furthermore, DOMA’s provision that one state isn’t obligated to recognize a marriage from another state probably won’t offer much help if the court decides the federal definition of those terms doesn’t apply. The court will then have to determine which state law will apply.

That more complicated approach — deciding which of two or more potentially applicable state laws to apply for determining benefits eligibility — has been used by a number of courts faced with similar issues involving the validity of heterosexual marriages. Those courts have recognized an exception to the general rule that ERISA and the federal law used to decide ERISA questions overrides state law when federal law is silent and when it comes to issues traditionally left to state regulation, like marriage.

Long before the same-sex marriage debate, courts had to decide tricky issues like which of several wives seeking spousal benefits under an ERISA pension plan had a valid marriage and was therefore entitled to the benefits. In those cases, when not presented with or declining to follow a choice-of-law rule in the plan, courts analyzed the relationship of the parties and the dispute to the respective states to determine which state had the greatest interest in having its law applied. So while it’s possible that Louisiana law would apply in your situation to exclude benefits for same-sex spouses, the answer is unclear without knowing the language of your plan — and because of the novelty of this developing legal issue.

The uncertainty in this area only emphasizes our point: You and your benefits provider can reduce the risk of a lawsuit by clearly defining eligibility criteria, including terms like

"spouse" and "marriage," by plainly specifying whether you intend to provide benefits to homosexual domestic partners, heterosexual domestic partners, or both (and what those terms mean), and by including a choice-of-law provision. If you want to exclude same-sex spouses from coverage, consider revising the definition of "spouse" in your plan to require that spouses be of the opposite sex (similar to DOMA).

But make sure you also define what you mean by "opposite sex" and how your plan will determine "gender" for that purpose. Another developing legal issue is whether gender means the genetic assignment of certain characteristic(s) present at birth or whether a person's subsequent gender reassignment, through surgery or otherwise, should control. That's a topic for a different article on another day, but it's worth mentioning here.

Finally, keep in mind that if you choose to provide benefits to domestic partners, even those whose marriages are recognized by one of the few states permitting same-sex marriages, they won't receive the same treatment that married opposite-sex couples receive under federal laws like the Internal Revenue Code, COBRA, and the Health Insurance Portability and Accountability Act (HIPAA). That's because DOMA, as we have pointed out, defines "marriage" and "spouse" for the purposes of federal law, including those three laws in particular.

So, for example, benefits your company provides to someone who doesn't qualify as a spouse under DOMA (because she isn't married to a person of the opposite sex) and who isn't a dependent will be taxable, even if they're provided through a cafeteria plan. Although benefits for married opposite-sex couples can be purchased with pretax dollars, that's not the case for unmarried couples or same-sex married couples under federal tax law regardless of what your plan or state law says.

Q: Someone recently told me that changes have been made to the law that covers paying employees unused vacation time when they resign. Is that true?

A: Louisiana employers have always been required by law to compensate employees for earned but unused paid vacation when their employment ends — either voluntarily or involuntarily. Compensation for accrued paid vacation time is considered wages — just like a paycheck.

You're right that the law covering payment for vacation time changed recently. Over the years there have been a number of different deadlines by which you must pay former employees for their vacation time, sometimes depending on whether they resigned or were fired. The Louisiana Legislature attempted to make things simpler by creating one uniform deadline for paying vacation time, regardless of whether the separation was voluntary or involuntary, but a subtle distinction remains. Here's what it is.

If you *fire* an employee, you must pay him all wages you owe him (including earned but unused vacation) within 15 days of the date of discharge or on the next regular payday, whichever comes first. So if you fire someone on the 30th and your next regular payday is the 31st, you must pay him all the wages he's owed by the 31st. If you know you're going to fire an employee shortly before the next regular payday, make sure you calculate what you

owe him, including unused vacation, so you're prepared to make the payment within the time required by law.

If an employee *quits*, you must pay all wages you owe him (including earned but unused vacation) within 15 days of the date of resignation or on the next regular payday for the pay cycle during which he was working at the time of separation, whichever comes first. Let's imagine you pay your employees every Friday for the pay cycle consisting of the previous workweek. If an employee quits on Thursday, you will have until the next Friday to pay him all the wages he's owed. The next Friday is the payday for the pay cycle during which he was separated, and that date occurs before the 15th day following the date of his resignation. Of course, that will differ depending on the circumstances, so you'll need to consider each case as it arises.

Q: I recently had a supervisor challenge me over the type of medical information about his employees he's allowed to keep at his desk. I have always advised managers to send all doctors' notes, statements, and the like to HR and I would house them in the appropriate place, but he was adamant about seeing a physician's note with medical information. Is that allowed under HIPAA?

A: HIPAA causes confusion among employers because of the unique way it applies to you. The Act regulates the use and disclosure of "protected health information" (PHI) by "covered entities." Covered entities include health care providers and group health plans. You aren't likely to be a covered entity unless you're a health care provider. The group health plan you sponsor is a covered entity, however, and must comply with the HIPAA privacy rule, which sets forth detailed requirements for the use and disclosure of PHI (including amendments to health plans, the issuance of privacy policies and procedures, security of PHI, and other requirements).

The key when determining whether HIPAA applies is to determine how you came by the information and which "hat" you were wearing when you received it (the employer hat or the group health plan hat). HIPAA doesn't regulate health information obtained in your capacity as an employer.

For example, you may need health information to determine an employee's eligibility for sick time or leave under the Family and Medical Leave Act. That information wouldn't be subject to the HIPAA privacy rule if it's obtained from a source other than the group health plan (e.g., from the employee or her physician with authorization). But it you received the information from your group health plan (for example, a claim for payment for chemotherapy or a pregnancy test result), it's PHI and must be protected, according to the HIPAA privacy rule.

While it's acceptable for a supervisor to obtain health information from an employee (or from an entity directed by the employee to provide the information) to carry out your responsibilities as an employer, that health information should always be kept in a file separate from other personnel information once it has served its purpose. It should also be kept in a manner that restricts access only to employees who have a need to know for the

purpose of carrying out your company's responsibilities as an employer. That's a requirement under the Americans with Disabilities Act that will help prevent claims that you used health information to make impermissible employment-related decisions.

We agree that allowing your supervisor to keep medical information about employees at his desk is a bad idea. Employee medical files should be kept in a secure place with limited access. Tell your supervisor to send all medical information directly to the designated employee in human resources so it can be kept separately from other personnel information in a secure file cabinet or another area. Tell him he can visit or call HR if he needs information about an employee's work restrictions or to otherwise fulfill his responsibilities.

Q: Is it legal to pay employees who opt out of a health insurance plan the same amount that's paid to all employees? Would that go against ERISA regulations?

A: The law that comes into play here is the dreaded Internal Revenue Code, not ERISA. Under the Code, if an employee is offered a choice between cash and some other benefit (e.g., health insurance), he'll generally be deemed to have "constructively received" the cash and will be taxed on that amount even if he elects the other benefit. But you may offer employees a choice between cash and certain other benefits (like health insurance) via a "Section 125 plan" (also known as a "cafeteria plan") without running afoul of the constructive receipt doctrine.

Under that scenario, the employee can be "paid" to opt out of the health insurance plan via credits you provide under the cafeteria plan. For example, someone who elects no benefits under the cafeteria plan might receive $100 in additional compensation per month. Alternatively, he can forgo the $100 and enroll in the health insurance plan. If the health plan costs more than $100 per month, the employee can pay the remainder of the cost of his benefit on a pretax basis through a Section 125 plan.

Find out more about managing your employee benefits in the subscribers' area of HRhero.com, the website for Louisiana Employment Law Letter. You have access to an HR Executive Special Report titled "Top Ten Employee Benefits Mistakes." Just log in and scroll down to the link for all the Special Report titles. Need help? Call customer service at (800) 274-6774.