Brown & Brown

EMPLOYEE BENEFITS

Married Employees Working for the Same Employer

Possible Compliance Concerns

March 2022

On occasion, an employer will find that they have two employees who are married to each other. When faced with this situation, some cost-conscious employers have a practice that restricts the employee benefits plan choices the married employees can make. This can take the form of a policy that bars married employees from each enrolling in single coverage under one of the employer's plans and instead requires them to enroll in family or employee-plus-one coverage for them to participate in an employer-sponsored plan. When an employer ties HSA contributions to whether an employee elects coverage and/or the coverage type they elect, such a policy would affect the amount otherwise eligible employees could receive based on their marital status.

The above practice can raise potential compliance concerns under ERISA, the ACA and certain state discrimination laws that an employer may not otherwise consider. Below is a brief discussion of some of the key compliance concerns regarding restricting coverage options (and contributions) for married employees working for the same employer. Before adopting such practices, plan sponsors should seek the advice of their employee benefits attorney, who can counsel them.

ACA Employer Shared Responsibility Payment Considerations

Where an applicable large employer has a policy requiring married employees to enroll in family coverage rather than allowing them both to choose single coverage, there are potential penalty risks under the employer-shared responsibility provisions of the ACA.

Under the Affordable Care Act's employer shared responsibility provisions, applicable large employers ("ALEs") may face a penalty if 1) they do not make an offer of minimum essential coverage to substantially all full-time employees and their dependents (called the "subsection (a)" penalty) or 2) they fail to make an offer of coverage to a full-time employee that is affordable and of minimum value (called the "subsection (b) penalty").

An employer could be subject to a subsection (b) penalty if they employ a policy restricting married employees' coverage options due to a failure to provide affordable coverage to each employee. The affordability requirement and calculation under the ACA is based on the lowest-cost employee-only plan, and employers often do not offer affordable family or employee-plus-one coverage. By not allowing both married employees to each elect the affordable single coverage, the subsection (b) penalty is potentially implicated because the policy deprives one of the employees of an opportunity to enroll in affordable coverage.

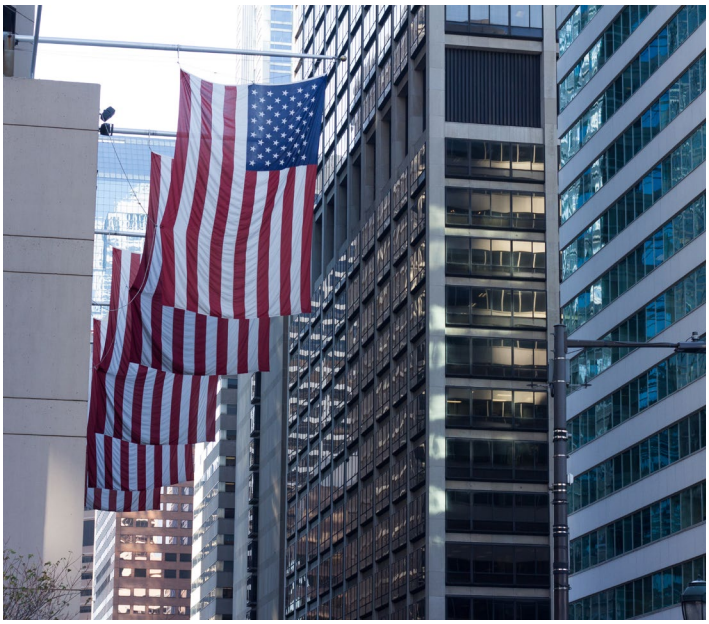
The potential risk of a subsection (a) penalty may be more remote, as employees would be offered coverage – one as an employee the other as a spouse of the employee. However, there is still a possibility that offering coverage in such a way may not be considered by the IRS to offer minimum essential coverage to a full-time employee.

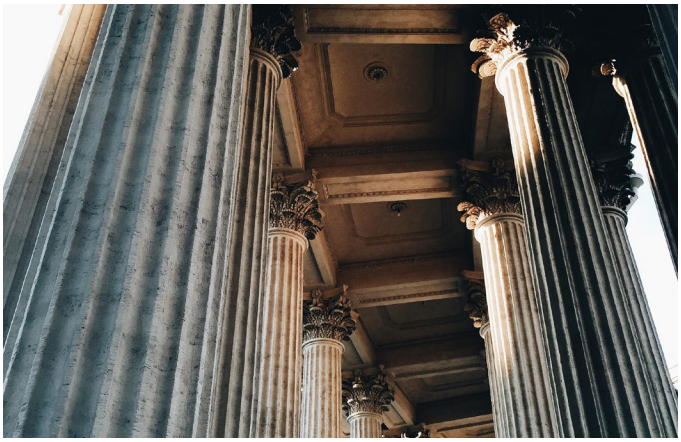
The IRS has not provided guidance on these issues. However, based on the requirements of the subsection (b) penalty, risk remains if employees, regardless of marital status, are not provided an opportunity to enroll in affordable coverage.

State Laws: Marital Status Discrimination Laws

Some state discrimination laws that prohibit marital status discrimination in employment may pose a problem for employers who restrict coverage options for married employees.

Apart from the Civil Service Reform Act, which bars marital status discrimination in federal government hiring and employment, marital status is not a protected class under federal anti-discrimination law. However, certain state laws explicitly recognize marital status as a protected class and extend nondiscrimination protections to individuals based on their marital status in the context of employment. New York, Minnesota, Wisconsin and California are just a few of the states with nondiscrimination laws protecting individuals from marital status discrimination in employment.



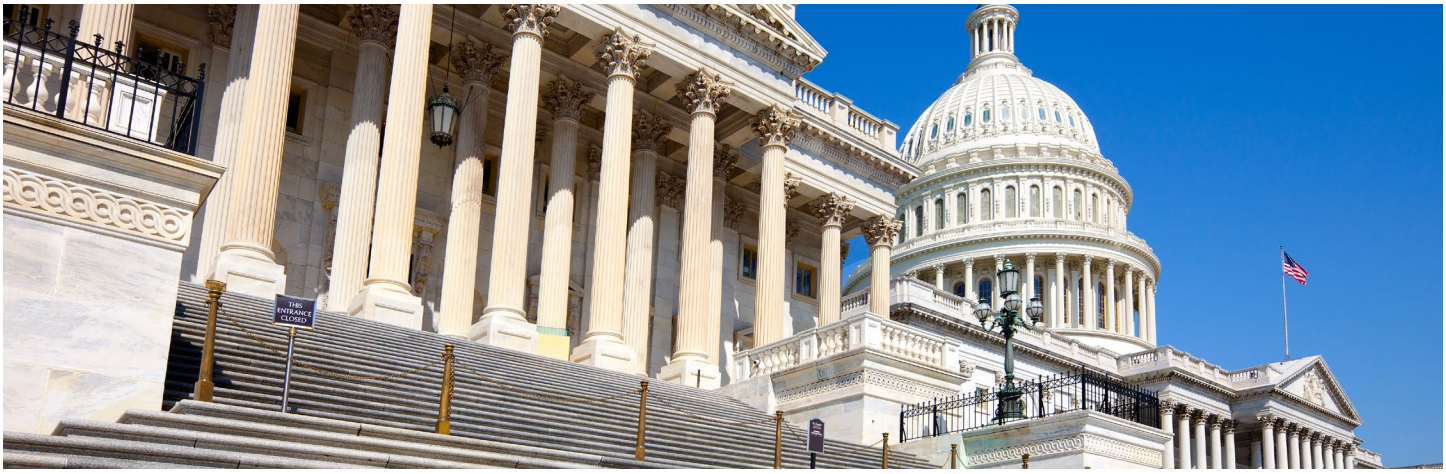


For instance, the Minnesota Human Rights Act ("MHRA") prohibits an applicable employer from "discriminat[ing] against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of their marital status. Limiting the health care coverage options for married employees due to their status as married employees could violate MHRA's blanket prohibition of marital status-based employment discrimination.

The Wisconsin Fair Employment Act similarly prohibits employers from discriminating against employees regarding their marital status. However, there is a relevant limited exception, as noted on the State's Department of Workforce Development website:

> ***My employer has a non-duplication policy and limits married coworkers to health insurance coverages under one family plan. Is that lawful?***
>
> *If you have a government or public employer, the employer may limit married employees to one family health insurance policy without violating the law.*

The Wisconsin Department of Workplace Development's position appears to be informed by a 1998 Wisconsin Supreme Court case, which determined that public employers could bar married employees from each electing family medical coverage without violating the Act's prohibition on marital status discrimination. The case did not address whether other employers could bar married employees from each electing family medical coverage or whether a public employer could bar married employees from each electing other types of coverage (e.g., single coverage). While Wisconsin has a limited exception, other states that prohibit marital status discrimination may not have such an exception.



For employers with plans subject to ERISA, there may be a preemption of the requirements of a state discrimination law to the extent that it "relate(s) to any employee benefit plan." See generally 29 U.S.C. § 1144 (ERISA § 514). HSAs typically are not subject to ERISA, so there would be no ERISA preemption to state discrimination laws where an employer differentiates HSA contributions based on marital status.

The above are just a few examples drawn from the selected states. Employers who have such policies should consider the relevant laws in states where they have employees working to determine whether the policy is consistent with the state law or whether ERISA preempts such laws.

ERISA Considerations

Another potential issue with a policy restricting coverage options for married employees relates to whether or not the policy is appropriately documented in the governing plan document.

Section 402 of ERISA mandates that welfare plans subject to the law "be established and maintained pursuant to a written instrument." The written instrument requirement means that an ERISA compliant written plan document must include the underlying plan's eligibility provisions. Additionally, under the plan administrator's fiduciary duty, outlined in Section 404 of ERISA, the administrator has a duty to administer the plan "in accordance with the documents and instruments governing the plan."

Many employers who bar married employees from each enrolling in employee-only coverage will often not have the policy appropriately documented if they have it documented anywhere. For employers with insured plans, the plan's eligibility terms might be contained in the insurance documentation, which typically forms part of the plan's written plan document. In that case, the employer may be limited from excluding certain groups from certain coverage under the plan because the carrier may be unwilling or unable to modify the insurance documents.

If they do not follow the express written terms of the plan and instead administer plan eligibility according to an informal policy that restricts coverage options for married employees, the employer could risk violating its fiduciary duty under ERISA and/or ERISA's written instrument requirement.

The issues listed above are complex, and at times there is not a clear answer. For these reasons, an employer considering a plan designed to limit the coverage options for married spouses should discuss their next steps, if any, with their legal counsel.

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