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Marriage Equality Act Passes in Washington State

By Pamela Salgado and Daniel Thieme

On February 13, 2012, Governor Christine Gregoire signed SB 6239 to legalize same-sex marriage in Washington State. Meanwhile, opponents have promised to gather enough signatures to force a referendum on the law.

Effective Date

The bill, commonly called the Marriage Equality Act, is set to become effective on June 7, 2012. Its effectiveness will be suspended, however, if opponents muster the 120,577 signatures necessary to force a referendum. Those signatures are due by June 6, 2012. If a referendum is triggered, the Act will be placed on the November ballot, and will become law only if approved by the voters. In 2009, opponents of Washington's "Everything but Marriage" law were successful in forcing a referendum, which the voters passed by a margin of 53% to 47%.

Limited Substantive Change as "Everything but Marriage" Addressed Most Issues of Equality

For Washington State employers, the Marriage Equality Act, if it becomes effective, will cause only limited changes. This is because, in 2009, Washington was the first state in the country to adopt "everything but marriage" domestic partner rights. Under the "Everything but Marriage" law, the terms "spouse, marriage, marital, husband, wife, widow, widower, next of kin and family" apply equally to married couples and state-registered domestic partnerships under all aspects of Washington law, apart from the definition of marriage. Thus, the registration provides the same benefits and obligations that apply to spouses under Washington law, including the right to use sick leave to care for each other, the right to workers' compensation benefits, and the right to unemployment and disability insurance benefits. The Marriage Equality Act would be somewhat more expansive in its coverage, however, as it would not require that those who marry must share a home, which currently is a requirement to register as Washington domestic partners.

Effect on Same-Sex Marriages and Domestic Partnerships from Other States

Under the Marriage Equality Act, a valid same-sex marriage from another state would be recognized as a marriage in Washington. Individuals married in other states who move to

Washington would need do nothing more to have the marriage recognized. Similarly, a couple in a validly formed domestic partnership from another state would be treated as having the same rights and responsibilities in Washington as married spouses. But to retain that status, the couple would have to marry within one year after becoming permanent residents of Washington State, unless at least one of the partners was at least 62 years of age.

Domestic Partnerships Will Remain an Option for Some Persons

The Marriage Equality Act would generally eliminate the option of registering as domestic partners, and give currently registered domestic partners two years to either divorce or marry. The domestic partnership option would remain available, however, if at least one person in the couple is at least 62 years of age. Similarly, domestic partnerships formed in another state, with at least one person 62 years of age or older, would not have to enter into a marriage to be recognized as domestic partnerships in Washington.

Impact on Benefits

For purchased insurance, including health benefits, the Act is unlikely to have any impact, apart from a change in terminology from domestic partner to spouse. Employers should check with their insurance brokers, however, to see if there are any changes to plans, policies, enrollment forms or other issues related to purchased insurance benefits.

Employers should also take this opportunity to review their non-insured employee benefits that provide spousal coverage (including self-insured health benefits) to determine whether any terminology or substantive changes are appropriate or required. In doing so, employers should consider whether any existing provisions might run afoul of Washington law prohibiting discrimination on the basis of sexual orientation or marital status. Those state anti-discrimination laws are likely preempted with respect to ERISA-covered benefits, but the same is not true for benefits that do not qualify as ERISA-covered plans.

The Marriage Equality Act would not impact the current requirement to treat the value of health benefits provided to an employee's same-sex partner as taxable income to the employee, when the partner is not the employee's tax dependent. This difference in treatment results from federal tax law and the federal Defense of Marriage Act, which state law cannot change.

Difference in State and Federal Law Will Continue to Create Traps for Unwary Employers Regarding Family and Medical Leave Act Issues

Washington employers need to be aware that the Marriage Equality Act will not eliminate the FMLA-related traps for unwary employers that were created when the "Everything but Marriage" law changed the state law definition of spouse to include registered domestic partners.

One of these traps relates to tracking the use of FMLA leave. Under the Washington Family Leave Act (WFLA), an employee is entitled to leave to care for a seriously ill same-sex domestic partner (and the same would be true under the Marriage Equality Act for same-sex spouses), but the federal Family and Medical Leave Act (FMLA) does not provide leave to care for a same-sex domestic partner or same-sex spouse. Thus, FMLA leave does not always run concurrently with the WFLA. For example, an employee is able to take 12 weeks of leave to care for a seriously ill same-sex domestic partner (or same-sex spouse) under the WFLA, and still have 12 weeks of available leave for situations covered under the FMLA.

Another trap relates to docking an employee's salary when the employee takes off part of a day for WFLA purposes. An employer may dock the salary of an exempt salaried employee who takes intermittent or reduced-schedule leave under the FMLA, without affecting the employee's exempt status. But because same-sex domestic partners and same-sex spouses are not recognized under federal law, this exception allowing the deduction does not apply if the leave is taken under the WFLA for a serious illness of a same-sex domestic partner or same-sex spouse. If an employer does deduct from an exempt employee's salary for partial-day absences taken for that purpose, the employer may destroy the exempt status and may be liable for additional wages and overtime for this employee.

It is critical that employers be aware of these differences in implementing their leave policies under the FMLA and WFLA as applied to same-sex domestic partners and same-sex spouses.

Employers Should Be Alert for Tensions in Workplace

Employers can expect that employees will be discussing the passage of the law, the likely referendum to be placed before the voters, and impending wedding plans between same-sex partners. These conversations may elicit strong reactions from employees on either side of the issue, requiring employers to carefully balance employees' competing rights. Employers should be aware that an individual's sexual orientation, marital status and creed are all protected characteristics under the Washington Law Against Discrimination (as is religion under federal law). Thus, comments regarding an individual's sexual orientation, or statements regarding an employee's belief as to what constitutes marriage, may give rise to claims of unlawful harassment, even if the comments are only exchanged between coworkers. Likewise, inconsistent treatment of employees, such as asking an employee who is planning a same-sex wedding to "keep it private," may also lead to claims of unlawful harassment or discrimination. Employers will need to be alert to situations that violate its anti-harassment/anti-discrimination policies. Employers also should review their anti-harassment and anti-discrimination policies, and consider whether supervisor and manager training would be appropriate.

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