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The Massachusetts Same-Sex Marriage Ruling: Groundbreaking Issues in the American Workplace

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The Massachusetts Supreme Judicial Court's same-sex marriage decision in Goodridge v. Department of Public Health *has resulted in new obligations on the part of employers to provide benefits to the workforce. As explained in this article, these obligations may extend well past the geographical boundaries of the Commonwealth of Massachusetts. The authors suggest that employers should approach such decisions armed with a thorough understanding of the decision's legal implications—and that they should stay abreast of the near daily legislative and court actions affecting Goodridge-based legal rights and obligations.*

The Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*[1] (*Goodridge*) has not only created a political hornet's nest, but it has also produced many groundbreaking legal issues. Prominent among them are questions concerning how the new law must be implemented in the workplace. These questions involve not only Massachusetts employers and workers but also those throughout the United States. *Goodridge* has spawned action by the Massachusetts legislature, by Congress, and by other state legislatures. Moreover, litigation in Massachusetts has been filed to determine whether non-Massachusetts residents may enter into valid marriages in Massachusetts. Litigation is inevitable in other states seeking to determine whether Massachusetts marriages will be recognized elsewhere and whether state and federal so-called "defense of marriage" legislation is lawful.

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GOODRIDGE

An analysis of workplace issues must start with a discussion of the *Goodridge* ruling. The 4–3 majority in *Goodridge* determined that by not permitting same-sex couples to marry, the Massachusetts marriage licensing law[2] violated the liberty and equality provisions of the Massachusetts Constitution and Declaration of Rights. Those provisions equate to the Due Process and Equal Protection Clauses of the federal Constitution.

The Commonwealth argued in *Goodridge* that the same-sex marriage prohibition was rationally based because:

1. It provided a "favorable setting for procreation;"

2. It supported the optimal environment for child rearing;

3. It conserved scarce state and private resources by providing the benefits of marriage to opposite-sex couples only, because they may be more needy than same-sex couples.[3]

The Supreme Judicial Court determined that to restrict marriage to opposite-sex couples furthers none of these policies. First, Chapter 207 does not require marriage license applicants to show any intention or ability to procreate. Moreover, Massachusetts has long allowed single homosexual and heterosexual persons and same-sex couples to adopt children and act as foster parents. The majority also was not persuaded by the argument that to allow same-sex marriages would decrease the number of heterosexual couples marrying or having children. The Court found no basis whatsoever for the argument that those in heterosexual marriages were more in need of state or private financial resources. Because there was, opined the Court, no rational basis for the statutory provision, the Court did not reach the question as to whether a fundamental right or suspect classification was at issue.

The *Goodridge* decision was issued November 18, 2003, with a May 18, 2004, effective date in order to allow the state legislature the opportunity to take appropriate statutory action. The legislature responded by proposing a law permitting civil unions but prohibiting same-sex marriages. Same-sex partners in civil unions, under the proposal, would have been guaranteed the same legal benefits as those who have entered into a civil marriage, but their unions would have been called civil unions. The legislature asked the Supreme Judicial Court for an advisory opinion as to whether this proposed law was constitutional. Another slim majority answered "no," on the grounds that there existed no rational basis for what the majority described as a separate and unequal status.[4] A strong dissenter opined that civil unions versus marriage was merely a "squabble over the name" to be used.[5] Moreover, according to dissenting Justice Sosman, the very fact that same-sex couples are of the same sex provides a rational basis for calling their unions civil unions and not marriages. As such, they will not receive marital status under federal law or under the laws of most other states and therefore it makes sense to treat them differently. The majority, however, found the issue to be more than one of semantics; indeed, separate names would, said the majority, "maintain[] and foster[] a stigma of exclusion" prohibited by the Massachusetts Constitution.[6] As to the argument that the distinction rationally delineates unions not protected by federal or other states' laws, the majority was similarly unmoved. According to the majority, they will not deny rights granted by the Massachusetts Constitution simply because those rights are not recognized in other states or under federal law.

Thus rebuffed, the state legislature began considering an amendment to the Massachusetts Constitution nullifying the Justices' Opinion. At its Constitutional Convention in April 2004, it voted favorably on an amendment prohibiting same-sex marriages and establishing civil unions. Such an amendment would not take effect until late 2006 at the earliest, should it be voted on favorably at the next Convention and be approved thereafter by a majority of voters.[7]

Goodridge took effect on May 18, 2004, and scores of couples have now taken advantage of its benefits. The controversy surrounding same-sex marriage in Massachusetts and elsewhere has, however, taken no honeymoon. The Massachusetts Governor, who made many attempts to halt the implementation of *Goodridge*, used a little known provision of the marriage law—enacted in 1913 and designed to discourage interracial marriages—to block out-of-state couples from entering into Massachusetts marriages. He was defied by a number of municipal clerks, who have granted licenses to non-residents. Those claimed marriages have not been entered on Massachusetts marriage rolls. The issue as to the validity of Massachusetts same-sex marriages of non-residents is the subject of two lawsuits recently filed with the trial court in Massachusetts.[8]

SAME-SEX MARRIAGE ELSEWHERE

At present, 38 states prohibit same-sex marriage, either through "defense of marriage" legislation, to be discussed below, or by constitutional amendment. Only 11 states, in addition to Massachusetts, have no such limiting provisions. They are Connecticut, Maryland, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Wisconsin, and Wyoming. Vermont legislation provides for civil unions.[9] California, Hawaii, and New Jersey allow domestic partners to register and receive marriage-like benefits.[10]

The United States Congress has recently weighed in on a proposed constitutional ban on same-sex marriages. This proposed amendment, filed in the Senate, was sent to the floor prior to the usual committee vote so that it would be debated just before the July 26, 2004, Democratic National Convention. This proposal did not garner sufficient support to be voted on formally.

While the future of same-sex marriage is unknown, *Goodridge* applies currently in Massachusetts. Moreover, as will be discussed below, it may well apply to at least some out-of-state residents (and employees) married in Massachusetts and to at least some Massachusetts same-sex married couples who move or work elsewhere.

WORKPLACE ISSUES: AN OVERVIEW

Goodridge will require all employers with employees in Massachusetts to:

- Make important decisions as to how broadly they want to and cover employees and same-sex spouses or domestic partners; and

- Review carefully all benefit plans and policies and modify them to come into compliance with *Goodridge*.

Importantly, employers throughout the United States must keep abreast of litigation in Massachusetts and elsewhere in order to determine whether they must honor

Massachusetts marriages of non-Massachusetts residents or honor, in other states, Massachusetts marriages of Massachusetts residents.

By the same token, committed same-sex couples deciding whether to marry will have to consider what effects their decision will have on employee benefits, in addition to adoption rights, real estate ownership, income taxes, and estate planning.

These issues are exceedingly complex and multi-faceted. They involve both state law and federal law, which are in many ways conflicting. They also involve complicated issues concerning employee-employer relations.

THE FEDERAL DEFENSE OF MARRIAGE ACT

The federal Defense of Marriage Act (the DOMA), signed by President Clinton in 1996, provides that as to any federal law, the word "marriage" means only a legal union between a man and a woman. A "spouse" is defined as a person of the opposite sex who is a husband and or wife.[11] Put simply, federal law does not recognize same-sex marriages. Furthermore, in what some see as an attempt by legislative enactment to negate the Full Faith and Credit Clause of the Constitution,[12] the DOMA instructs states that they need not give effect to same-sex marriages licensed in another state. That section of the DOMA provides:

> No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship.[13]

Under the preemption doctrine, the DOMA takes precedence over state law where there is a federal law on a particular subject. This means that federal benefit laws such as the Family and Medical Leave Act (FMLA),[14] the Consolidated Omnibus Budget Reconciliation Act (COBRA)[15] and the Employee Retirement Income Security Act (ERISA),[16] for example, trump state law and only husbands and wives in heterosexual marriages will qualify for the benefits granted by these laws to spouses. As always, there is an exception, the most crucial of which is that ERISA (which governs employee benefit and welfare programs), does not preempt state laws relating to insurance plans. So, what does this mean in the workplace?

INSURANCE ISSUES

While ERISA prohibits states from making certain laws concerning retirement plans, it does not cover state insurance laws. Therefore, in Massachusetts, same-sex married employees must be treated the same as opposite-sex married employees for health, dental, vision, life, and long-term care insurance purposes. ERISA does, however, mandate special insurance enrollment eligibility for dependent spouses of employees, and this provision does not apply to same-sex married couples because ERISA is interpreted using the DOMA definition of spouse.[17] If, however, an employer has a self-funded insurance plan, that plan is covered exclusively by federal law.[18] An employer maintaining a self-funded plan does not have to treat same-sex spouses the same as opposite-sex spouses but may, however, decide as a policy matter that it wishes to cover same-sex spouses.

COBRA, the federal law that extends health insurance benefits to terminated employees, their spouses, and others, applies to employers with 20 or more employees.

It does not apply to same-sex married persons. An employer may decide as a policy matter whether to cover same-sex partners and may do so if its insurer offers that coverage. If domestic partner COBRA coverage was provided by an employer prior to *Goodridge* and partners of former employees are now receiving benefits, those benefits should not be revoked without careful review. It is likely that contract, quasi-contract, or promissory estoppel obligations would preclude such a revocation.

Massachusetts also has a "mini-COBRA" law. That law parrots the federal COBRA law in most respects and applies to employers with fewer than 20 employees.[19] Thus, ironically, after *Goodridge*, employers with fewer than 20 employees will be required to provide continuation coverage to same-sex married couples under Massachusetts law while those with 20 or more, covered by federal COBRA, will not.

Goodridge also raises complicated issues relating to so-called "cafeteria plans" and income tax withholding requirements. Cafeteria plans allow employees to purchase certain benefits for themselves and their families (such as health and childcare) with before-tax dollars through payroll deduction. Because cafeteria plans are a creation of federal law,[20] employers are not required to offer to same-sex spouses the benefits they offer to opposite-sex spouses. In fact, the Internal Revenue Service may well determine, based on the DOMA, that to allow employees to use such a plan on behalf of same-sex spouses would cause all contributions to the plan to become taxable.

As to income tax, while the value of a same-sex spouse's insurance benefits paid by an employer maintaining a family plan is excludible from an employee's gross income for Massachusetts tax purposes, it must be included for federal purposes and proper withholding must be taken by the employer. Similarly, payments made by an employee for a spouse's coverage are deductible by the employee under state income tax law and are not deductible under federal law.[21]

RETIREMENT PLANS

The *Goodridge* decision does not generally affect retirement plans because these are covered by the federal ERISA law. Employers may, however, choose to extend some, but not all, rights and benefits to same-sex married spouses or former spouses as "spouses" under their plans. Three types of rights and benefits may not be extended. First, a domestic relations order (a so-called "QDRO") extending retirement benefits to a former spouse is not valid to require an ERISA retirement plan to transfer benefits to a same-sex former spouse. Second, a same-sex spouse cannot roll over a deceased spouse's benefits to an IRA or other qualified retirement plan. Third, certain types of distributions (the "joint and survivor annuity" and the "preretirement survivor annuity") are not available to same-sex spouses.[22]

FMLA

The *Goodridge* decision does not affect coverage under FMLA and employers are not required to allow employees to take leaves to care for same-sex spouses. An employer may do so if it wishes. If an employer does allow such leaves, it may create something of a Catch-22. FMLA requires that an employer provide its employees with one leave, up to 12 weeks in length, in each 12-month period. An employee in a same-sex marriage who is allowed a leave to care for a spouse would be able to take that non-FMLA leave *and* a FMLA leave (for any purposes

set forth in the statute), both in the same 12-month period. An employee in an opposite-sex marriage, however, would not be entitled to two leaves. This result could well be considered discriminatory to heterosexual couples, who are also legally protected in Massachusetts based upon their sexual orientation. Thus, some attorneys representing employers have advised their clients not to extend family leaves to same-sex married employees who request leave to care for a spouse unless they wish to allow employees in heterosexual marriages to take two leaves in a 12-month period.[23]

INTERNAL COMPANY POLICIES

Benefits not mandated or governed by federal law must, in Massachusetts, be provided to same-sex married employees just as they are provided to other married employees. Thus, policies such as bereavement and adoption leaves will have to be clarified to comply with this requirement. Additionally, the Massachusetts Small Necessities Leave Act,[24] allowing short leaves for specified purposes such as parent-teacher meetings, children's medical appointments and to provide for elderly relatives, will cover same-sex married employees and their spouses.

RECOMMENDED GENERAL APPROACHES

Massachusetts employers will have to make a number of decisions concerning benefit coverage.

While some benefits will be mandated by state law and others prohibited by federal law, still others may be provided or not within the employer's discretion. These latter benefits include COBRA-like extension of insurance benefits, benefits under self-funded insurance plans, spousal rights under retirement plans, and FMLA-like leaves to care for spouses with serious medical conditions. Employers that now allow benefit coverage for employees in domestic partnerships must decide whether to revoke it, grandfather current employees in such relationships, or continue prior practice. Some Massachusetts employers are recognizing domestic partnerships only if the partners are prohibited by state law from marrying.[25]

In making decisions about benefit coverage, Massachusetts employers with employees in states other than Massachusetts will have to consider the effects of such policies on non-Massachusetts employees and whether uniformity is needed. Employers must be aware that if they recognize same-sex domestic partnerships for benefit purposes in Massachusetts and any state where sexual orientation is a protected class, opposite-sex domestic partnerships must also be recognized. In deciding whether to extend benefit coverage to domestic partners, employers may also want to consider that despite *Goodridge,* Massachusetts same-sex couples are not as free to marry as heterosexual couples. If they wish to be a part of the armed forces or the reserves, they will be ineligible. Also, some countries will not allow known homosexuals to adopt children born in those countries. Finally, employers must consider, before denying partner benefits once allowed, that there may be contractual or quasi-contractual obligations to employees in place that would prohibit such a change.

Employers must also be sure to amend their written policies and handbooks to comply with *Goodridge* and to set forth with clarity their benefit coverage allowances. ERISA plans will have to be reviewed, amended and new summary plan descriptions distributed.[26]

OPEN ISSUES

Like most vast changes in the law, *Goodridge* leaves open nearly as many questions as it answers.

First, as stated earlier, a provision of the Massachusetts marriage licensing law prohibits municipal clerks from licensing marriages to out-of-state citizens where the marriage would be unlawful in their home state.[27] This statute was enacted primarily to prohibit interracial marriages. It had not been enforced for almost a century until it was ordered enforced post-*Goodridge* by the Massachusetts executive branch. Two cases (one brought by out-of-state couples and one by a number of municipal clerks)[28] are pending in Massachusetts challenging the application of this law on, *inter alia*, equal protection and statutory antidiscrimination grounds. Their ultimate outcome will affect whether employers, both in Massachusetts and elsewhere, will be required to honor Massachusetts same-sex marriages of residents of states other than Massachusetts.

Further, the question is open as to whether an employer outside of Massachusetts must honor a Massachusetts marriage of an employee, whether the employee was a Massachusetts resident at the time of the marriage or not. The few cases decided on similar issues lead to the conclusion that the result will depend on whether the home state precludes recognition of same-sex marriage. If so, the marriage will not be honored. If not, the courts in that state may well honor it.[29]

For example, a New York trial court has ruled that a Vermont spouse in a civil union may maintain a suit in New York for wrongful death as a "spouse" under New York estate law.[30] This case is on appeal to the New York Appellate Division. New York does not have a DOMA. The Vermont Attorney General has stated that Massachusetts same-sex marriages will be treated as civil unions in Vermont.[31]

In contrast, in *Rosegarten v. Downes*,[32] a same-sex couple in a Vermont civil union was not permitted to divorce in Connecticut. Here, the decision was based upon the determination that a civil union is not a "marriage" under the Connecticut divorce statute. The rule may be different as to Massachusetts marriages, which are indeed "marriages."

In Opinion No. 04-066, Office of the Attorney General, State of Tennessee,[33] the Tennessee Attorney General opined that Tennessee precludes recognition of civil unions as marriages in Tennessee. And in *Burns v. Burns*,[34] the Georgia appellate court refused to recognize a Vermont civil union as a legal marriage and stated that even if it were a marriage it would not be recognized in Georgia.

Open questions exist as well as to whether state DOMAs or the federal DOMA pass constitutional muster. This issue is certain to be the subject of litigation. DOMAs are subject to challenge on equal protection grounds and may be deemed to violate the Full Faith and Credit Clause. As to the federal DOMA, it is arguable that the DOMA federalizes domestic relations law and this type of regulation of marriage is not within the power of Congress.[35]

In the event the Massachusetts constitutional amendment is voted on favorably in 2006 or thereafter, the question is open as to the status of Massachusetts same-sex marriages that have been previously licensed. A state constitutional amendment invalidating previously performed marriages would in all likelihood violate the United States Constitution as it would impair the marriage contracts between married same-sex couples.[36]

CONCLUSION

The post-*Goodridge* era is just beginning. With it have come new obligations on the part of employers to provide benefits to the workforce. These obligations may extend

well past the geographical boundaries of the Commonwealth of Massachusetts. Additionally, difficult decisions will have to be made by employers and employees as *Goodridge* is implemented. They and their counsel are cautioned to approach such decisions armed with a thorough understanding of *Goodridge*'s legal implications. They would also be wise to stay abreast of the near daily legislative and court actions affecting *Goodridge*-based legal rights and obligations.

NOTES

1. 440 Mass. 309 (2003).

2. Mass. Gen. Laws Ann. ch. 207.

3. 440 Mass. at 331.

4. In Re Opinions of the Justices, 440 Mass. 1201 (2004).

5. *Id.* at 1210–1211 (Sosman, J., dissenting).

6. *Id.* at 1208.

7. A proposed legislative amendment to the Massachusetts Constitution must receive the affirmative vote of a majority of members of both the House and Senate at two consecutive constitutional conventions. Thereafter, it is submitted to the voters at the next state election and will become part of the Constitution if it is approved by a majority of the voters voting in the election. This amendment received a slim majority favorable vote in 2004, will be considered again in 2006, and, if approved, will be put to the voters in November 2006.

8. Cote-Whitacre v. Department of Public Health and Johnstone v. Reilly, SUCV2004-02656. The trial court denied injunctive relief in both cases and appeals are pending.

9. VT Stat. Ann., Tit. 15 §§ 1201–1207.

10. West. Ann. Cal. Fam. Code §§ 297-299.6; Haw. Rev. Stat. §§ 572C1-7; N.J. Rev. Stat. § 26:8a-1-7.

11. 1 U.S.C. § 7.

12. U.S. Const., Art. IV, § 1.

13. 28 U.S.C. § 1738C. A New York trial court has questioned, in dicta, whether the DOMA violates the Full Faith and Credit Clause of the United States Constitution. Langan v. St. Vincent's Hospital of New York, 765 N.Y.S.2d 411 (Sup. 2003).

14. 28 U.S.C. § 2601 et. seq.

15. 29 U.S.C. § 1161 et. seq.

16. 29 U.S.C. § 1001 et. seq.

17. 29 U.S.C. § 1181(f).

18. 29 U.S.C. § 1144.

19. Mass. Gen. Laws Ann. ch. 176J, § 9.

20. 26 U.S.C. § 125.

21. If, however, the spouse or the spouse's children qualify as dependents under IRC § 152, the result would be different under federal law and such benefits would not generally be taxable. IRC § 152. To the extent opposite-sex married taxpayers may exclude from income or deduct payments on behalf of a spouse's children, a same-sex married taxpayer may now do so for state tax purposes.

Under Massachusetts law, marital status is determined as of the close of the taxable year and applied during the entire year. Mass. Gen. Laws Ann. c. 62, § 1(g). Commonwealth of Massachusetts Technical Information Release 04-17 (July 7, 2004).

22. 26 U.S.C. §§ 401, 414 and 29 U.S.C. §1055.

23. This strategy may not even solve the problem. It may be considered a violation of Mass. Gen. Laws Ann. c. 151B, § 4, which prohibits discrimination on the basis of sexual orientation, to provide FMLA leave to an employee to care for an opposite-sex spouse and not to provide a leave to a same-sex employee to care for his or her spouse. The more sound argument is that any failure to provide a leave to a same-sex employee to care for a spouse is not discriminatory because leaves to employees married to those of the opposite sex are provided only as far as mandated by federal law.

24. Mass. Gen. Laws Ann. ch. 149, § 52D.

25. Included would be Massachusetts employees with partners who reside out-of-state and employees who either commute to Massachusetts from out-of-state or work for Massachusetts companies from homes that are outside of Massachusetts.

26. 29 U.S.C. §§ 1021, 1022, 1024, 1029.

27. Mass. Gen. Laws Ann. ch. 207, § 11.

28. *See* note 8.

29. Of course, the DOMA, 28 U.S.C. § 1738C, specifically gives states the option not to honor such marriages. This statute may violate Article IV, Sec. 1, the Full Faith and Credit Clause.

30. Langan v. St. Vincent's Hospital of New York, 765 N.Y.S.2d 411 (Sup. 2003).

31. The Boston Globe, May 20, 2004.

32. 71 Conn. App. 372, 802 A.2d 170 (2002).

33. 2004 WL 1009389 (2004).

34. 253 Ga. App. 600, 560 S.E.2d 47 (2002).

35. For a comprehensive, if one-sided, analysis of the constitutionality of the federal DOMA, *see* "Is DOMA Doomed?" a paper issued by the Gay & Lesbian Advocates & Defenders (GLAD) and found at its Web Site, *www.glad.org*. GLAD represented the Goodridge plaintiffs and is counsel to the out-of-state same-sex couples in Cote-Whitacre v. Department of Public Health.

36. U.S. Const., Article I, § 10.

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