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California Edition

A Littler Mendelson California-specific Newsletter

California Supreme Court Opens the Door on Same-Sex Marriage

By Daniel J. Cravens, Nancy L. Ober and Olga Savage

In a landmark decision, the California Supreme Court held that the state's Constitution guarantees the right to marry to same-sex couples as well as to couples of the opposite sex. As domestic partners already enjoy broad rights under a patchwork of recently enacted state domestic partner laws, the primary consequence of the California Supreme Court's decision for employers is to bring same-sex couples within the sweep of pre-existing policies providing benefits to married couples. The following is an update for employers on the current status of the law.

The California Supreme Court's Decision

The status of same-sex marriage in California has been unsettled since early 2004 when San Francisco City and County officials briefly permitted same-sex marriage. The California Supreme Court ruled later that year that San Francisco officials had exceeded their authority in issuing marriage licenses to same-sex couples in the absence of a judicial determination that the statutory provisions limiting marriage to the union of a man and woman are unconstitutional. The court at that time expressly declined to address whether California's current statutory provisions limiting marriage to a man and a woman were constitutional.

The court addressed this issue in *In re Marriage Cases*, No. S147999 (Cal. Sup. Ct. May 15, 2008) and, in a 4-3 split, held that the right of same-sex couples to marry is protected by the California Constitution. The court held that:

> The substantive right of two adults who share a loving relationship to join together to establish an officially recognized family of their own – and, if the couple chooses, to raise children within that family – constitutes a vitally important attribute of the fundamental interest in liberty and personal autonomy that the California Constitution secures to all persons for the benefit of both the individual and society.

Acknowledging that domestic partners are entitled to nearly all of the same benefits as married couples under current law, the court nevertheless held that a legal system that assigned different names to same-sex and opposite-sex unions violated not only the constitutional right to marry but also the equal protection clause of the California Constitution. The court's decision nullifies an amendment to the Family Code passed by a 2000 voter initiative, Proposition 22.

In finding a violation of equal protection, the court applied the heightened "strict scrutiny" standard to California's marriage law. The strict scrutiny standard has previously been applied to laws that discriminate on the basis of race, gender, religion, and national origin, but not to sexual orientation. Under the strict scrutiny standard, a law that discriminates against members of one of these suspect categories is unconstitutional unless it serves a compelling state interest and

is necessary to serve that interest. The court's holding signals the court's intention to apply the strict scrutiny standard to any law that potentially discriminates on the basis of sexual orientation.

The Status of the Domestic Partnership Law

The California Legislature first enacted a domestic partner law in 1999 and incrementally expanded it through subsequent legislation. Effective January 1, 2005, A.B. 205 gave state-registered domestic partners essentially all the legal rights and responsibilities of married couples, creating an institution parallel and putatively equal to marriage. State registration is available to same-sex couples, as well as to opposite-sex couples where at least one partner is at least 62. The California Supreme Court's decision does not address the domestic partner law, and at least for now, domestic partnership continues as a parallel institution.

Employee Benefits and Workplace Discrimination Following the Supreme Court Decision

In re Marriage Cases is unlikely to have broad implications for employers. In recent years, the California Legislature has enacted several statutes that collectively require both public and private employers to extend the same benefits to state-registered domestic partners as are provided to spouses, except employee benefit plans regulated by federal law, ERISA. These statutes remain in effect. The California Supreme Court decision does not affect ERISA benefits or the federal tax treatment of employment benefits because the federal Defense of Marriage Act (DOMA) limits marriage recognized under federal law to a legal union between one man and one woman.

California discrimination statutes already prohibit discrimination on the basis of sexual orientation and marital status, and the California Supreme Court previously ruled in a public accommodations case that these laws prohibit discrimination against domestic partners. Thus, the effect of *In re Marriage Cases* will be to expand the meaning of the word "spouse" in employment policies and benefits subject to state law, and to require employers to treat all married employees equally regardless of sexual orientation.

Same Sex Marriage Outside of California

Other States with Same-Sex Marriage/ Civil Union Laws

Massachusetts was previously the only state that recognized same-sex marriage. Massachusetts has recognized same-sex marriages since a 2003 ruling by that state's highest court. A proposed constitutional amendment banning same-sex marriages was rejected by the Massachusetts legislature in July 2007.

Other states have enacted civil union or domestic partnership laws that offer all or some of the rights and responsibilities of marriage under state law to same sex-couples. Connecticut, Vermont, New Jersey, and New Hampshire have enacted laws that explicitly provide couples in civil unions with all the same benefits, protections, and responsibilities afforded to married couples. Maine, Hawaii, the District of Columbia, Oregon, and Washington have enacted laws allowing same-sex couples to enter into domestic partnerships or to receive some of the same benefits as married couples.

Effect of the California Ruling on Other States

The prospect of lawfully performed same-sex marriages in California raises the question of whether other states will be required to recognize those marriages. Generally, states are required to recognize valid marriages performed in other states under the Full Faith and Credit clause of the United States Constitution and the legal principle of comity, which require that one state give effect to the laws and judicial decisions of other states. However, the United States Supreme Court has recognized a "public policy" exception to this principle. If same sex-marriage conflicts with a strong public policy of the state, the state is not required to recognize a same-sex marriage performed in a different state. Whether same-sex marriage conflicts with a strong public policy of the state depends on the way that the state's courts and legislature have treated same-sex marriage in the past. If, for example, a state has passed a law or constitutional amendment banning same-sex marriage or restricting the definition of marriage to a union between a man and a woman, it is more likely that a court would find that the state has a strong public policy against same-sex marriage and does not have to recognize same-sex marriages performed in California. To date, 26 states have passed constitutional amendments that ban same-sex marriage and can be expected to vehemently oppose recognition of California same-sex marriages under the public policy exception.

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