**News Alert – Updated “Spouse” Guidance for FMLA and Medicare Secondary Payer Spouse Definitions**

**FMLA Updates Definition of Spouse**

On June 27th, 2014, The Department of Labor (“DOL”) proposed a new rule to redefine Spouse under the Family and Medical Leave Act (FMLA) rules, in light of the recent Supreme Court Windsor case. While this rule is not yet final, and the effective date of the final rule is not yet known, employers should begin making considerations now to implement the proposed changes in their FMLA policies upon the DOL’s proposed rules becoming final. The following informaiton provides a breif summary of the new rules.

The new definition that the DOL proposes is outlined below:

* DOL is proposing to move from a “state of residence” rule to a “state of celebration” rule based on where the marriage was entered into.
* The proposed definition of spouse expressly references the inclusion of same-sex marriages in addition to common law marriages, and will encompass same-sex marriages entered into abroad that could have been entered into in at least one State (no matter where that state is).
* DOL proposed definition is as follows:
  + - 1. Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under State law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either (1) was entered into in a State that recognizes such marriages or, (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Although the DOL’s proposed rule is in proposal form, it is expected that the “final” rule be implemented or finalized late August or September 2014. We will keep you updated.

**Medicare Secondary Payer policies redefine “Spouse”**

In addition to the DOL proposal, on June 3rd, 2014, the Centers for Medicare and Medicaid Services (“CMS”) released guidance regarding the definition of “spouse” for Medicare Secondary Payer (“MSP”) policies. This was done as a result of the *Windsor* case, which ruled the federal Defense of Marriage Act to be unconstitutional. In this guidance, CMS provided the definition of spouse under a same-sex marriage and how it would apply to the MSP rules for the working aged policy for group health plans (“GHP”).

Prior to this, the MSP working aged provisions only applied to subscribers and their opposite-sex spouses, not individuals in a same-sex marriage.

With the CMS adoption, the Department of Health & Human Services (“HHS”) adopted a policy that will become effective January 1, 2015, treating same-sex marriages on the same terms as opposite-sex marriages. Therefore, any *legal*same-sex marriages entered into in a U.S. jurisdiction that recognizes same-sex marriages under one of the 50 states, the District of Columbia, or a U.S. territory or a foreign country will be recognized for MSP purposes. The broader definition of spouse may be used prior to the January 1, 2015, deadline if the employer, insurer, third party administrator or other plan sponsors so chooses. To set forth this MSP policy, the following examples should allow for a little more clarity.

A summary and examples of application of this policy are as follows:

* If an individual is entitled to Medicare as a spouse based upon the Social Security Administration’s rules, that individual is a “spouse” for purposes of the MSP Working Aged provisions.
* If a marriage is valid in the jurisdiction in which it was performed as described herein, both parties to the marriage are “spouses” for purposes of the MSP Working Aged provisions.
* Where an employer, insurer, third party administrator, GHP, or other plan sponsor has a broader or more inclusive definition of spouse for purposes of its GHP arrangement, it ***may (but is not required to)*** assume primary payment responsibility for the “spouse” in question. If such an individual is reported as a “spouse” pursuant to Medicare, Medicare, & SCHIP Extension Act of 2007 (“MMSEA”) Section 111, Medicare will pay accordingly and pursue recovery, as applicable.

As a refresher, an abridged summary of the requirements, which must be met, for the MSP rules to apply follows:

* The beneficiary must be on Medicare due to being age 65 or older.
* The individual insured under the GHP must be the beneficiary or spouse of the beneficiary.
* The GHP coverage must be based on the current employment status of the insured individual.
* The employer providing the GHP plan must have 20 or more employees. If the GHP is part of a multiple employer or multi-employer plan, at least one of the employers in either arrangement employs at least 20 or more employees.

If you have any questions on the information above, or would like to know how the new rules apply to you, please contact your local account representative.