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New developments regarding same-sex marriage are occurring daily, even as employers face new domestic partnership issues in California.

The Wedding Cake Falls: An Update On Same-Sex Marriage And Domestic Partner Issues After The San Francisco Marriage Decision

By Nancy L. Ober and Paul R. Lynd

Ruling in a pair of cases challenging the issuance of same-sex marriage licenses by the City and County of San Francisco, the California Supreme Court held that San Francisco officials exceeded their authority. The Court also held that the approximately 4,000 same-sex marriage licenses issued by San Francisco were void from the inception. The California ruling resolved — for now — questions facing employers concerning whether these same-sex marriage licenses were valid. Nonetheless, employers still face issues on several fronts concerning same-sex marriage and domestic partner rights. The landscape keeps shifting rapidly. The following is an update for employers on these issues.

The California Supreme Court's Decision

California law, as it stands, does not allow same-sex marriage. San Francisco issued marriage licenses to same-sex couples, arguing that California's marriage laws violate the equal protection guarantees of the California Constitution. No California court has ruled on that question.

On August 12, the California Supreme Court ruled in *Lockyer v. City and County of San Francisco* and *Lewis v. Alfaro*. The Court held, 7-0, that San Francisco officials exceeded their authority by issuing same-sex licenses in the absence of a judicial determination that California's marriage laws are unconstitutional.

In a 5-2 vote, the Court further held that the same-sex marriage licenses issued by San Francisco "are void and of no legal effect from their inception" because city officials had no authority to issue them.

Although challenges to California's marriage laws are pending, the Court held "it would not be prudent or wise to leave the validity of these marriages in limbo for what might be a substantial period of time" because of the uncertainty that would result for several parties, including employers. It also held that the licenses would not be revived later, because same-sex couples would be free to enter into marriages when, and if, same-sex marriage is allowed in California.

Other Same-Sex Marriage Efforts In California

The California Supreme Court emphasized that it was not deciding whether California's marriage laws are constitutional and that its decision "is not intended, and should not be interpreted, to reflect any view on that issue." Several cases challenging California's marriage laws as unconstitutional have been filed and consolidated in San Francisco Superior Court. The California Legislature also is expected to consider whether to legalize same-sex marriage again next year. This year, a bill to do so passed the Assembly Judiciary Committee, but did not receive a vote in the full Assembly.

Same-Sex Marriage Outside of California

In May, Massachusetts began issuing same-sex marriage licenses as a result of a ruling by the Massachusetts Supreme Judicial Court that denying such licenses violated the Massachusetts Constitution. The federal Defense of Marriage Act provides that a state may choose not to recognize same-sex marriages from another state. No state except Massachusetts allows same-sex marriage, and 38 states have laws refusing to recognize same-sex marriages from elsewhere. Massachusetts has refused to issue licenses to same-sex couples from outside the state, citing a 1913

law barring marriages in the state that would not be recognized outside the state. A trial court in Massachusetts recently upheld that law and the state's decision.

Beyond California, other same-sex marriage challenges have been pursued recently, with varying results. Earlier this year, local officials in New Mexico and Oregon issued same-sex marriage licenses. The validity of those licenses remains unclear, and court challenges are pending in those states. In Washington state, two trial courts recently held that denying same-sex marriage licenses is unconstitutional; those rulings are on appeal. In Indiana and New Jersey, trial courts have rejected similar challenges; those rulings have been appealed. Cases also are pending in trial courts in Connecticut and Maryland. In 2003, the Arizona Court of Appeal rejected a challenge, and the Arizona Supreme Court declined to review the case.

California's Domestic Partnership Law Survives Legal Challenge

On September 8, a Sacramento County Superior Court judge cleared the way for California's expanded domestic partnership law, AB 205, to go into effect January 1, 2005. It rejected challenges in two cases. The plaintiffs argued that AB 205 and an earlier law, AB 25, violate Proposition 22, a 2000 initiative statute that provides that only marriage between a man and a woman is valid or recognized in California. They claimed that domestic partnership is same-sex marriage by another name, and that these laws are invalid unless approved by the voters. The court concluded that Proposition 22 does not restrict the grant of rights and benefits to persons who have registered as domestic partners, "even if those rights closely parallel the rights enjoyed only by married persons."

California employers will need to get ready for AB 205, which will give state-registered domestic partners essentially all of the rights of married couples. Among employment issues, it will give employees the right to family and medical leave for a domestic partner. (The new paid family leave program, which became effective January 1, 2004, already covers domestic partners.)

The law also will require that some legal relationships created outside of the state be recognized on the same basis as state-registered domestic partnerships. To be recognized in California, such relationships must be a "legal union of two persons of the same sex, other than a marriage" that is "substantially equivalent" to a California domestic partnership. The only such relationship that appears to meet this standard is Vermont's "civil union," which gives same-sex couples the same rights and responsibilities as a married couple. It remains open to question whether relationships recognized under New Jersey's new domestic partnership law or Hawaii's "reciprocal beneficiaries" law might qualify; neither provides rights as extensive as California and Vermont. Same-sex marriages from other jurisdictions (Massachusetts or foreign countries) will not trigger any rights under California's domestic partnership law. Individuals in lawful marriages — even those not recognized in California — are excluded from California's domestic partnership law.

New California Legislation Requires Health Care Insurers to Sell Domestic Partner Coverage Equal to Spousal Coverage

On September 14, Governor Schwarzenegger signed into law AB 2208, requiring health care service plans (HMOs) and insurers providing hospital, medical or surgical benefits or coverage to provide coverage for state-registered domestic partners equal to that provided to spouses. The act applies to HMO contracts and health insurance policies that are issued, amended, delivered or renewed effective on or after January 2, 2005.

AB 2208 expands existing law, which, beginning January 1, 2002 required HMOs and insurers to offer coverage to domestic partners equal to the coverage provided to dependents. Under AB 2208, an HMO or insurer must enroll domestic partners of employees on the same terms and conditions that apply generally to all spouses under the plan or policy. The HMO or insurer may require proof of the domestic partnership, and notification of termination of the domestic partnership — but only if verification of marital status and notification of dissolution of marriage are also required.

AB 2208 applies to insurers and HMOs, but not directly to employer-sponsored health plans. While AB 2208 requires HMOs and insurers to sell coverage for domestic partners that is equal to coverage for spouses, it does not require employers to provide health benefits to their employees' domestic partners. As under current law, insurers and HMOs are required to enroll domestic partners only *upon application of the employer or group administrator.* The legislation does not apply to self-funded arrangements under which employers reimburse the medical expenses of covered individuals. AB 2208 specifically provides that it is not to be construed as expanding COBRA continuation coverage rights under federal law.

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