

SAME-SEX MARRIAGE IN MASSACHUSETTS: WHAT EMPLOYERS NEED TO KNOW

On May 17, 2004, same-sex marriages will be permitted in Massachusetts. Employers need to know how this will impact the workplace, primarily with regard to employee benefits. Although the Massachusetts Supreme Judicial Court held in *Goodridge v. Department of Public Health* that homosexual couples are constitutionally entitled to the same benefits and protections as heterosexual couples, employers must also comply with federal law. The conflict between the Massachusetts and federal law on this issue requires that careful attention be paid in order to comply fully with both standards.

IN SUMMARY:

- “Spouse” will include heterosexuals and homosexuals for the purpose of all Massachusetts laws, but will only include a person married to someone of the opposite sex for the purpose of federal law.
- The federal Defense of Marriage Act (“DOMA”) provides that, for purposes of federal statutes and regulations, the term “marriage” means only opposite-sex marriage and “spouse” means only an opposite-sex husband or wife.
- The federal Employee Retirement Income Security Act (“ERISA”) will generally preempt state law regarding ERISA-covered benefit plans, which in this context means that *Goodridge* cannot compel employers to treat homosexual couples equally in connection with ERISA plans. Employers should review and amend their ERISA plans to clarify whether they will extend such benefits to same-sex spouses.
- ERISA does not preempt state laws that regulate insurance, so Massachusetts insurance laws that extend coverage to a “spouse” will now apply to same-sex spouses; insured medical or life insurance plans will likely now be available to same-sex married couples.
- Employers will need to consider whether to continue “domestic partner” benefits.
- Employers should review their policies wherever reference to “spouse” is made; many non-ERISA policies (such as bereavement policies) may now apply to same-sex spouses.

UNDERSTANDING THE CONFLICT WITH FEDERAL LAW

Although Massachusetts employers will be compelled, as of May 17, to treat same-sex married couples in the same manner as heterosexual married couples for the purpose of Massachusetts laws, the *Goodridge* decision does not trump the federal laws which govern the meaning of federal laws and regulations. The federal Defense of Marriage Act (“DOMA”) specifically provides that, for purposes of federal statutes and regulations, the term “marriage” means only opposite-sex marriage and “spouse” means only an opposite-sex husband or wife. In addition, ERISA preempts the application of state laws concerning ERISA-covered plans, and therefore employers will have to consider whether a particular benefit is subject to ERISA, in order to determine whether same-sex spouses must be given equal benefits.

Where ERISA plans are involved, employers will not be required to extend benefits to same-sex spouses. Given that self-funded health and dental plans are governed exclusively by ERISA, there is no requirement that employers extend coverage under those plans to same-sex spouses (unlike insured medical and dental plans). These and other ERISA plans (including retirement plans and certain severance plans) should be amended, however, to clearly reflect the employer’s decision regarding whether or not to extend benefits to same-sex spouses.

Goodridge is unlikely to require that an employer extend FMLA benefits to same-sex spouses. Further, it will not change employer’s obligations regarding COBRA benefits, although insurers may continue to provide continuation coverage, and same-sex spouses may be entitled to insurance continuation under Massachusetts laws, such as the “mini-COBRA” statute (for insured plans covering fewer than 20 employees). Employers should consult the terms of their plan documents and their insurer with respect to this issue.

Similarly, same-sex spouses will not be entitled to equal treatment under federal income tax rules relating to employee benefits, or federal employment laws. Although a same-sex spouse may be entitled to coverage under insured medical plans (discussed below), under DOMA, a covered same-sex spouse will not be considered to be a “spouse” for federal income tax purposes. Therefore the value of the spouse’s coverage will be included in the employee’s gross income for federal income tax purposes, and the employee will not be entitled to a federal pretax deduction for the cost of the entire premium. This is the same tax rule that is currently applicable to benefits for domestic partners; employers not familiar with this problem will need to address it carefully.

WHERE *GOODRIDGE* WILL REQUIRE CHANGES

Despite the conflict with federal law, the *Goodridge* decision will have a profound impact on matters regulated by state law. This is likely to include insured medical plans and life insurance plans, as the *Goodridge* decision could be read to require that references to “spouse” under Massachusetts laws and in insurance policies covering Massachusetts residents must now be interpreted to include same-sex spouses.

The *Goodridge* decision will also impact any non-ERISA employee policy that makes reference to a “spouse.” Therefore, employers are advised to review all of their policies in this respect. For example, a bereavement policy that allows employees to take time off for a spouse’s death will now apply to same-sex spouses as well.

Practical Tip: Look out for instances where an employer policy was merely intended to comply with federal law, but may now be interpreted more broadly. For example, many Family and Medical Leave Act policies track the federal language without explicitly limiting the scope of the policy to the FMLA; in these instances, the policy may now be interpreted to include same-sex spouses, if no clarification is made.

Goodridge will also change employers’ obligations under the Massachusetts Small Necessities Leave Act (“SNLA”). The SNLA provides for limited leave in order to accompany an elderly relative to appointments for professional services; because “elderly relative” is defined as someone related by blood or marriage to an employee, employees may now be entitled to leave to assist the elderly relative of a same-sex spouse.

WHAT HAPPENS TO DOMESTIC PARTNER PLANS?

Employers who currently offer benefits to same-sex domestic partners need to review their policies and consider their approach going forward. If an existing policy provides benefits only to individuals who are legally barred from marriage, the *Goodridge* decision may have the unintended effect of making same-sex couples ineligible under these plans. Employers may choose to retain the option of offering benefits to unmarried, same-sex domestic partners (either indefinitely or for a limited period of time), or they may revise their policies to permit only married couples (same or opposite sex) to receive benefits. Employers who operate outside Massachusetts may want to retain uniform domestic partner benefits, or amend the policy

to provide that it applies only in states which do not permit same-sex marriage.

EMPLOYERS NEED TO MAKE A CHOICE AND REVISE PLANS AND POLICIES ACCORDINGLY

Employers have some flexibility in this area: they may choose to recognize same-sex marriage only to the extent required by law (and thus offer benefits only where required by state law); or they may choose to extend to same-sex spouses all the rights accorded opposite-sex spouses. Federal law does not prohibit amending ERISA plans and other policies to extend benefits to same-sex spouses, even where not required by law. Either way, employers should review and revise their benefit plans and policies to reflect their decision. Because many policies may refer to a “spouse,” it is imperative to clarify this language, or else the employer risks continuing confusion about whether the policy now includes same-sex spouses.

DISCRIMINATION

Sexual orientation is currently a protected class under Massachusetts law, and will remain so after *Goodridge*. As before, discrimination and harassment on the basis of sexual orientation is prohibited. Employees who must inform their employers of their sexual orientation in order to avail themselves of employee benefits may well be concerned with possible harassment or other discrimination, and employers should be prepared to reassure employees of their commitment to anti-discrimination and anti-harassment policies, if the need arises. In addition, many employers have anti-harassment policies that address only *sexual* harassment (such as the MCAD model policy), and not other forms of harassment such as harassment based on sexual orientation, age, disability, or other protected classes. This may be an opportune time to revamp and broaden such policies.

CONCLUSION

Many employees, as well as employers, may be surprised to learn that, despite the *Goodridge* decision, federal law will continue to apply to many employee benefits, resulting in the continued unavailability of certain benefits to same-sex spouses. Moreover, although the change in the law has been widely discussed, little specific guidance on its implications is available. Employers should think through the impact of *Goodridge*, decide how they want to respond with respect to their policies and benefit plans, and communicate these decisions to their workforce.

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