

## EVERYTHING BUT MARRIAGE ACT – FAQ FOR EMPLOYERS

Washington's Everything but Marriage Act was effective December 3, 2009. As discussed in an earlier Alert, the Act requires equal treatment of registered domestic partners and spouses. From an employer perspective, this may impact, among other things, current benefit plan offerings and leave policies.

The following addresses some frequently asked questions. We expect more guidance from the Office of the Insurance Commissioner, Department of Labor and Industries. Many carriers are already providing information as it relates to this new law.

### **Who is a registered domestic partner?**

In order to register as a domestic partner in Washington State, both partners must:

- Either be:
  - of the same sex, or
  - of the opposite sex provided at least one partner is at least 62 years of age;
- Share a common residence;
- Both be at least 18 years of age;
- Not be married to or in a registered domestic partnership with someone else;
- Be capable of consenting to the domestic partnership;
- Not be nearer kin than second cousin; and
- Not be a sibling, grandchild, aunt, uncle, niece or nephew to the other partner.

There is a process that domestic partners must go through to be a "registered domestic partnership" under Washington law. This includes completing the Declaration of Domestic Partnership form, signing the form, having it notarized and submitting the form to the Secretary of State along with a registration fee.

Domestic partners registered in other states will be recognized in Washington as registered domestic partners and receive all the benefits allowed under the Washington law.

### *HEALTH PLAN REQUIREMENTS*

#### **Our group health plan is insured in Washington; what does this new law mean for me?**

While many of the details are currently being worked out, the law requires insurers and insurance contracts to treat registered domestic partners as spouses under the terms of the insured policies. This requirement would apply to an insured group health plan (medical, dental, vision) or group life insurance contract written in Washington. Therefore, those contracts will need to cover a registered domestic partner in the same manner as a covered spouse.

Many insured health plans already satisfy this requirement by extending coverage to domestic partners of employees. However, if an insured plan only offers coverage to a spouse (and not a domestic partner), the law appears to require that the insured coverage be extended to a registered domestic partner as if he/she were a spouse.

The insurance commissioner indicated that the carriers will determine the process for enrolling a newly-eligible registered domestic partner. This process may include a special enrollment period or possibly enrolling these individuals at open enrollment.

#### **Our health plan is self-insured; is it subject to this mandate?**

No, this is a Washington State insurance requirement and a self-insured plan generally will not be subject to state insurance mandates (as they are preempted by ERISA). However, many self-insured group health plans already cover domestic partners as a function of plan design.<sup>1</sup>

#### **What is my carrier doing to comply with these new requirements?**

Kibble & Prentice is working closely with our carriers to determine what steps are being taken to comply with the Act. Recent guidance from the Washington Insurance Commissioner's Office (OIC) indicates carriers will not be required to change their current policy language to comply with the new requirements. However, the insurer will need to administer the policy in a manner that treats

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<sup>1</sup> This question addresses the self-insured group health plan requirements only and does not take into consideration any other issue, including potential employment law concerns. A discussion of whether failing to provide equal benefits raises issues from an employment law perspective is beyond the scope of this article and should be discussed with legal counsel.

registered domestic partners the same as married spouses. Going forward, the OIC will require carrier contracts to specifically state that all plan provisions that apply to spouses apply equally to registered domestic partners.

The OIC's statements raise a number of issues, including how a registered domestic partner may enforce the requirement for coverage if it is not written into the terms of the plan, and the plan sponsor's ability to comply with ERISA's written plan requirement. Additional guidance from the carriers and OIC is needed.

### **Do I need to make changes to the health FSA or HRA?**

No, this is a Washington State insurance requirement. The health FSA and HRA are not subject to state insurance mandates. Further, only qualified medical expenses of an employee, the employee's spouse or other tax dependent under federal law (Code Section 152) are eligible for reimbursement through these tax-favored arrangements. A registered domestic partner would need to be a tax dependent of the employee in order to have his or her qualified medical expenses reimbursed from the employee's FSA or HRA.

### **For tax purposes, how will I treat the premiums associated with the registered domestic partner's coverage?**

This will depend on whether the registered domestic partner is a tax dependent under Code Section 152. Employer-provided health coverage is "tax-free" to the employee if coverage is provided to the employee, the employee's spouse or tax dependent. If the registered domestic partner is not a tax dependent of the employee, the fair market value of the coverage is imputed as income to the employee less any employee after-tax contribution.

## *FAMILY LEAVE REQUIREMENTS*

### **Can an employee take a protected leave of absence to care for a seriously ill or injured registered domestic partner?**

Currently, Washington's Family Leave Act (FLA) generally mirrors the Federal Family Medical Leave Act (FMLA).<sup>2</sup>

The new law should amend FLA to provide equal treatment between a registered domestic partner and a spouse. This is more expansive than current requirements and will afford FLA leave to an employee to care for a seriously ill or injured registered domestic partners. This state requirement does not change FMLA, which is a federal law and currently does not extend leave protection for domestic partners (registered or not). Therefore, it is possible that within the

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<sup>2</sup> Special rules apply for pregnancy disability.

same 12-month period, an employee could take a protected Washington FLA leave to care for a registered domestic partner who is seriously ill or injured and also take a federal FMLA leave to care for the employee's own serious illness or injury (or other FMLA-qualifying leave event).

The Washington Department of Labor and Industries is expected to issue additional guidance on this issue in the near future.

For more information, visit the following Web sites:

- Washington State Office of the Insurance Commissioner  
<http://www.insurance.wa.gov/consumers/domesticpartners.shtml>
- Washington Secretary of State  
<http://www.secstate.wa.gov/corps/domesticpartnerships/>
- Washington State Department of Labor and Industries  
<http://www.lni.wa.gov/WorkplaceRights/LeaveBenefits/default.asp>

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