

**Presentation for the
Association of Corporate Counsel, Iowa Chapter
March 18, 2010 / Monthly Meeting
Embassy Club of Des Moines
Lunch: 11:30 – Noon
Presentation: Noon – 1:00 p.m.**



Brown Winick
ATTORNEYS AT LAW®

Employee Benefits Overview

Ronni F. Begleiter

E-mail: begleiter@brownwinick.com

Beth A. Coonan

E-mail: coonan@brownwinick.com

INTRODUCTION

The Iowa Supreme Court's decision in *Varnum v. Brien* appears to require the extension of employment benefits to same-sex spouses in the same manner as employers provide benefits to opposite sex couples. However, conflicting federal law can make compliance confusing.

Enacted in 1996, the federal Defense of Marriage Act (DOMA) defines "marriage" as a union between a man and woman and "spouse" as a person of the opposite sex. DOMA requires the use of these definitions when interpreting the meaning of any federal statute, ruling, regulation or interpretation by any agency of the United States.

DOMA was enacted when Hawaii was considering the legalization of same-sex marriage. At the time, the word "marriage" appeared in more than 800 provisions of federal law, and the word "spouse" appeared more than 3,100 times. Marital status was a factor in more than 1,000 federal statutory provisions, but the term was not defined. While there is a challenge to DOMA's constitutionality pending in a federal district court in Massachusetts (*Gill v. Office of Personnel Management*), that case has not been decided. Therefore, DOMA currently governs the

administration of federally-regulated employee benefits. It's definition of "marriage" and "spouse" deny federal employment law benefits to same-sex couples.

ERISA

Many federal employment law benefits are governed by the Employee Retirement Income Security Act of 1976 (ERISA). That Act governs and regulates employee pension and welfare benefit plans. Pension plans include retirement plans and deferred compensation plans. Welfare plans include health plans, life and disability insurance plans and some apprenticeship programs. Because ERISA is a federal statute, many practitioners believe that ERISA and DOMA would override any state law requiring an employer to extend ERISA benefits to same-sex spouses. DOMA may also deny same-sex spouses some of ERISA's benefits and protections, but DOMA does not prohibit employers from offering benefits to same-sex spouses.

Insured welfare benefit plans are one exception to ERISA's preemption of state law. Health and disability plans provided through commercial insurance policies must comply with state insurance laws. However, not all issues involving an insured benefit are classified as non-preempted "insurance" issues. In several cases (many involving employee remedies against uncooperative insurers, rather than state mandated benefits), the Supreme Court has held that ERISA provides the applicable law. The affect of DOMA on insured plans is uncertain because ERISA specifically leaves insurance issues to the states.

To make this more confusing, ERISA (rather than state law) applies to self-insured health benefits provided by employers. Although the plans may be administered by an insurance company, self-insured plans are funded directly by employers. The employers (rather than their insurers) bear the actuarial risk. Many large employers have self-insured plans. Although those employers may have "stop loss" insurance to fund medical benefits in catastrophic cases, the stop loss plans are still classified as "self insured plans." As self-insured plans, they are subject to ERISA and to DOMA and to preemption of state law.

Iowa law does not mandate insurance coverage for same-sex spouses or for spouses of opposite sexes. One could argue that Iowa Code Section 507B.4(7)(b) (prohibiting discrimination between insureds of the same class), requires insurers to cover same-sex spouses when they cover heterosexual couples. Similarly, non-pension or non-welfare benefits falling outside ERISA's scope (e.g., bereavement leave or travel reimbursement) should be offered equally to same- and opposite-sex spouses. Failure to do so may impose liability under the Iowa Civil Rights Act.

While ERISA provides extensive regulation of retirement plans, it does not apply to governmental plans and church plans. There is some question of its applicability to 403(b) plans (retirement annuities provided by certain tax-exempt employers). ERISA's most stringent rules apply to defined benefit pension plans (generally plans that pay retirement benefits for life regardless of investment performance).

ERISA generally requires that defined benefit pensions be distributed to a spouse in an annuity, or in fixed payments payable for life, unless the spouse consents to a different beneficiary or a

different form of distribution. This obviously protects spouses from losing retirement income when they become widows or widowers. Because same-sex spouses are not treated as spouses under ERISA, a defined benefit pension plan may simply stop paying benefits when the covered same-sex spouse dies. Thus, same-sex spouses cannot get the benefit of continuing pension payments.

These spousal protection rules do not apply to 401(k) and similar plans. The only protection is that a spouse must consent if someone else is named as death benefit beneficiary. Although a same-sex spouse is not treated as a "spouse" for purposes of this rule, an employee may designate a same-sex spouse as beneficiary of a defined contribution retirement plan if the employee dies before receiving his or her entire retirement account balance. In addition, defined contribution retirement plans can issue hardship distributions when the hardship is suffered by the designated beneficiary (the same-sex spouse).

Before the Pension Protection Act, non-spouse beneficiaries could not roll over inherited retirement benefits and were required to begin immediate taxable distribution. Now, a non-spouse beneficiary may roll over most retirement benefits into a newly-created "inherited" IRA, opened in the name of the deceased employee. There are, however, notable differences between spousal and "non-spousal" rollovers.

While a heterosexual spouse need not make a withdrawal from a rollover account before reaching the age of 70½, a same-sex spouse cannot take advantage of that deferral rule. The required beginning date for a same-sex spouse's distributions will vary, but disbursements will probably have to start a year after the participant's death. The withdrawal amount is also calculated differently. Opposite sex spouses use a two-life table that increases the pay-out period as the beneficiary ages, so that the beneficiary can never outlive the inherited retirement account. Same-sex spouses use a single-life fixed table. Both of these factors generally result in more immediate and higher tax liability for same-sex spouses.

Finally, ERISA contains the rules and procedures for dividing retirement benefits on divorce. A same-sex spouse may not be entitled to share in the other spouse's retirement benefits on divorce because DOMA denies spousal status to a same-sex spouse.

TAXATION AND TAX BENEFITS

DOMA also governs the federal income taxation of employee benefits. However, it does not govern Iowa's taxation of them.

The Iowa Department of Revenue has issued its own guidance, and that guidance is attached. The conflict between state and federal tax law will complicate tax filings for same sex couples.

Many employee benefits receive preferential tax treatment under the Internal Revenue Code (the "Code"), generally in the form of employer tax deductions and employee gross income exclusions. Benefits extended to an employee's spouse and dependents also qualify. Because same-sex individuals cannot qualify under DOMA as spouses, a same-sex spouse must qualify as a dependent to preserve those federal tax preferences. Most same-sex spouses will not qualify.

Without spouse or dependent status, the fair market value of the spouse's coverage, less any amount paid by the employee, is included in the employee's gross income. Even if the same-sex spouse's coverage does not change the employee's premium, the employee must report the value of the spousal coverage as income. Any income amount also counts as employee compensation for FICA, unemployment, and withholding purposes. Any flexible savings account expenditure or premium attributable to a same-sex spouse must be paid with after-tax dollars. Similarly, same-sex spouses cannot participate in health reimbursement accounts, health savings accounts, or medical savings accounts.

A same-sex spouse's change of employment status probably will not constitute a change in circumstances allowing a new benefit election in a cafeteria plan. Nor will a same-sex marriage afford the opportunity for one spouse to enroll immediately in the other's health insurance plan.

While the Consolidated Omnibus Budget Reconciliation Act (COBRA) does not apply to same-sex spouses because of DOMA, Iowa requires employers to offer continuing group health insurance coverage when an employee loses health insurance coverage. Iowa's mini-COBRA is not as valuable as the federal version and compliance with COBRA relieves an Iowa employer of the need to comply with Iowa's mini-COBRA law. While the premium under Iowa's mini-COBRA is 100% (not 102%) of the active employee premium, continuation coverage lasts for only 9 months and not for 18 or 36 months. The recent federal subsidy of continued health coverage for laid-off workers applies both to federal COBRA benefits and to Iowa's mini-COBRA. While Iowa's mini-COBRA allows the election of continuation coverage for same-sex spouses, the federal subsidy may not apply to the spousal portion.

After *Varnum*, clients need to reevaluate employee plans and policies. Some changes may be as simple as redefining plan terms, but others may have significant tax and legal consequences.



BrownWinick
ATTORNEYS AT LAW®

**Brown, Winick, Graves, Gross,
Baskerville and Schoenebaum, P.L.C.**

A Firm Commitment to Business™

www.brownwinick.com

Ronni F. Begleiter, Attorney at Law

Ronni F. Begleiter is a member of BrownWinick and practices in the estate planning and employee benefits areas. Ronni has helped clients and their families plan for death, disability and business succession for several years. She has also assisted large and small employers in designing and administering retirement and other benefit plans for their employees.

Ronni has spoken on both estate planning and employee benefits issues for Drake University, the University of Iowa, the Iowa State Bar Association, the Society of Human Resource Managers, Iowa League of Municipalities and various church and civic groups. She has also served as an adjunct professor at Drake University Law School.

Ronni has been elected to the American College of Trusts and Estates Counsel and has been selected for inclusion in The Best Lawyers in America® for employee benefits law and trusts and estates. In 2008, Ronni was included in *SuperLawyers*® in the areas of employee benefits/ERISA and estate planning and probate law. She is a member of the ERISA Forum and the Iowa State Bar Association, currently serving as secretary for its Probate Section.

She is a member of the Clive City Council to which she was elected last year, and she has been runner-up for Clive Citizen of the Year. She is also a director of the Friends of the Clive Public Library. As a City Council member, Ronni represents Clive on various boards and commissions.

Ronni received her B.A. from Cornell University, her M.L.S. from Columbia University and her law degree from Drake University. She was elected to *Phi Beta Kappa* and *Order of the Coif*. Ronni was admitted to the Iowa bar in 1983.



Contact Info

515-242-2463 *direct*
515-323-8563 *fax*
begleiter@brownwinick.com

666 Grand Avenue
Suite 2000, Ruan Center
Des Moines, IA 50309

Practice Areas

Pensions and Profit Sharing
Taxation Law
Wills, Estate and Probate Law

Industries Served

Nonprofits and Planned Giving
Financial Institutions
Insurance

Education

Undergraduate:
Cornell University
B.A., with distinction, 1969

Graduate:
Columbia University
M.L.S., with honors, 1971

Legal:
Drake University
J.D., with honors, 1982

Admitted
Iowa, 1983

Memberships / Associations

Iowa State Bar Association
Member; Taxation Law Section; Council, Probate and Trust Law

ERISA Forum
Member
Fellow: American College of Trusts and Estate Counsel

Clive City Council
Member, 2002-Present
Clive Public Library
Chairperson, Board of Trustees, 1999-2002

Order of the Coif; *Phi Beta Kappa*; *Beta Phi Mu*

Drake Law Review, 1979-1981

Publications

Co-authored (with Karen L. Karr), "*Varnum v. Brien*"
The Legal Monitor (June 2009)

"Qualified Personal Residence Trusts: How to Have Your Second Home - and Give It Away Too"
The Legal Monitor (March 2009)

Co-authored (with Alice Helle), "Deadline for Section 409A Compliance is Imminent

The Legal Monitor (September 2008)

"Section 409A - Deferred Compensation Plans"
The Legal Monitor" (December 2007)

"Non-Qualified Plans for Key Employees"
Ethanol Producer Magazine (December 2006)

"Deferred Compensation Plans"
The Legal Monitor (January 2005)

"IRS Announces Split Treatment of Split Dollar Insurance"
The Legal Monitor (November 2003)

"IRS Issues New Rules for IRA Distributions and What It Means to You"
The Legal Monitor (August 2001 and May 2001)

Speaking Engagements / Seminars

54th Annual Spring Tax Institute

May 02, 2008

University of Iowa, Iowa City, Iowa

The 54th Annual Spring Tax Institute will be held in the Main Lounge of the Iowa Memorial Union on the University of Iowa campus on Friday, May 2, 2008, and the Richey Ballroom in the Iowa Memorial Union on Saturday, May 3, 2008.

Estate Planning Basics

September 20, 2007

Ramada Northwest, 5000 Merle Hay Road, Des Moines, Iowa

Create peace of mind for your clients with solid estate plans.

Transitioning Ownership of a Closely Held Business

May 03, 2006

BrownWinick Client Seminar - Legal Strategies to Protect and Grow Your Business

Newsletter Articles

Varum v. Brien

Newsletter: *The Legal Monitor*, June, 2009

Qualified Personal Residence Trusts: How to Have Your Second Home - and Give it Away Too

Newsletter: *The Legal Monitor*, March, 2009

Deadline for Section 409A Compliance is Imminent

Newsletter: *The Legal Monitor*, January, 2008

Section 409A - Deferred Compensation Plans

Newsletter: *The Legal Monitor*, December, 2007

Deferred Compensation Plans

Newsletter: *The Legal Monitor*, January, 2005

IRS Announces Split Treatment for Split Dollar Insurance

Newsletter: *The Legal Monitor*, November, 2003

IRS Issues New Rules for IRA Distributions and What It Means to You

Newsletter: *The Legal Monitor*, August, 2001

IRS Issues New Rules For IRA Distributions and What It Means to You

Newsletter: *The Legal Monitor*, May, 2001

BrownWinick News / Events

July 29, 2009 The Best Lawyers in America® 2010 Includes Attorneys From BrownWinick
BrownWinick is proud to announce that 13 of its attorneys have been named to *The Best Lawyers in America® 2010*, the oldest and most respected peer-review publication in the legal profession.

October 01, 2008 Super Lawyers® List

BrownWinick congratulates attorneys for recognition in Super Lawyers®.

September 01, 2008 The Best Lawyers in America® 2009 Includes Attorneys From BrownWinick
Ten lawyers from the BrownWinick were selected by their peers for inclusion in
The Best Lawyers in America® 2009

September 04, 2007 The Best Lawyers in America® 2008 Includes Twelve Attorneys From
BrownWinick

September 05, 2006 The Best Lawyers in America® 2007 Includes Ten Attorneys From
BrownWinick
Ten Lawyers from the BrownWinick law firm were recently selected by their peers for
inclusion in *The Best Lawyers in America® 2007*

Legal News

September 01, 2008: **Deadline for Section 409A Compliance is Imminent**

The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.



Elizabeth A. Coonan, Attorney at Law

Elizabeth A. Coonan is a member at BrownWinick. Elizabeth assists clients in the areas of employment, workers' compensation and business immigration law. She represents employers in various aspects of their business including workers' compensation strategy and prevention and internal policy development and enforcement. Elizabeth also counsels clients regarding discipline and termination situations and compliance with local, state and federal employment and civil rights laws and regulations. She represents clients in proceedings in front of various administrative bodies, such as the Iowa Division of Workers' Compensation and the Iowa Civil Rights Commission, as well as state and federal courts. Elizabeth also handles appeals to various agencies and courts and assists clients in dispute resolution using alternate forums.

Elizabeth is a member of the Polk County Women Attorneys, a member of the Blackstone Inn of Court and a member of the Polk County, Iowa State (Workers' Compensation and Litigation Sections) and American (Labor and Employment Law and Litigation Sections) Bar Associations. Elizabeth is active in the community as a volunteer with, member of the Board of Directors and Fund Development Director of the Junior League of Des Moines; Vice President of the Board of Directors of the Young Women's Resource Center; a volunteer with Greater Des Moines Habitat for Humanity and a member of the Greater Des Moines Young Professionals Connection.

Elizabeth received her B.A. in Political Science and International Studies from Miami University in Oxford, Ohio and her J.D. *with honors* from Drake University. She was admitted to the Iowa bar in 2002.

Memberships / Associations

Polk County Bar Association
Member

Iowa State Bar Association
Member; Sections on: Litigation; Workers' Compensation

American Bar Association
Member; Sections on: Labor and Employment Law; Litigation

Polk County Women Attorneys
Member

Greater Des Moines Young Professionals Connection
Member

Blackstone Inn of Court
Member

Greater Des Moines Habitat for Humanity
Volunteer

Junior League of Des Moines
Member; Board of Directors; Fund Development Director

Young Women's Resource Center
Member; Vice President, Board of Directors

Moot Court Board, 2000-2002



Contact Info

515-242-2408 *direct*
515-323-8508 *fax*
coonan@brownwinick.com

666 Grand Avenue
Suite 2000, Ruan Center
Des Moines, IA 50309

Practice Areas

Administrative Law
Employment and Labor Law
Litigation / Trial Law
Workers' Compensation Law

Industries Served

Insurance
Manufacturing
Wind Energy - Renewable Energy
- Fossil Fuels - Nuclear
Energy

Education

Undergraduate:
Miami University
*B.A., Political
Science/International Studies,
1999*

Legal:
Drake University
J.D., with honors, 2002

Admitted

Iowa, 2002

Publications

"Growing Your Workforce: Employment Law Considerations"
The Legal Monitor (February 2007)

Speaking Engagements / Seminars

Family and Medical Leave Act in Iowa

June 26, 2008

Holiday Inn Downtown, Des Moines, Iowa

The Family and Medical Leave Act - with its broad definition of medical conditions and generous leave provisions - can create headaches for employers, especially for smaller companies who only have a small number of key employees.

2008 Workers' Compensation Seminar

April 29, 2008

EMC Insurance Companies, 717 Mulberry, Des Moines, IA

Learn how current legislation has the potential to dramatically increase your workers' compensation costs; gain an awareness of recent workers' compensation trends; see what functional capacity testing can do to impact the cost of your companies workers' compensation coverage; hear why the cost of employee injuries is only the tip of the iceberg; take home useful ideas to implement in your workplace.

Bermuda Triangle - FMLA/ADA/Work Comp Litigation Issues for Construction Employers

December 04, 2006

BrownWinick Employment Law Client Seminar

When To Call Your Lawyers

December 04, 2006

BrownWinick Employment Law Client Seminar

Immigration Law Update

December 04, 2006

BrownWinick Employment Law Client Seminar

Top Ten Recordkeeping and Documentation Issues for HR Managers

May 03, 2006

BrownWinick Client Seminar - Legal Strategies to Protect and Grow Your Business

Newsletter Articles

Growing Your Workforce: Employment Law Considerations

Newsletter: The Legal Monitor, February, 2007

BrownWinick News / Events

January 22, 2010 How to Respond to a Union Organizational Campaign

Trade unions have announced that they are targeting the renewable energy industry.

Please join BrownWinick attorneys on a live webcast discussing "How to Respond to a Union Organizational Campaign".

December 02, 2009 2009 Employment Law Client Seminar

The Employment Law Practice Group at BrownWinick will host their 4th Annual 2009 Employment Law Client Seminar on Wednesday, December 2, 2009 at the Hilton Garden Inn, Des Moines/Urbandale, 8600 Northpark Drive, Johnston, Iowa.

December 02, 2008 2008 Employment Law Client Seminar

The Employment Law Practice Group at BrownWinick will host their 3rd Annual 2008 Employment Law Client Seminar on Tuesday, December 2, 2008 at the Hilton Garden Inn, Johnston, Iowa.

December 10, 2007 2007 Employment Law Client Seminar

The Employment Law Practice Group at BrownWinick hosted their 2nd Annual 2007

Employment Law Client Seminar on Monday, December 10, 2007 at the Hilton Garden Inn, Johnston, Iowa.

December 04, 2006 2006 Employment Law Client Seminar
The Employment Law Practice Group at BrownWinick hosting their 1st Annual 2006
Employment Law Client Seminar on Monday, December 4, 2006 at the Hilton Garden Inn,
Johnston, Iowa.

Legal News

January 05, 2010: **H-1B Cap Has Been Reached**

The determination of the need for legal services and the choice of a lawyer are extremely important decisions and should not be based solely upon advertisements or self-proclaimed expertise. This disclosure is required by rule of the Supreme Court of Iowa.