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# THE ATTORNEY GENERAL OF MARYLAND

## OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

January 18, 2013

The Honorable Richard S. Madaleno, Jr.
Senate of Maryland
203 James Senate Office Building
Annapolis, Maryland 21401-1991

Dear Senator Madaleno:

You have requested advice on a series of issues relating to the implementation of same-sex marriage in Maryland. Those issues, your questions, and our answers appear below.

**Background**

Chapter 2 of the Laws of Maryland of 2012 ("Chapter 2") took effect on January 1, 2013, after having been approved by the voters during the November 2012 general election. Section 2-201(b) of the Family Law Article ("FL") now provides that "[o]nly a marriage between two individuals who are not otherwise prohibited from marrying is valid in this State." Accordingly, marriage licenses are now being issued to same-sex couples and same-sex marriages have begun to be performed in Maryland. *See generally* 97 *Opinions of the Attorney General* 95 (Nov. 29, 2012) (tentative pagination).

Even before passage of Chapter 2, the State had since 2010 recognized same-sex marriages lawfully entered into in other states where such marriages are permitted. The Attorney General issued an opinion to that effect on February 12, 2010, 95 *Opinions of the Attorney General* 3 (2010), and last year the Court of Appeals formally recognized out-of-state same-sex marriages in *Port v. Cowan*, 426 Md. 435 (2012). Thus, as a result of that case and Chapter 2, same-sex spouses and same-sex couples in Maryland are now entitled to the same benefits, protections, and obligations under Maryland law as opposite-sex spouses and couples.

The State of Maryland, as an employer, is subject to the State's anti-discrimination laws, and thus it is illegal for the State to "fail or refuse to hire, discharge or otherwise discriminate against any individual with respect to the individual's compensation, terms, conditions, or privileges of employment" based on sexual orientation, marital

status, gender, or other protected classifications. Md. Code Ann., State Gov't ("SG") § 20-606(a). In the wake of the Attorney General's opinion, Governor O'Malley issued a statement on February 24, 2010, directing "all State agencies to work with the Attorney General's office to ensure compliance with the law." On December 20, 2012, after the voters approved Question 6 (ratification of Chapter 2), Governor O'Malley directed his Cabinet to work expeditiously to ensure full implementation of Chapter 2. A copy of his directive is attached for your information. Thus, the State has been taking steps to ensure equal treatment of same-sex married couples under Maryland law.

Federal law on spousal issues, however, is controlled by the federal Defense of Marriage Act ("DOMA"), Section 3 of which provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7. As a result, when the State administers federal programs, the federal definition of "marriage" as a union between a man and a woman will control.

The federal law in this area is, however, rapidly evolving. The federal Courts of Appeal for the First and Second Circuits have invalidated Section 3 of DOMA on constitutional grounds, although those decisions have been stayed pending appeal. *See Windsor v. United* States, 699 F.3d 169 (2d Cir. 2012); *Massachusetts v. United States HHS*, 682 F.3d 1 (1st Cir. 2012). The Supreme Court has agreed to review *Windsor* and is expected to hear argument in the spring of this year, with a decision expected in June. Even though the U.S. Department of Justice has declined to defend the constitutionality of DOMA, "the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality." Letter from Eric H. Holder Jr., U.S. Attorney General, to the Honorable John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011). Meanwhile, guidance and regulations from the executive branch of the federal government continue to evolve.

Given the fluidity of this area of the law, this letter does not and cannot resolve every question that has arisen or may arise in the context of same-sex marriage. Instead,

we have attempted to address the specific issues and questions that you have raised to date.

**Insurance**

Under current law, an insurer is prohibited from, among other things, refusing to underwrite a particular risk or class of risk based wholly or partly on sex or for any arbitrary, capricious or unfairly discriminatory reason. Md. Code Ann., Insur. ("IN") § 27-501(a). Similar provisions apply specifically to prohibit unfair discrimination in a variety of insurance contexts, including life insurance and annuities, IN § 27-208(a), health insurance, IN § 27-208(b), and all other lines of insurance, IN § 27-212. The passage of Chapter 2 has the effect of extending these anti-discrimination provisions to same-sex marriage. Thus, with the exception of fraternal benefit societies described in IN § 8-402 that are operated, supervised, or controlled by a religious organization—which are exempted under § 4 of Chapter 2—all insurers would be expected to comply, including during open enrollment. If a customer believes that one of these provisions is being violated by an insurer, the customer may file a complaint with the Maryland Insurance Administration, which would investigate the claim and make a determination. Information about how to file a complaint with the Insurance Administration can be found on its website at: http://www.mdinsurance.state.md.us/sa/jsp/Mia.jsp#.

**Effect on ERISA employee welfare benefit plans and non-ERISA benefits plans (*e.g.*, non-Federal government and Church plans)**

The impact of Chapter 2 on ERISA welfare benefit plans will depend on whether the plan is entirely self-funded or purchases insurance through an insurer. A self-funded ERISA plan (*i.e.*, one in which the plan bears all the risk) would not be affected by the law. By contrast, ERISA plans that purchase insurance through an insurer are "directly affected by state laws that regulate the insurance industry." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985). Such insured plans would be expected to comply with IN § 27-501 and other anti-discrimination provisions of the Insurance Article, as would non-ERISA plans, the only exception being, again, certain types of fraternal benefit societies.

**The express preemption provision of ERISA § 514 provides that ERISA [Title 1 provisions] will supersede any and all State law that relates to an employee benefit plan. Does the new Maryland law fall into ERISA's broad savings clause exception for State law that regulates insurance, banking, or securities?**

Yes, with regard to insured plans. The Supreme Court has expressly held that ERISA does not preempt state laws that regulate insurance "by imposing conditions on the right to engage in the business of insurance." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 583 U.S. 325, 338 (2003); *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2002) ("[W]hen insurers are regulated with respect to their insurance practices, the state law survives ERISA."). Thus, state laws that regulate the terms of insurance contracts, including laws that require contract terms to be interpreted and applied in a particular manner, are saved from preemption. *See Metropolitan Life*, 471 U.S. at 740-41 (Massachusetts law mandating the inclusion of certain mental health benefits in policies of health insurance sold to ERISA plans saved from preemption).

**Insurance Plans' Compliance with Maryland law**

Chapter 2 allows same-sex marriages to occur in the State. And, as mentioned above, the Court of Appeals held in *Port v. Cowan* that Maryland courts recognize such marriages legally performed in other jurisdictions. Thus, insurers are already required to comply with IN § 27-501 and other anti-discrimination provisions of the Insurance Article, and consumers who believe that an insurer is not complying with the statute can file a complaint with the Maryland Insurance Administration.

**Are employer-sponsored self-insured welfare benefit plans that offer benefits to a spouse required to include same-sex civil unions or marriages in the plan's definition of "spouse"?**

No. In *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983), the Supreme Court considered whether a New York law prohibiting discrimination in employment could be enforced against an employee benefit plan that discriminated on the basis of pregnancy. The Court concluded that the state law provision, which went beyond what was required by federal law, was preempted by ERISA to the extent that it related to employee benefit plans and prohibited practices that were permitted by federal law. *See also Partners Healthcare Sys., Inc. v. Sullivan*, 497 F. Supp. 2d 42, 45 (D. Mass. 2007) (holding that plaintiffs' discrimination claim related to the provision of benefits to same-sex, but not opposite-sex, domestic partners was preempted by ERISA); *Council of City of N.Y. v. Bloomberg*, 846 N.E.2d 433 (N.Y. 2006) (city ordinance barring contracts over $100,000 with an entity that does not provide benefits for domestic partners is preempted by ERISA); *Rovira v AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993) (plan provision limiting class of eligible beneficiaries to spouses whose marriage was valid under state law was not *per se* unreasonable or discriminatory under ERISA).

**If the term "spouse" is left undefined, would same-sex spouses be considered to be included in the employer-sponsored self-insured welfare benefit plan?**

It is our view that a plan that does not define the term "spouse" would be interpreted to include same-sex spouses. The term "spouse" is typically defined to include "a married person." *See* Webster's Third New International Dictionary of the English Language, Unabridged (1971) ("1. A man or woman joined in wedlock: married person: husband, wife); The New Shorter Oxford English Dictionary (1993) ("A married person; a wife, a husband."). Thus, to the extent that a plan does not specifically define the term "spouse" to limit it to opposite-sex couples, it would include same-sex couples.

**Are Church plans excepted or excluded from the extension of the Insurance Article's anti-discrimination provisions to same-sex marriages?**

Yes. Church plans are generally exempt from ERISA, though they can opt in, at least with respect to retirement plans.[1] 29 U.S.C. § 1003(b)(2). To the extent that they are exempt from ERISA, church plans are subject to state laws that would otherwise be preempted. *Catholic Charities of Maine v. City of Portland*, 304 F.Supp.2d 77 (D. Me. 2004). Even if otherwise applicable, however, Maryland's law prohibiting employment discrimination does not apply to:

> a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion *or sexual orientation* to perform work connected with the activities of the religious entity.

SG § 20-604(2) (emphasis added). Additional protection for smaller religious entities may be found in § 20-601(d)(1) of the State Government Article, which exempts employers with fewer than 15 employees from the employment discrimination laws altogether.

In addition, as discussed above, Chapter 2, Section 4 provides that a fraternal benefit society that is operated, supervised, or controlled by a religious organization "may not be required to admit an individual as a member or to provide insurance benefits to an individual if to do so would violate the society's religious beliefs." The section further

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[1] The Department of Labor has apparently taken the position that only pension plans can opt in to ERISA. *See* Dep't of Labor, Advisory Letter No. 95-07A. Some courts, however, have disagreed. *See, e.g., Catholic Charities of Maine v. City of Portland*, 304 F.Supp.2d 77, 89 (D. Me. 2004).

provides that such a refusal "may not create a civil claim or cause of action or constitute the basis for the withholding of governmental benefits or services from the fraternal benefit society." Therefore, church plans may exclude same-sex spouses from benefit coverage based on religious doctrine.

**Open Enrollment Periods**

Although Chapter 2 and *Port v. Cowan* do not directly affect open enrollment, marriage is a "qualifying event" under IN § 15-1208.1 for small group insurance plans, and under IN § 15-1406.1 for large group insurance plans. Thus, provided the particular insurance coverage at issue offers spousal coverage, a same-sex spouse is entitled to be added to the policy of the other spouse. Individuals who believe they have been wrongly denied the opportunity to add a same-sex spouse to their coverage may file a complaint with the Insurance Administration. It is important to note, however, that the majority of health insurance provided through Maryland employers is provided through self-insured plans, which the Insurance Administration does not regulate.

**Tenants by the Entireties - Title Insurance**

It is our view that a same-sex couple should be treated the same as an opposite-sex couple with regard to holding title to property as tenants by the entireties and obtaining title insurance. This would apply to original purchases as well as re-titling property already held by the couple.

The Maryland Rules of Interpretation provide that:

> Unless the General Assembly specifically provides otherwise in a particular statute, all words in this Code importing one gender include and apply to the other gender as well.

Md. Ann. Code art. 1, § 7. Furthermore, we believe a court would interpret statutory references, including references to "husband," and "wife," in a manner that is consistent with the current law. Because same-sex couples are entitled to marry in Maryland, and because lawful out-of-state same-sex marriages are entitled to the same recognition as out-of-state opposite-sex marriages, statutory references to "spouse," "husband" and "wife" must be interpreted in a neutral and nondiscriminatory way, unless the context clearly requires otherwise. In the context of holding title to property and obtaining title insurance, we see no legitimate reason to read "husband" and "wife" other than as applying to same-sex couples and opposite-sex couples equally.

## Taxation

### Tax Filing Status

State law provides, with certain exceptions, that "a husband and wife who file a joint federal income tax return shall file a joint Maryland income tax return." Md. Code Ann., Tax-Gen. ("TG") § 10-807(a). A husband and wife who file a joint federal income tax return may file separate State income tax returns only under certain specified circumstances. TG § 10-807(b). Although the statute is silent as to the treatment of spouses who file separate/individual federal returns, the related regulations provide, in part:

> A. Except as otherwise provided in this regulation, each resident of this State shall use the same filing status:
>
> (1) As used to file their federal income tax return; or
>
> (2) As if the individual had been required to file a federal income tax return.

COMAR 03.04.02.02. Thus, under the current regulatory framework, a couple that files separate federal returns must file separate State returns.

The U.S. Internal Revenue Service does not allow same-sex spouses to file joint federal income tax returns because of DOMA and its definition of "marriage" and "spouse." Thus, because a same-sex couple in Maryland does not have the option to file a joint federal income tax return, that couple is limited to filing separate, individual State income tax returns. However, because the limitation is reflected in regulation and not statute, this inequity can be remedied without the need for legislative action. The Comptroller recently announced his commitment to do so:

> I want to make sure that it is clear to everyone that same-sex couples in the State of Maryland . . . will have the opportunity to file joint tax returns for Tax Year 2013, and will receive the same tax treatment as any married couple. This will occur either as a result of a legislative action, or if necessary, a regulatory change, either of which is necessary because Maryland's tax code is conjoined to the IRS unless specifically decoupled.

Statement of Comptroller Peter Franchot Regarding Same-Sex Couples and Tax Filing (Dec. 19, 2012) (*available at* http://www.marylandtaxes.com/publications/nr/2012/pr47.asp (last visited Jan. 16, 2013)).

**Imputed Spousal Income**

Current Maryland law provides that the Maryland adjusted gross income of an individual is the individual's federal adjusted gross income for the taxable year, as adjusted by the addition and subtraction provisions set forth in TG §§ 10-204 through 10-210.1. *See* TG § 10-203. Thus, if a same-sex spouse's healthcare benefit is included in federal taxable income, then it is similarly included in Maryland taxable income. Because of the federal prohibition against recognition of same-sex marriages reflected in Section 3 of DOMA, any State or employer subsidy provided to an employee in a same-sex marriage to pay for certain dependent coverage must be imputed as income to the spouse because, under federal law, the same-sex spouse does not qualify for the tax benefits available to a "spouse." This was addressed with regard to State employees and retirees in an April 19, 2010 memorandum to the Secretary of Budget and Management, a copy of which is attached.

For healthcare benefits to be excluded from a same-sex spouse's Maryland taxable income, as it is for opposite-sex couples, there would have to be a statutory change to the Tax-General Article to provide for the subtraction of the benefit amount from the spouse's Maryland adjusted gross income.

**Estate Taxes**

Federal estate tax provisions provide an unlimited marital deduction. Thus, the value of property that passes to the decedent's surviving spouse is excluded when determining the size of the taxable estate. Internal Revenue Code ("I.R.C.") § 2056. Due to the provisions of DOMA, however, the surviving spouse of a legally married same-sex couple would not be entitled to the marital deduction and the estate tax benefits it provides. This is the issue in *Windsor v. United States*, which is currently pending in the Supreme Court.

For Maryland estate tax purposes, Maryland law defines "estate" as the federal gross estate. TG § 7-301(b). Consequently, like Maryland taxable income for income tax purposes, unless a specific marital deduction is created in the Maryland statute, the inability to take the marital deduction to determine the federal gross estate means that the Maryland estate on which the estate tax is imposed is also determined without the reduction afforded by the marital deduction. To alleviate this impact, a specific

modification allowing the marital deduction would have to be added to the Maryland statute. This modification would either be in a new section to Title 7, Subtitle 3 of the Tax-General Article or be added as a new provision within § 7-309.

**Various Maryland Tax Credit Programs**

The General Assembly has enacted over the years a number of tax credit programs that are not connected to, or dependent upon, the provisions of the Internal Revenue Code. One example is the Community Investment Tax Credit Program under Title 6, Subtitle 4 of the Housing and Community Development Article ("HCD"). In general, because these credits are not federally created, they are governed solely by Maryland law. Once action is taken to allow a same-sex married couple to file a joint Maryland tax return, these credits can be claimed by a same-sex married couple and reported on their joint Maryland return in the same manner that they are claimed and reported by an opposite-sex married couple.

**Other Tax Issues**

The following is a non-comprehensive brief summary of other tax issues that will resolve themselves if and when DOMA is ruled unconstitutional or Congress takes action to repeal it. These issues could also be resolved without federal action if a change were made to State law to decouple Maryland's filing status requirements from the Internal Revenue Code. Such a decoupling would require the same-sex couple to prepare a *pro forma* federal return applying all of the federal tax code provisions applicable to opposite-sex couples and then use those figures to prepare and file the Maryland return.

- *Alimony* – In general, alimony is included in gross income to the recipient and deductible from the gross income of the payor. I.R.C. §§ 62, 71, 215.
- *Constructive ownership of stock* – Under constructive ownership of stock rules, one spouse is considered to own any share of stock owned by the other. I.R.C. §§ 318, 267(c), 554.
- *Co-ownership of a joint venture* – I.R.C. § 761(f) allows businesses co-owned by a husband and wife who file a joint return to elect not to be treated as a partnership.

- *Earned income tax credit* – The federal earned income tax credit varies with the marital status of the taxpayer. The amount of the Maryland State and county earned income tax credit that may be taken on a Maryland return is tied to the amount of the federal earned income tax credit. TG § 10-704(b) & (c).

- *IRA contribution deductibility* – The income cutoff levels at which a taxpayer can no longer make a deductible contribution to an IRA vary depending upon one's filing status.

- *Material participation* – In general, a taxpayer is limited in the amount of losses from a passive activity that he or she may deduct. A critical test in determining whether something is a passive activity is whether the taxpayer materially participated in the activity. The material participation of a spouse in the activity can have an impact on the analysis.

- *Mortgage interest deduction* – There is a cap on the amount of mortgage interest that can be deducted. Legally married same-sex couples have been able to double this cap because the marriage is not recognized at the federal level.

- *Nonresident alien spouse* – A nonresident alien can be treated as a resident if married to a U.S. citizen or resident alien.

- *Self-employment income* – Under federal law, spouses can split self-employment income for purposes of IRA contribution calculations and health insurance deductions.

- *Social Security* – Taxpayers must pay income taxes on their Social Security benefits if their income is over a certain limit. The limit depends on whether a joint return is filed.

- *Transfer of property between spouses* – I.R.C. § 1041 provides that a taxpayer cannot recognize the gain or loss on a transfer of property to his or her spouse.

## State Employee and Retiree Benefits

### State Retirement and Pension System

On October 3, 2011, the Board of Trustees of the Maryland State Retirement and Pension System ("System") promulgated a regulation recognizing same-sex marriages except where prohibited by federal law. The regulation, set forth at COMAR 22.07.02.04, provides:

> A. Except as provided in §B of this regulation, the Retirement Agency shall administer benefits with respect to the same-gender spouse of a member, former member, or retiree from a lawfully recognized marriage in the same manner as an opposite-gender spouse, including the payment of any spousal death or survivor benefits.
>
> B. The State system may not recognize a same-sex marriage in the administration of benefits to the extent that recognition is inconsistent with a requirement applicable to the State system as a qualified governmental defined benefit plan under the Internal Revenue Code, or when such recognition would violate any other federal or State law.

Although promulgated before passage of Chapter 2, the regulation is not limited to same-sex marriages performed outside of Maryland, and therefore will not require any amendment in light of the approval of same-sex marriages in Maryland.

Consistent with this regulation, the System treats a same-sex spouse in the same manner as an opposite-sex spouse for purposes of the administration of benefits, except where such recognition would conflict with federal law and jeopardize the System's tax-qualified status under the Internal Revenue Code. Specifically:

- *Spousal Death and Survivor Benefits* – Certain State systems (*e.g.*, Judges, State Police, Legislative plan) provide a death or survivor benefit to the surviving spouse of a member or retiree. Most State systems also provide a line of duty death benefit to the surviving spouse of a member. These surviving spouse benefits are payable to the same-sex spouse of a

member in the same manner as they are paid to an opposite-sex spouse.

- *Spousal Annuity Election* – The surviving spouse of a member of several systems, including the Employees and Teachers systems, may elect to receive a monthly survivor annuity in lieu of the standard death benefit if the member dies while employed and was eligible to retire or had a significant number of years of service (*e.g.*, age 55 with at least 15 years). This benefit is payable to the same-sex spouse of a member in the same manner as it is paid to an opposite-sex spouse.

- *Eligible Rollover Distributions* – The System permits surviving spouses and other surviving beneficiaries to make eligible rollover distributions in compliance with federal tax law. Although DOMA prevents a same-sex spouse from being treated in the same manner as an opposite-sex spouse for purposes of federal tax law, the I.R.C. allows a designated beneficiary who is not an opposite-sex spouse to elect an eligible rollover distribution to an individual retirement account or individual retirement annuity established for the purpose of receiving the distribution, and the IRA will be treated as an inherited retirement account or annuity for tax purposes.

- *Election of Options 2 or 5 (100% survivor annuity)* – At the time of retirement, certain members may elect an optional form of allowance that provides a reduced benefit to the member during retirement, but provides a survivor's allowance to a designated beneficiary. To guarantee compliance with the I.R.C.'s "minimum incidental benefit requirement," State pension law provides that, unless a member designates his or her spouse or disabled child, the member may not designate as the beneficiary to receive an optional 100% survivor annuity someone who is more than 10 years younger than the member. However, the federal regulation may in some circumstances permit an age difference that is greater than 10 years, depending on the age

of the member at the time of retirement. In light of the Board of Trustees' regulation, a same-sex spouse will be treated in the same manner as an opposite-sex spouse under this state law, as long as the designation of a same-sex spouse will not explicitly violate the I.R.C.'s "minimum incidental benefit requirement." To the extent that designation would violate federal law and regulations in light of DOMA, however, the Agency will be required to observe the federal requirements.

- *I.R.C. 415(b) Limit on Benefits* – In compliance with federal tax law, State pension law prohibits the payment of a retirement allowance that exceeds the limits established under I.R.C. § 415(b), currently $200,000 for a retiree, age 62, in 2012. The Internal Revenue Code permits different treatment under this § 415(b) limit for retirees who have designated their spouse as their beneficiary. In light of DOMA, a same-sex spouse may not currently be treated in the same manner as an opposite-sex spouse for purposes of calculating the § 415(b) treatment.

- *Eligible Domestic Relations Orders* – Pension benefits earned during a marriage are marital property that may be divided between the parties by a court in a divorce. The System honors the assignment of a portion of a retiree's benefits to the retiree's former spouse pursuant to a valid court order. If provided with a valid court order relating to a same-sex couple, the Retirement Agency would do the same and distribute benefits to a same-sex former spouse. Pursuant to federal law, however, the tax treatment would be different; payments to a same-sex former spouse would be treated as income to the participant, not the same-sex former spouse.

**Family Medical Leave Act**

In 1996, Maryland adopted the federal Family and Medical Leave Act ("FMLA") and has promulgated regulations to implement FMLA for State employees. Md. Code Ann., State Pers. & Pens. ("SPP") § 9-1001. The State may not, however, implement FMLA in a manner that conflicts with federal law, including DOMA. As a result, given DOMA's definition of "spouse," the State currently may not grant FMLA leave to provide care for a same-sex spouse. *See* April 19, 2010 memorandum to the Secretary of

Budget and Management. The April 19, 2010 memorandum described options for the equal treatment of same-sex spouses, including a regulatory revision regarding unpaid leave, COMAR 17.04.11.24, and the creation of an independent family and medical leave program for State employees that would be comparable to FMLA but would specifically provide a broader definition of "spouse" than that permitted under DOMA.

In response to a June 22, 2010 guidance letter from the U.S. Department of Labor ("DOL"), the Maryland Office of Personnel Services and Benefits issued a directive on September 10, 2010—a copy of which is attached—that clarified the definition of "son or daughter" as it applies to an employee standing *in loco parentis* to a child. Under that directive, the key determination is whether the person intends to assume the status of a parent toward the child. According to the directive, the DOL guidance contemplates situations involving the child of a same-sex partner. Thus, FMLA leave may be granted to a same-sex spouse on an equal basis for the care of children.

**Medical Assistance**

The Medicaid program is a cooperative endeavor between the federal government and the states, in which the federal government provides matching funds to the states to assist them in furnishing health care to people with low incomes, people with disabilities, and the elderly. *See, e.g., Harris v. McRae*, 448 U.S. 297, 308 (1980). The program is administered by the states, 42 U.S.C. §§ 1396 to 1396w-5, but federal regulations establish the basic criteria that govern eligibility for benefits. Many of the federally-imposed eligibility criteria refer to or depend on marital status. In particular, and among other references to marital status, spousal income and resources may be deemed income and resources of the applicant for purposes of determining financial eligibility. *See* 42 U.S.C. § 1396a(a)(17)(D).

For example, in determining whether a person with a disability is financially eligible for Medicaid-financed long-term care in a nursing facility, Medicaid regulations afford a number of protections for the assets of the person's spouse. These protections are of critical concern, because they may affect, for example, the ability of a same-sex spouse of a Medicaid beneficiary to remain in his or her home. The protections include a prohibition on imposing a lien on a home if the "community spouse"—*i.e.*, the non-institutionalized spouse—is living in it, 42 U.S.C. § 1396p(a)(2), prohibiting estate recovery until the community spouse's death, 42 U.S.C. § 1396p(b)(2), exempting transfers to the community spouse from penalties that would otherwise apply, 42 U.S.C. § 1396p(c)(2), and extending certain protections to spousal income and resources to prevent the impoverishment of the community spouse. 42 U.S.C. § 1396r-5.

These and other federal Medicaid statutory provisions, and the federal Department of Health and Human Services regulations that interpret those provisions, must be construed, as a result of DOMA, to limit the definition of "spouse" to opposite-sex spouses. However, the Centers for Medicare and Medicaid Services ("CMS") has provided guidance as to how the states, exercising state law, may implement certain aspects of the program so as to accommodate same-sex marital status despite the restrictions within DOMA. In a letter to State Medicaid Directors (SMDL #11-006), CMS set forth a mechanism for optional extension of spousal impoverishment and estate recovery protections to same-sex partners in civil unions or marriages. Letter from Cindy Mann, Director, Centers for Medicare and Medicaid Services to State Medicaid Directors (June 10, 2011) (*available at* http://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/SMD11-006.pdf (last visited Jan. 16, 2013)). While CMS maintains that, pursuant to DOMA, same-sex spouses are not entitled to the mandatory protections for spousal assets contained in the Medicaid statute, the letter clarified that states have discretion to:

- decline to impose liens on real property for recovery purposes when a same-sex spouse is residing in the home;
- extend their procedures for undue hardship eligibility determinations, including the creation of criteria or presumptions, to those cases where a penalty period is imposed because of a transfer of assets to a same-sex spouse that would otherwise be penalty-free; and
- extend their procedures for undue hardship estate recovery determinations to include criteria or presumptions protective of same-sex spousal assets.

*Id.* The June 10 letter expresses a preference that the circumstances under which the state Medicaid program imposes liens be incorporated into the state plan, but makes clear that states need not amend existing hardship programs before extending them to same-sex couples. *Id.* Extending the spousal impoverishment protections to all recipients equally will protect the homes and assets of community same-sex spouses during times of serious health crises requiring the institutional care of the other spouse. The three choices outlined in the CMS letter allow the State to extend equally to all married couples all of the protections afforded spousal assets in the Medicaid program.

More difficult questions for states arise in other eligibility-related contexts. There is no clearly-defined path under DOMA to treat same sex couples as married for all Medicaid eligibility-related purposes under federal law. Moreover, the mechanisms for

determining Medicaid eligibility are intertwined with other federal and state programs such as the Supplemental Nutrition Assistance Program ("SNAP"), Temporary Assistance for Needy Families ("TANF"), and the new health insurance premium tax credits that will be administered through the Maryland Health Benefit Exchange. The Affordable Care Act fundamentally alters the rules for Medicaid eligibility, and federal agencies, including CMS and the Internal Revenue Service, are still promulgating regulations directly related to the implementation of the expanded income-based criteria for Medicaid established in that law. Finally, many of these complex issues could be resolved when the Supreme Court decides *Windsor v. United States*. The Office of the Attorney General expects to advise State policymakers concerning this complex and evolving legal landscape during the coming year, but it is not possible, at this time, to offer definitive advice on these issues.[2]

**Other Public Assistance Programs**

Other public assistance programs, which are administered by the Department of Human Resources, would appear not to require regulatory or legislative changes. The majority of these programs provide assistance based upon an applicant's individual qualifications or household's qualifications. For example, under the Food Supplement Program (formerly the Food Stamp Program), a "household" is defined as "a group of individuals who live together and customarily purchase food and prepare meals together for home consumption." COMAR 07.03.17.03A. A similar definition of "household" is used in the Energy Assistance Program. COMAR 07.03.21.02(16). For Temporary Cash Assistance, the program uses the phrase "assistance unit" and defines it as "a group of eligible individuals living together for whom cash assistance has been authorized." COMAR 07.03.03.02(8). And throughout the various public assistance program eligibility requirements, where applicable, the gender neutral term "spouse" is employed referring to "either of two individuals who would be defined as married to each other

[2] Maryland's Medicaid eligibility regulations currently define spouse as "an individual who has been determined by law to be the husband or wife of another person under State law and for the purpose of determining Social Security benefits." COMAR 10.09.11.02 (Children's Health Insurance Plan); 10.09.24.02(58) (Medical Assistance). This regulation is facially inconsistent with Chapter 2, because it requires a spouse not only to be in a valid marriage, but also to be treated as a spouse under the federal law governing Social Security benefits. To the extent that it applies this regulation for any purely State law purpose, the Department of Health and Mental Hygiene should consider invalid, on the basis of inconsistency with Chapter 2, that portion of the regulation that limits the definition of "spouse" to those determined to be married under federal law; and the Department should consider amending the regulation to ensure full conformity with Chapter 2.

under applicable State law." *E.g.*, COMAR 07.03.17.02B(25) (Food Supplement Program); COMAR 07.03.05.02B(20) (Temporary Disability Assistance Program). Although we are unable to anticipate the myriad living arrangements and how these provisions may apply to them, the regulatory definitions are largely already familial status-neutral and likely will require no further action to encompass same-sex married couples.

**Name Changes**

An individual can change his or her name in one of three ways under current Maryland law: court order, common law usage, or marriage certificate. A judicial order is obtained through the court, the process of which is described in Md. Rule 15-901. This option requires the filing of a petition to the court and payment of a fee. Maryland common law allows individuals to informally claim a name change, which then becomes valid through consistent and non-fraudulent use. 16 M.L.E. Names § 2; *In re Adoption/ Guardianship No. 3155 Circuit Court for Harford County*, 103 Md. App. 300, 309 (1995). Thus, common law grants legal validity to an individual's new surname if he or she uses it regularly. However, this process can require a significant passage of time to sufficiently show that the individual has been using his or her new surname "consistently." The easiest way to change one's name based on marriage is by valid marriage certificate, which does not require a court order or payment of a fee.

Maryland law provides that "if any individual who has applied for or obtained a driver's license under this subtitle has the individual's name changed under the common law of this State, by marriage, or by court order, the individual shall . . . notify the Administration in writing of the former name and new name." Md. Code Ann., Transp. ("TR") § 16-116. Similar language is used in provisions relating to name change for title and registration, TR §§ 13-118 and 13-414, transfers between spouses, TR §13-503, and excise tax exemptions for spouses, TR § 13-810(c)(1)(i). This language implies that name change by marriage is distinct from common law and judicial name change procedures. The applicable regulations provide that a marriage certificate, court order, divorce decree, or birth certificate may be submitted for a change of name on a license. *See* COMAR 10.32.01.15, 11.17.09.04. Further, the Motor Vehicle Administration ("MVA") website instructs individuals wishing to make a name change to obtain "a marriage certificate, divorce decree or court name change order." *See* http://www.mva.maryland.gov/Driver-Services/Apply/license.htm (last visited Jan. 16, 2013). Thus, in our view, a marriage certificate alone is sufficient for a name change for purposes of the MVA. And because, under *Port v. Cowan* and Chapter 2, a name change by use of a valid same-sex marriage certificate is legally valid and should be treated the same as a name change resulting from

an opposite-sex marriage, we believe the MVA and other State agencies should recognize a name change made as described above.

While a valid State-issued marriage certificate is, in our view, sufficient to complete a name change with the MVA, this is not necessarily the case for purposes of obtaining a new Social Security card from the Social Security Administration ("SSA"). First of all, the SSA may require a marriage certificate or court order *and* a driver's license. *See* http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/315/~/change-a-name-on-a-social-security-card (last visited Jan. 16, 2013). More importantly, however, we cannot say with certainty that the SSA, as an agency of the federal government, will recognize State-issued marriage certificates for same-sex couples for purposes of changing the name on a Social Security card.

**Technical Corrections to the Annotated Code**

**How will references in the Family Law Article and elsewhere in the Annotated Code be interpreted to reflect the change in the law pursuant to Chapter 2 and *Port v. Cowan*? Will legislation be necessary to change incorrect or outdated words and phrases?**

While the word "spouse" is already gender-neutral, there are numerous references to "husband" and "wife" in the Annotated Code. For example, the signature lines reflected in the standard marriage certificate language in § 2-403(a) of the Family Law Article include spaces for "intended husband" and "intended wife." We do not, however, believe that this and similar uses of gender-specific terms affect the operation of Maryland statutes. As discussed above, the Maryland Rules of Interpretation provide that:

> Unless the General Assembly specifically provides otherwise in a particular statute, all words in this Code importing one gender include and apply to the other gender as well.

Md. Ann. Code art. 1, § 7. Furthermore, we believe a court would interpret statutory references in a manner that is consistent with the current law. Because same-sex couples are entitled to marry in Maryland, and because lawful out-of-state same-sex marriages are entitled to the same recognition as out-of-state opposite-sex marriages, statutory references to "spouse," "husband," and "wife" should be interpreted in a neutral and nondiscriminatory way.

Thus, most, if not all of these statutory references may be applied in a neutral manner. The Annual Corrective Bill authorizes the publishers of the Annotated Code to make non-substantive corrections to any reference rendered incorrect or obsolete by any Act of the General Assembly without the necessity of further legislative action. If it is discovered during the review process of such statutory references that a substantive change is necessary, future legislation may be required.

I hope this is responsive to your inquiry.

Sincerely,

Bonnie A. Kirkland
Assistant Attorney General

Adam Snyder
Chief Counsel, Opinions & Advice

The following Assistant Attorneys General contributed significantly to the preparation of this letter: Jonathan Acton II, Motor Vehicle Administration; Joshua N. Auerbach and Sarah Rice, Health and Mental Hygiene; Deborah B. Bacharach and Rachel S. Cohen, Retirement and Pension Systems; David E. Beller, Human Resources; J. Van Lear Dorsey, Insurance Administration; Bruce P. Martin, Budget and Management; Brian L. Oliner, Comptroller; Kathryn M. Rowe, General Assembly. Angelica Bailey, a law clerk with the Office of Counsel to the General Assembly also contributed to this letter.

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TTY USERS CALL VIA MD RELAY

**TO:** Cabinet Members

**FROM:** Governor Martin O'Malley

**SUBJECT:** Policy Directive – Implementation of Civil Marriage Protection Act

**DATE:** December 20, 2012

I direct all State agencies to work expeditiously to ensure the full implementation of the Civil Marriage Protection Act. The clear intent of the legislation is to establish full equality of same-sex couples under Maryland law. Many areas of Maryland law address marital status – including insurance, taxes, governmental benefits, and property – and many State agencies will be required to update their policies and practices. If any barriers to full implementation of the Civil Marriage Protection Act are identified, members of the Cabinet should notify me through my Office of Legal Counsel.

I commend the Office of the Attorney General for providing timely guidance and working quickly to resolve outstanding issues that have been raised by State agencies. The O'Malley-Brown Administration is committed to solving any implementation challenges that arise.

# OFFICE OF THE ATTORNEY GENERAL

*DEPARTMENT OF BUDGET AND MANAGEMENT*
45 Calvert Street
Annapolis, Maryland 21401

**TO:** T. Eloise Foster
Secretary

**FROM:** Bruce P. Martin
Principal Counsel

Sherry Lynn Burke
L. Kristine Hoffman
Assistant Attorneys General

**SUBJECT:** Recognition of Out-of-State Same-Sex Marriages

**DATE:** April 19, 2010

Recently the Attorney General opined that a court would likely conclude that same-sex marriages validly performed in other jurisdictions may be recognized in Maryland. 95 *Opinions of the Attorney General* 3 (2010). The Opinion concludes that, to the extent that there is no other law prohibiting recognition and identical treatment of a same-sex spouse (such as an incorporation of federal law or specific language in a controlling State statute), Maryland law would recognize a same-sex spouse of a valid out of state marriage as a legal spouse in Maryland.

The Opinion recommends that State agencies review their existing policies, regulations and applicable statutes and "conduct [the] appropriate deliberative process" in order to apply the advice.[1] That process should include consideration of the State's anti-discrimination laws to which the State, as an employer, is subject as well as how federal law precluding equal treatment for same-sex spouses applies. Because it is illegal for the State, as an employer, to fail or refuse to hire, discharge, or "otherwise discriminate against an individual with respect to the individual's compensation, terms, conditions, or privileges of employment" based on sexual orientation, marital status, gender or other protected classifications, State Gov't §20-606(a), non-equal treatment of same-sex spouses recognized under Maryland law must be based on specific legal requirements.

This memorandum of advice discusses the issues raised in connection with the Department's administration of State employee leave programs and the State Employee and Retiree Health and Welfare Benefits Program (Program), and makes certain recommendations for departmental action. The most immediate actions we recommend are with regard to the Department's obligation to

[1] The Attorney General recognized that prior advice from the Office indicated that it was unlikely that the Court of Appeals would conclude that Maryland law recognizes same-sex marriages that were validly performed out of State and that agencies have acted in reliance upon that prior advice in determining how to treat a same-sex marriage validly performed in another jurisdiction. 95 *Opinions of the Attorney General* 3, 6 n.3 & 54 n. 64 (2010).

recognize valid out of state same-sex marriages for purposes of Open Enrollment. To assist the Department in review and implementation we attach a list of suggested action items.

## *I. State Employee Leave Programs*

Recognition of a same-sex spouse impacts certain leave programs administered by the State: Family Medical Leave Act (FMLA) leave, sick leave, bereavement leave, Leave Bank and Donated Leave programs and unpaid leave of absence. In several cases, the leave benefit is not tied to federal law and the statute or existing regulations use only the term "spouse" without any limitation as to same-sex versus opposite-sex marriages. In such situations, we advise that a same-sex spouse will likely be recognized as a spouse under Maryland law and that the regulations and statutes governing State employee leave should be applied equally to such spouses.

### *A. Sick Leave*

Sick leave is authorized under State Personnel and Pensions Article (SPP) §9-501. In addition to other uses not relevant here, sick leave may be used "for death, illness or disability of a member of the employee's immediate family" and "for a medical appointment of the employee or a member of the employee's immediate family." SPP §9-501(b). Under COMAR 17.04.11.05, the regulation governing sick leave, such leave may be used "only for the purposes set forth in [SPP] §9-501."

While the phrase "immediate family" is not defined in SPP Title 9, Subtitle 5, it is defined in connection with the State Leave Bank and Employee-to-Employee Leave Donation Programs. SPP §9-601(c). There, the term includes "the spouse of the employee," without any language limiting the term "spouse" based on the gender composition of the marital couple. An employee may use donated leave for his own illness or disability or when the employee is needed to provide direct care for the catastrophic illness or injury of a member of the employee's immediate family. COMAR 17.04.11.22D(1).[2]

An employee may use up to five days of sick leave in the event of a death in the employee's immediate family. SPP §9-501(b)(2). The Department's regulations provide that family group includes "spouse", legal guardians and members of the employee's household in addition to specific blood or marital relatives. COMAR 17.04.11.06A. By regulation, DBM also provides bereavement leave, a category of leave not specifically created by statute. COMAR 17.04.11.06. The regulation permits an employee to use up to three days of bereavement leave instead of sick leave (*i.e,.* replacing the use of three sick days with three bereavement days and not suffering a loss of sick leave) in the case of a death of specified members of the employee's "immediate family." In connection with bereavement leave, the phrase "immediate family" includes a "spouse" and other specific relatives. COMAR 17.04.11.06B.

Since at least 1984 the Department (and the former Department of Personnel) have provided by regulation for the specific scope of the sick leave and bereavement leave. In the earliest version

[2] The Leave Bank is only available to an employee who has a serious and prolonged medical condition; it cannot be used to care for a sick or injured spouse or other family member. COMAR 17.04.11.23F & J(1).

of the applicable regulation that we have found, COMAR 06.01.01.42D as it appeared in 1984, the term "spouse" appeared as part of the description of family members for whom the employee could take leave in the event of a death. In 1988, legislation expanded the permitted uses of sick leave to care for ill family members; in 1991, the Department of Personnel amended the sick leave regulation then in place to permit the use of sick leave to care for certain family members (including a spouse).[3] 18:24 Md. Reg. 2642 (Nov. 29, 1991). Although the phrase "immediate family" has had different meanings in connection with leave authorized for an illness in the family compared with a death in the family, the term in both cases included a "spouse" without any limitation that the spouse be part of a marriage created in Maryland.

Based on this history and the language of the regulation, sick leave should be granted for an illness or death of a same-sex spouse on the same conditions as provided for an opposite-sex spouse. Because the language of SPP §9-601 specifically includes a "spouse" as a member of the "immediate family" for whom donated leave is available in certain circumstances, that form of leave is also available to any spouse recognized under Maryland law. Because, with the exception of FMLA, no federal law bears upon State leave programs established by State statute and regulations, the State may treat the term "spouse" as including same-sex spouse for State leave purposes.

### *B. Family and Medical Leave Act (FMLA)*

The implementing regulations for FMLA define spouse as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." 29 C.F.R. § 825.122(a). However, the FMLA regulation was enacted before the passage of the federal Defense of Marriage Act, 1 U.S.C. §7 (DOMA). Under DOMA the definition of "spouse" for purposes of federal law is limited to only those in opposite-sex marriages. Accordingly, FMLA does not require that leave be provided to an employee to care for a same-sex spouse.[4]

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[3] The regulation permitted the use of sick leave to care for and up to three days of sick leave in the event of the death of a specific list of relatives and household members, including a spouse. However, only one day of sick leave could be taken in the event of the death of relatives that were more distantly related. COMAR 06.01.01.42D(5), D(7), as adopted in 18:24 Md. Reg. 2642 (Nov. 29, 1991).

[4] In a 1998 the federal Department of Labor opined:

> Under the FMLA (29 U.S.C. 2611(13)), the term "spouse" is defined as a husband or wife, which the regulations (29 CFR 825.113(a)) clarified to mean a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized. The legislative history confirms that this definition was adapted to ensure that employers were not required to grant FMLA leave to an employee to care for an unmarried domestic partner. (See Congressional Record, S 1347, February 4, 1993) Moreover, the subsequently enacted Defense of Marriage Act of 1996 (DOMA) (Public Law 104-199) establishes a Federal definition of "marriage" as only a legal union between one man and one woman as husband and wife, and a "spouse" as only a person of the opposite sex who is a husband or wife. *Because FMLA is a Federal law, it is our interpretation that only the Federal definitions of marriage and spouse as established under DOMA may be recognized for FMLA leave purposes.*

U.S. Department of Labor Opinion Letter, FMLA-98, November 18, 1998 (emphasis added). http://www.dol.gov/whd/opinion/FMLA/prior2002/FMLA-98.htm.

Pursuant to SPP § 9-1001, the Department issued the State of Maryland Family and Medical Leave Act Guide and adopted various regulations to address FMLA issues in the context of State leave policies.[5] However, given that the State's implementation of FMLA must comport with DOMA, the Secretary, as pertains to FMLA leave, cannot by regulation adopt a definition of spouse that would conflict with the DOMA definition of marriage. Therefore, FMLA leave may not be provided to care for a same-sex spouse.

This creates a potential dilemma as differential treatment and benefits to employees based on the gender of the employee's spouse may violate the State's anti-discrimination laws if that distinction is based on sexual orientation, marital status, gender, or another protected classification.[6] Compliance with federal law, where that law requires a minimum benefit but does not *prohibit* equitable treatment of same-sex spouses, might not be a full defense to a claim brought under State anti-discrimination statutes. This is especially so where the State has exercised discretion to provide leave benefits that are more generous than FMLA.[7] As explained below, the State has implemented FMLA in such a way that unpaid leave benefits available to State employees might be open to challenge because unpaid family leave is available only to those eligible for FMLA.

Although the Department's regulations and the applicable provisions of SPP Title 9 permit paid leave in the form of sick leave or donated leave to be used in the event of a spouse's illness, for an employee who neither has a sufficient reserve of leave nor access to donated leave, the use of extended unpaid leave to care for a family member appears to be limited to FMLA leave. Given DOMA's restrictive definition of marriage, and the limitations of the State's programs, this impacts the ability of an employee to use unpaid leave to care for a same-sex spouse.

COMAR 17.04.11.24 permits unpaid leave to be used in limited circumstances:

> A. An employee in the State Personnel Management System may apply for, and the appointing authority may grant, a leave of absence without pay:
> (1) For personal reasons for a period not to exceed 30 calendar days;
> (2) Under the Family and Medical Leave Act (FMLA) for the amount of time permitted by the FMLA; or
> (3) Up to a maximum of six months, for the employee's documented temporary personal illness or disability, when there is medical documentation that the employee can return to the employee's full range of duties within 6 months.

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[5] There are few DBM regulations that address FMLA, and each of those merely note the limitations provided under FMLA. *See* COMAR 17.04.03.16B(4) (prohibiting the State Medical Director from providing a third or forth opinion when prohibited under FMLA); 17.04.11.05F(3) (noting that a medical certification for use of sick leave is not required when prohibited by FMLA); and 17.04.11.24A(2) (noting that an unpaid leave of absence may be for a duration authorized under FMLA).

[6] In addition, State and federal constitutional provisions requiring equal protection prohibit unsupported or arbitrary distinctions in treatment between similarly situated individuals. To the extent that the State is complying with a federal law such as FMLA, that compliance would likely constitute a defense to any constitutionally based claim because compliance with the law provides a rational basis for the disparate treatment. That defense might not be available in connection with a claim brought under State anti-discrimination statutes.

[7] For example, paid leave through the Leave Bank and Donated Leave Programs is available to care for grandparents and siblings, even though FMLA leave is limited to caring for a spouse, parent, or child. SPP §9-601; *cf.* 29 CFR §§825.112(a), 825.113 (defining terms).

Thus, in cases of an extended (more than 30 days) illness of a family member where the employee lacks sufficient reserves of paid sick leave and does not qualify for or have access to donated leave, FMLA leave appears to be the only option. As FMLA is not available to an employee who seeks leave to care for a same-sex spouse, this may constitute disparate treatment based on gender, or sexual orientation, and could expose the State to liability under the State's anti-discrimination statutes. The fact that State paid leave is provided on conditions that are more generous than FMLA may support a claim that linking unpaid leave to FMLA may violate State anti-discrimination laws.

This situation may be ameliorated by revising COMAR 17.04.11.24A to permit an extended unpaid leave of absence for an employee who requires such leave to care for a same-sex spouse. SPP §9-1105. The standards for granting such leave could parallel FMLA, which would prevent claims of discriminatory treatment in favor of employees in same-sex marriages. An exception to the existing regulation may be granted should an employee require unpaid leave to care for a same-sex spouse before the regulation is revised. COMAR 17.04.01.03.

Another option would be the creation of an independent family and medical leave program for State employees (a State-employee FMLA) that would be comparable to FMLA but specifically providing a broader definition of spouse than that permitted by DOMA. Since SPP § 9-501 identifies illness or disability of a member of the immediate family it could also be argued that a State FMLA program could be created under that specific authority. Moreover, even in the absence of specific statutory authority for the Secretary to promulgate a regulation to create a new leave program independent of FMLA, it may be possible to do so pursuant to the Secretary's general authority to establish leave policies. SPP §9-1104(6) & §9-1105. Nevertheless, to avoid the possibility of a challenge to the Secretary's authority to promulgate such regulations, we recommend consideration of legislation authorizing the creation of a State FMLA program that would either expressly or implicitly allow for coverage of employees with same-sex spouses.

One noteworthy potential consequence of using FMLA as the basis for an independent State employee FMLA leave is that the limits on taking FMLA (*i.e.*, 12 weeks within a one year period) would not apply to an employee who uses leave to care for a same-sex spouse and, subsequently, another family member.[8] An employee could use the State FMLA to care for a same-sex spouse, and still be entitled to the full FMLA benefits for FMLA qualified purposes. FMLA regulations require that FMLA benefits run concurrently with any state FMLA-type benefits that an employee can claim. 29 CFR § 825.701(a). If an employee were to claim a benefit that is not provided by FMLA (*i.e.*, coverage to care for a same-sex spouse), FMLA would not be triggered. Thus, the leave to care for the same-sex spouse would not count against the available FMLA leave. As an employee's rights under FMLA cannot be waived, the employee would be entitled to take both the State FMLA-type benefit and the federal FMLA leave. However, double-dipping, where the

[8]See Department of Labor, "Do State laws providing family and medical leave still apply?" at www.dol.gov/dol/allcfr/ESA/Title_29/Part_825/29CFR825.701.htm ("If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a 'spouse equivalent,' and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or 'spouse equivalent'").

employee first exhausts FMLA, and then seeks to use the State FMLA (or unpaid leave if under COMAR 17.04.11.24A), may be avoidable by careful drafting.[9]

## *II. State Employee and Retiree Health and Welfare Benefits Program*

In connection with the Program, the issues raised by the Opinion appear to be primarily:

(1) How to apply the regulations defining and governing eligibility of a spouse for Program eligibility and whether a same-sex spouse may be recognized under those regulations;
(2) The tax treatment of coverage provided for same-sex spouses and certain surviving spouses eligible for independent participation in the Program;[10]
(3) Administration of certain Program benefits for same-sex spouses, namely continuation of coverage, special enrollment periods, and mid-year changes in election; and
(4) Contract management in connection with fully-insured plans and benefits.

In addition, there may be policies which the Department would like to revisit based on the Opinion. An example is whether to eliminate or expand the dependent eligibility currently provided for same-sex domestic partners. As you know, the Maryland Commission on Human Relations determined that same-sex domestic partners are not similarly situated to opposite-sex domestic partners in connection with a complaint filed last year.[11] The limitation of domestic partner benefits to same-sex partners loses some of its justification if same-sex couples may marry elsewhere and return to Maryland assured of recognition of their relationships.

### *A. Program Definition of Spouse and Eligibility for Coverage*

There is no statutory provision governing the Program that defines "spouse" or defines who is entitled to dependent coverage in the Program. *See* SPP Title 2, subtitle 5. The provisions that govern the eligibility for participation of a surviving spouse only use the term "spouse" and do not limit eligibility to specific genders or subcategories of recognized marriages. *Id.* The current regulatory definition of "spouse" for Program purposes does not appear to require amendment based on the recognition of a same-sex spouse. The regulation provides: "'Spouse' means either a husband or wife who is joined in marriage to an employee or retired employee by a ceremony recognized by the laws of the State of Maryland." COMAR 17.04.13.01.B(9). In reliance on Family Law §2-201 and 2004 advice from the Office of the Attorney General, the Department has previously interpreted and applied this language to exclude same-sex spouses because such marriages are not validly created in Maryland. However, based on the Opinion and its recognition

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[9] Of course, if federal legislation were to repeal DOMA and change FMLA to give same-sex couples equal rights under FMLA, these issues would be resolved without the need for State legislation or regulatory changes.

[10] We provide only a summary discussion of the basis for the federal tax treatment of health benefits provided to same-sex spouses because we have previously discussed those issues in depth. *See* Memorandum of Advice from Sherry Lynn Burke, April 3, 2008.

[11] The charge alleged that the retiree and his opposite-sex partner were discriminated against based on their sexual orientation because of the limitation of domestic partner coverage to same-sex couples. The Department's defense was based, in part, on the intent to provide access to benefits for long-term partners who are prohibited under Maryland law from marrying.

of the fluidity of Maryland law on this issue, that earlier interpretation no longer appears consistent with how Maryland courts would rule.

Although the phrasing "husband or wife" suggests a marriage between opposite gender partners, the language does not compel that conclusion and may be applied in a gender neutral manner. Historically, the Department has interpreted and applied the definitional regulation to recognize any spouse recognized as such under Maryland law, including common law spouses based on common law marriages formed in other jurisdictions.[12] It appears advisable to amend the language to refer only to an individual who is "lawfully joined in marriage to an employee or retired employee, as recognized by the laws of the State of Maryland" in order to clarify that any recognized legal spouse will be within the definition. Defining "spouse" for Program purposes to preclude inclusion of a spouse who is otherwise recognized as a spouse for purposes of Maryland law could violate the State's employment discrimination laws if that distinction is based on sexual orientation, marital status, gender, or another of the protected classifications.

The regulation governing eligibility of spouses to be covered as dependents incorporates the federal tax requirements for pre-tax (or tax-free) treatment of employer provided or paid health benefits coverage. COMAR 17.04.13.03A(9)(a) currently limits spousal coverage to "A spouse of an employee or retired employee who meets the requirements of 26 U.S.C. §§105, 106, and 125, and federal regulations implementing those statutory provisions for tax preferred health benefit coverage." Because DOMA limits the definition of "spouse" for purposes of federal law to only those in opposite gender marriages, a same-sex spouse is not automatically entitled to pre-tax/tax-free coverage the way that an opposite-sex spouse is. *See* 26 USC §104, 105 and 106; 26 CFR §1.106. As a result, a same-sex spouse is entitled to federal pre-tax/tax-free benefits coverage as a dependant only when the individual also meets additional requirements:

> 1 - The individual does not meet the "qualifying child" tests in relation to the employee/retiree;
> 2 - The individual must live with the employee/retiree all year as a member of the employee/retiree's household (and the relationship must not violate local law); and
> 3 - The employee/retiree must provide more than half of the individual's support for the year.

26 USC §105(b); 26 CFR §1.106; IRS Notice 2004-79.[13]

Because the Department has established operational procedures to address Program coverage for post-tax dependents (such as domestic partners), there does not appear to be a legitimate justification to limit Program coverage to only those spouses entitled to pre-tax/tax-free coverage. Defining spouse or the parameters of spousal coverage to exclude same sex spouses in connection with the Program when Maryland law provides for recognition of same sex spouses may

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[12] *See* Memoranda of Advice of Sherry Lynn Burke to Diane Bell, October 2, 2002 & October 22, 2005, recognizing the Department's enrollment of common law spouses from jurisdictions where such marriages are validly formed.

[13] These requirements are built into the "Tax Affidavit" used by the Department to determine whether a domestic partner qualifies for pre-tax/tax-free coverage. The requirements differ from the "qualifying relative" dependent test for purposes of claiming an individual as a tax dependent only in that the qualifying relative test also requires that the claimed individual does not earn more than $3,650 during the year.

violate SG §20-606(a) because the real distinction is based on sexual orientation. In addition, as this is and will continue for some time to be an evolving area of the law, an aggrieved employee or retiree could conceivably allege discrimination on the basis of marital status (based on the type or place of origin of the marriage) or gender.[14] Further, Maryland's constitutional equal protection provision may come into play if the distinctions between classes of eligible dependents are drawn without a rational basis.

In our view, the Department should promptly take steps to amend COMAR 17.04.13.03A(9) to eliminate the pre-tax/tax-free requirement for spousal coverage. We recommend timing such an amendment to the new plan year.[15] In addition, the Department should revisit the FAQs published last year concerning same-sex spouse coverage. Recognition of same-sex marriages validly performed elsewhere will require an amendment to FAQs #10 and #13.[16]

### *B. Tax Treatment of Spousal Coverage*

As noted above, only certain spouses may be eligible for federal pre-tax/tax-free treatment of health benefits coverage.[17] Therefore, coverage for those spouses – as a dependent or as a surviving spouse pursuant to SPP §§2-507, 2-508 or 2-509 – who are not eligible for federal pre-tax/tax-free treatment must be provided on a post-tax basis. Currently, Maryland tax law follows federal tax law in calculating income for tax purposes.[18] Tax-General, §§10-201 *et seq.*

The federal prohibition against recognizing same-sex spouses requires the imputation of income for any State or employer subsidy provided to pay for the coverage and post-tax contributions by the employee or retiree in connection with certain dependent coverage. As discussed above, because DOMA limits the definition of "spouse" for purposes of federal law to those in opposite gender marriages, a same-sex spouse is not automatically entitled to pre-tax/tax-free coverage. *See* 26 USC §104, 105 and 106; 26 CFR §1.106. The operational aspects of calculating and processing imputing income and post-tax payments were addressed last year and implemented by the Department in connection with dependant coverage of domestic partners. The same considerations and the same steps are applicable to same-sex spouses: requiring an affidavit or certification from an employee/retiree to establish tax status, and calculating imputed income and post-tax contributions using the same formulas. The Department may wish to consider the creation of a new form tax affidavit to be used in connection with all spousal coverage to avoid the possibility of offending an employee or retiree by requiring use of the domestic partner affidavit for same-sex spouses as well.

For those surviving spouses who are independently eligible to participate in the Program, the applicable statutes do not limit their application to marriages formed only in Maryland. *See* SPP

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[14] Please note that federal law does not currently provide for statutory protection based on marital status and sexual orientation classifications; however, these are protected classes under Maryland law. SG § 20-602.

[15] Pending adoption of a revised regulation the Secretary may grant exceptions. COMAR 17.04.01.03.

[16] http://dbm.maryland.gov/benefits/Documents/PlanYear2010/same_sex_domestic_partner_faqs.pdf

[17] We are unaware of any non-health pre-tax/tax-free coverage offered to dependents in the Program. If spouses or dependent children are provided pre-tax/tax-free coverage in other benefits, please let us know.

[18] If Maryland law decouples from federal law with regard to same-sex marriages the Department may be faced with additional administrative requirements to limit the imputation of income for federal tax purposes only.

§§2-507(b), 2-508(b)(2), and 2-509(a)(2). Each of the three statutes provides, in virtually the same language, that the "surviving spouse" of a deceased State employee or retiree may participate in the Program, provided that the spouse is receiving a certain State retirement allowance or a periodic distribution of benefits from the retiree's ORP account. Retiree and surviving spouse payments are provided on a post-tax basis[19] but there is a State subsidy provided in most cases for surviving spouses.[20] Like the subsidy provided for dependents, federal law limits when an employer subsidy of survivor benefits may be provided pre-tax/tax-free in connection with health benefits provided to an employee or former employee. In cases where the surviving spouse is not eligible for pre-tax/tax-free coverage, the Department must impute the value of the subsidy for the surviving spouse's coverage as income. The State must issue a W-2 to the surviving spouse every tax year to account for the provided income and must take steps to address withholding/collection obligations in connection with the imputed income. We strongly recommend that the Department coordinate this function with the State Retirement Agency, Central Payroll Bureau and the General Accounting Division so that the proper notices are provided to those retirees and same-sex surviving spouses who may have tax implications as a result of the Program participation.

### *C. Program Benefits*

Certain Program benefits originate in mandates from federal law, such as COBRA continuation coverage, HIPAA special enrollments, and cafeteria plan administration. By operation of DOMA, COBRA continuation of coverage rights triggered by death, divorce, and termination of employment are mandated only for opposite-gender spouses and dependent children. COBRA sets a federally mandated minimum but does not prohibit more extensive or broader continuation of coverage opportunities from being provided by an employer or governmental plan. However, the federal subsidy for COBRA premiums created by the American Recovery and Reinvestment Act cannot be extended to same-sex spouses that are not recognized under federal law. If an employer (or State) elects to make a similar subsidy available to same-sex spouses or covered children who are not dependent children under COBRA, the employer (or State) must absorb the entire financial burden of that extension. The federal payroll tax off-set/deduction available for ARRA subsidies is not available for coverage that is not mandated by COBRA.

State law also provides continuation of coverage rights for "spouses" without limiting the rights explicitly to marriages only validly formed in Maryland. Ins. §§15-407 – 15-410; COMAR 31.11.01 – 31.11.04. Although those benefits are not mandated in connection with the Program's self-funded plans, the Department has historically incorporated mandated benefits into the administration of Program self-funded plans. *See* Ins. §§1-101(t) and 1-201 (excluding governmental risk pooling from the scope of regulated insurance). Therefore, application of the State continuation requirements would result in continuation coverage for same-sex spouses. In addition, the Department has already voluntarily extended continuation coverage benefits, on

[19] Retired employees may not make pre-tax deductions from IRC §401 qualified retirement plans, such as the retirement plans provided to State employees. Rev. Rul. 2003-62, 2003-25 I.R.B. 1034, 2003-1 C.B. 1034, 2003 WL 21458469 (IRS RRU). Certain retired public safety officers may deduct up to $3,000 paid from a retirement plan for qualified health insurance premiums to purchase coverage for themselves, their spouses and §152 dependents. IRC §402(l).

[20] Certain ORP retiree surviving spouses may have unsubsidized coverage. SPP §2-509(b) (limiting the subsidy for dependent coverage to certain situations). In such cases of unsubsidized coverage, there do not appear to be imputed income issues.

generally the same terms and conditions available under COBRA and State law, to domestic partners who are not within the scope of those mandates. As a result, providing those benefits to same-sex spouses appears to present no additional administrative or operational hurdles regardless of whether the benefits are required.

HIPAA special enrollment periods are required by federal law for spouses at the time of marriage or when there has been a loss of other coverage. 42 USC §300gg(f).[21] By operation of DOMA, a same-sex spouse would not be covered by those mandated enrollment periods. However, State law also provides a mandated special enrollment specific to Program benefits; SPP §2-514 requires the Program to provide a special enrollment period upon the death of a spouse. *See also* Ins. §15-411 (providing a special enrollment mandate in certain cases of lost coverage). In connection with all mid-year changes in election, including HIPAA special enrollment periods, the Program uses the exhaustive list of permissible changes for cafeteria plans:

> (1) Except as provided in §C(2) of this regulation, changes in coverage outside of Open Enrollment may be made only if and when those changes are permissible in a cafeteria plan governed by 26 U.S.C. §125 and 26 CFR §§1.125-1—1.125-7.
>
> (2) Changes in coverage for eligible dependents who are covered on a post-tax basis are permissible if and when such changes are consistent with the requirements of §C(1) of this regulation. In determining whether the requested change is consistent, the eligible dependent shall be treated as if the coverage is provided on a pre-tax basis.

COMAR 17.04.13.04C. As a result, a Program benefit election is irrevocable on the same terms and conditions as a cafeteria plan income election.

In addition to specific permission for mid-year in connection with HIPAA special enrollment periods, 26 CFR §1.125-4(b), the regulation generally permits the addition or removal of a dependent to coincide with a change in circumstances that affects the eligibility of a dependent under the plan terms. 26 CFR §1.125-4(c)(2)(ii, iv). The valid marriage (performed in another jurisdiction) of a same-sex couple would be an adequate change in circumstance affecting the individual's eligibility. The Department's adoption of parallel mid-year change in election provisions for both post-tax and pre-tax covered individuals last year as part of the addition of domestic partners appears sufficient to also address the coverage for same-sex spouses.

### *D. Contract Management*

In connection with the fully-insured plans offered through the Program, the contract documents generally incorporate the Department's regulations to set eligibility parameters. The notable exception is the long term care insurance plan offered by Prudential, which does not provide domestic partner coverage. The Department should confirm that the addition of same-sex spouses, which would occur in conjunction with a regulation amendment, would not trigger a contract claim or request for higher premiums from the contractors. In connection with the long term care plan, the

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[21] There are additional special enrollment period rights available to dependent children that are not relevant here.

Department should confirm that the insurer is prepared to recognize and provide coverage for same-sex spouses.

*Conclusion*

Based on the Attorney General's Opinion that Maryland law would recognize as a legal spouse a same-sex spouse from a marriage that was legally valid elsewhere, the Department should undertake steps to amend the Program regulations to eliminate potentially discriminatory provisions that distinguish between opposite-gender and same-sex spouses. Such changes appear unlikely to require significant operational changes or implementation challenges. In addition to amending the regulations noted above, we suggest the following changes in Program administration:

(a) revision of the domestic partner FAQs to acknowledge that a same-sex spouse in a marriage validly performed in a jurisdiction authorizing such unions may be covered as a spouse instead of as a domestic partner;
(b) Revision of open enrollment materials to add "same-sex spouse" to those discussions of the tax implications of domestic partner coverage; and
(c) Creation of an additional tax affidavit for spousal coverage, requiring an attestation that the spouse is of the opposite gender or meets the test for pre-tax/tax-free coverage.

With respect to the leave programs, FMLA leave is not available to an employee for the purpose of caring for a same-sex spouse, and to the extent that unpaid leave is available for an extended illness of a family member, it too is limited by FMLA. Accordingly, we suggest revising the Department's regulations to permit an extended unpaid leave of absence for an employee who requires such leave to care for a same-sex spouse. A more comprehensive State family and medical leave program that goes beyond FMLA's requirements could address existing inequities and should be considered, however such a program may present double-dipping issues. The Department may also wish to consider amending the State Personnel and Pensions Article and its sick leave regulations to clarify and make consistent the definition of "immediate family".

Please let us know if you have any questions or concerns about this advice.

ADVICE OF COUNSEL – NOT AN OFFICIAL OPINION OF THE ATTORNEY GENERAL

cc: David C. Romans, Deputy Secretary
Cynthia A. Kollner, Executive Director, Office of Personnel Services & Benefits
Anne Timmons, Director, Employee Benefits Division

MARYLAND
DEPARTMENT OF
BUDGET & MANAGEMENT

*MARTIN O'MALLEY*
Governor

*ANTHONY BROWN*
Lieutenant Governor

*T. ELOISE FOSTER*
Secretary

*DAVID C. ROMANS*
Deputy Secretary

**MEMORANDUM**

**TO:** **Personnel Directors**

**FROM:** **Cynthia A. Kollmer**
**Executive Director**
**Office of Personnel Services and Benefits**

**DATE:** **September 10, 2010**

**RE:** **Family and Medical Leave Act – Clarification of the definition of "son or daughter" as it applies to an employee standing *in loco parentis* to a child**

On June 22, 2010, the Wage and Hour Division of the United States Department of Labor issued an interpretation letter (No. 2010-3) clarifying the definition of "son or daughter" as it applies to an employee taking leave under the Family and Medical Leave Act (FMLA). The FMLA defines "son or daughter" as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under the age of 18 or 18 years of age or older and incapable of self-care as a result of a physical or mental disability.

The Wage and Hour Division perceived a need to release interpretive guidance on the issue of employee's status as one who stands *in loco parentis* to a child. The key determination of whether an individual is standing *in loco parentis* to a child is whether the person intends to assume the status of a parent toward the child. The interpretation states that the FMLA regulations do **not** require an employee who intends to assume the responsibilities of a parent to establish that he or she provides day-to-day care and financial support for the child. Instead, it is enough to establish either.

It is important to note that there is no restriction on the number of parents a child may have under the FMLA. An example would be a situation in which a child's parents divorce and each parent remarries. The child will be the "son or daughter" of both of the biological parents, as well as the stepparents, and all four of these individuals would have equal rights to take FMLA leave to care for the child. The guidance also contemplates situations in which an individual shares equally in the raising of a child adopted by his or her same-sex partner.

Whether an employee stands *in loco parentis* to a child is a fact-specific determination and may include factors such as the age of the child, the degree to which the child is dependent on the person claiming the relationship, the amount of support, if any, provided, and the extent to

which parenting duties are carried out. A simple statement asserting the relationship is sufficient to establish its existence.

If you have any questions, please contact Leslie Buchman, Director, Personnel Services Divisions, at 410-767-4718.

cc: T. Eloise Foster, Secretary, Department of Budget and Management (DBM)
David Romans, Deputy Secretary, DBM
Bruce P. Martin, Principal Counsel, DBM
L. Kristine Hoffman, Assistant Attorney General, DBM
Leslie Buchman, Director, Personnel Services Division, Office of Personnel Services and Benefits, DBM