A Timely Analysis of Legal Developments

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In light of recent developments in numerous states, employers should be aware of the status of nationwide same-sex marriage and domestic partnership laws and employer benefit obligations.

An Update For Employers on Domestic Partnership and Same-Sex Marriage Laws

By Nancy L. Ober

Despite a November voter referendum in Maine that overturned the state's same-sex marriage law and a very recent rejection of same-sex marriage by the New York State Senate, the year 2009 saw progress for the legal recognition of same-sex marriage and domestic partnerships. The following is a summary of recent developments in this fast-evolving area of the law.

Same-Sex Marriage Rejected and Recognized

On November 3, 2009, voters in Maine approved Question 1, a "People's Veto" of legislation passed by the state legislature and signed by the governor in May 2009 that would have enabled "any 2 persons" otherwise qualified under state law to marry "regardless of the sex of each person."

On December 2, 2009, the New York State Senate voted against a measure that would have permitted same-sex couples to wed.

Meanwhile, Vermont's same-sex marriage law, SB 115, went into effect on September 1, 2009. Iowa began issuing marriage licenses to same-sex couples in April 2009, following a state supreme court ruling (*Varnum v. Brien*) holding that the state constitution guarantees same-sex couples the right to marry. And New Hampshire enacted legislation permitting same sex marriage that will go into effect January 1, 2010. These states join Massachusetts and Connecticut in permitting same-sex marriages.

In addition, on December 1, 2009, the Council of the District of Columbia approved, on the first of two required votes, legislation that would provide that marriage "is the legally recognized union of 2 people" and would permit any person who otherwise meets the requirements of local law to marry any other eligible person "regardless of gender." The second Council vote on the measure is scheduled later this month, and the mayor is expected to sign it.

Washington's Domestic Partnership Law Survives Referendum; Other States Enact Domestic Partnership Laws

In a victory for domestic partnerships, on November 3, 2009, Washington State voters defeated Referendum 71, which would have cancelled legislation enacted in May 2009, SB 5688, that grants state registered domestic partners the same rights, benefits, and responsibilities under state law as spouses, except marriage. SB 5688 was the third state domestic partnership law enacted in Washington, following measures in 2007 and 2008 that conferred more limited rights.

Nevada enacted legislation, SB 283, effective October 1, 2009, that permits same-sex and heterosexual couples to register as domestic partners and receive virtually all of the rights and responsibilities of spouses under state law.

Two other states passed more limited legislation. Wisconsin's domestic partnership law, effective August 3, 2009, establishes a state domestic partner registry and confers some of the benefits of marriage, including inheritance and survivor protections, family and medical leave, hospital visitation rights and exemption from the real estate transfer fee. In Colorado, effective July 1, 2009, any two unmarried adults may enter into a designated beneficiary agreement providing certain rights and responsibilities, including hospital visitation, inheritance, and standing to sue for wrongful death.

California Recognizes Some Out-of-State Marriages

Following the California Supreme Court's May 2008 decision holding that the state's constitution guarantees the right to marry to same-sex as well as opposite-sex couples (*In re Marriage Cases*), a voter initiative, Proposition 8, amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. In a decision issued on May 26, 2009 (*Strauss v. Horton*), the California Supreme Court upheld the constitutionality of Proposition 8, but ruled that the measure, which took effect on November 5, 2008, did not retroactively invalidate the 18,000 marriage certificates already granted to same-sex couples. The court also declared that Proposition 8 "leaves undisturbed" same-sex couples' constitutional right to establish an officially recognized and protected family relationship through the state's domestic partnership law, which gives state-registered domestic partners all of the legal rights and responsibilities of married couples under state law.

Bolstering the California Supreme Court's decision, the California Legislature passed, and the governor signed, Senate Bill 54, effective January 1, 2010, providing that a marriage contracted outside California between two persons of the same sex prior to the effective date of Proposition 8, November 5, 2008, will be recognized as a valid marriage in California if it would be valid in the jurisdiction in which it was contracted. The law further provides that two persons of the same sex who contracted a valid marriage in another jurisdiction on or after November 5, 2008 will be entitled to the same rights, protections, obligations and duties under law as are granted or imposed upon spouses, with the sole exception of the designation of "marriage."

The Status of Domestic Partner Laws Nationally

In addition to California, several other states previously enacted civil union or domestic partnership laws that provide some or all of the rights and responsibilities of spouses under state law.

- District of Columbia: Domestic partner law effective in 2002 gives domestic partners all rights and responsibilities of spouses under D.C. law.
- Hawaii: Reciprocal beneficiary law enacted in 1997 permits two adults who are unable to marry to register as reciprocal beneficiaries and receive certain rights and benefits previously only available to married couples, including the right of inheritance without a will, standing to sue for wrongful death, hospital visitation, health care decisions, property rights, and domestic violence protection.
- Maine: The rejection of same-sex marriage leaves intact the state's legislatively enacted domestic partnership law, which became

effective in 2004. That legislation established a state domestic partner registry and conferred limited rights on registered domestic partners, including the right of inheritance, the right to make funeral arrangements and to act as guardian or conservator, and protection against domestic violence.

- Maryland: Legislation effective July 1, 2008 gives domestic partners 11 protections under state law, including the right to make decisions about health care and hospital visitation rights.
- New Jersey: The Civil Union Act, effective in 2007, conferred virtually all state-level spousal rights on parties to civil unions.
- Oregon: A 2007 statute, the Oregon Family Fairness Act, gives domestic partners the same rights, benefits and responsibilities as spouses in a marriage under state law.

Connecticut, New Hampshire and Vermont previously enacted civil union laws providing couples in civil unions with nearly all the same benefits, protections and responsibilities afforded to married couples. Now that they have legalized same-sex marriage, Vermont and Connecticut have ceased performing civil unions, and New Hampshire will follow suit on January 1, 2010.

Effect of Same-Sex Marriage and Domestic Partnership Laws on Employee Benefits

For private employers, the principal effect of state laws recognizing same-sex marriage or broadly granting registered domestic partners the same rights under law as spouses is in the area of insured group health plans. State-regulated insurers may be required to extend spousal coverage to registered domestic partners or same-sex spouses. These laws do not affect employee benefit plans (including self-insured group health plans) that are solely regulated by federal law, ERISA, or the federal tax treatment of employee benefits, because the Defense of Marriage Act (DOMA) limits marriage recognized under federal law to a legal union between one man and one woman.

Notwithstanding DOMA, in two recent cases affecting public employees, two judges of the United States Court of Appeals for the Ninth Circuit issued orders providing benefits to same-sex spouses of federal employees who were married before the effective date of Proposition 8 in California. In *In the Matter of Karen Golinski*, a Ninth Circuit staff attorney sought to add her wife to family health insurance under the Federal Employees Health Benefits Act (FEHBA). The Director of the Administrative Office of the United States Courts refused, citing DOMA, and the attorney complained of sexual orientation and sex discrimination. Chief Judge Kozinski, acting under the Ninth Circuit's Employment Dispute Resolution (EDR) Plan, concluded that the FEHBA provision authorizing the Office of Personnel Management to contract for health benefits covering employees and "members of their families" and defining "member of family" as an employee's spouse and children was ambiguous and did not necessarily limit the type of insurance for which OPM could contract. He found that the statute could plausibly be construed as a set of general guidelines for medical benefit plans and minimum requirements that such plans must satisfy, such that the OPM would be within its authority if it contracted for coverage that exceeded the minimum. Adopting this second reading, he construed the FEHBA as permitting the coverage of same-sex spouses.

In a second case, *In the Matter of Brad Levenson*, a deputy federal public defender in the Central District of California who had married his husband in accordance with California law sought to add him as a family member beneficiary of his federal health, dental and vision benefits. When his request was denied on the ground that DOMA prohibits the provision of federal benefits to same-sex spouses, Levenson filed a complaint alleging that the denial of benefits violated the Ninth Circuit's EDR Plan, which prohibits discrimination on the basis of sex and sexual orientation, and the United States Constitution. Judge Reinhardt, ruling on Levenson's complaint, agreed that the denial of benefits violated the EDR Plan. Disagreeing with Judge Kozinski, he found that the FEHBA does not permit coverage of persons falling outside the definition of family member. He concluded that application of DOMA to FEHBA to exclude a same-sex spouse violates the Due Process Clause of the Fifth Amendment. He ordered the Director of the Administrative Office of the United States Courts to process Levenson's request to add his spouse as a beneficiary of his federal benefits. After the Office of Personnel Management intervened to prevent his enrollment, Levenson requested an order directing the federal public defender either to enter into separate contracts with private insurers to provide coverage, or for a monetary award. Judge Reinhardt issued a subsequent order

granting Levenson's alternative request for a monetary award in an amount equal to the cost of obtaining comparable coverage.

In another judicial development, the New York Court of Appeals in November 2009 rejected legal challenges to public officials' directives recognizing out-of-state same-sex marriages for purposes of public employee health insurance and other benefits, affirming the dismissal of two taxpayer lawsuits (*Godfrey v. Spano and Lewis v. New York State Department of Civil Service*). The court ruled that there was no basis for the plaintiffs' claims that the directives constituted a waste of taxpayer funds, or that the defendant officials acted inconsistently with the legislature's pronouncements on spousal benefits in the state Civil Service Law.

Outlook for Further Developments

It appears certain that efforts to expand recognition of same-sex marriage will continue, both at the state and federal level.

Nancy L. Ober is a Shareholder in Littler Mendelson's San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Ober at nlober@littler.com.