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Massachusetts Same-Sex Marriage Ruling Create Groundbreaking Issues in the Workplace

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SThe Massachusetts Supreme Judicial Court's decision in Goodridge v. Department of Public Health, 440 Mass. 309 (2003), has not only created a political hornet's nest, but has produced many groundbreaking legal issues. Prominent among them are questions concerning how the new law must be implemented in the workplace.

Goodridge mandated that, as of May 17, same-sex couples were permitted to marry. While an amendment to the Massachusetts Constitution nullifying the decision is under consideration by the state Legislature, such an amendment would not take effect until 2006 at the earliest.

It remains to be litigated how Massachusetts marriages will be treated in other states and whether Massachusetts marriages of non-residents will be deemed valid.

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

The ruling will require all employers with employees in Massachusetts to:

make important decisions as to how broadly they want to 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.

By the same token, committed same-sex couples deciding whether to marry will have to consider what effect their decisions will have on employee benefits, 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 1996 federal Defense of Marriage Act 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. Put simply, federal law does not recognize same sex marriages.

Federal law 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, COBRA and ERISA, for example, will 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?

Health And Dental Insurance

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 for health and dental insurance purposes the same as opposite sex married employees unless an employer has a self-funded plan. 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, spouses, and divorced spouses of employers with 20 or more employees,

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does not apply to same-sex married persons. An employer may decide as a policy matter whether to cover same-sex partners. Employers should not cancel partner coverage provided to those now receiving benefits without reviewing such a decision with counsel.

Massachusetts also has a "mini-COBRA" law containing requirements similar to the federal law. Employers with fewer than 20 employees will now be required to provide continuation coverage to same-sex married couples.

Goodridge also raises complicated issues relating to so-called "cafeteria plans" and income tax withholding requirements. Cafeteria plans allow employees to purchase benefits with before-tax dollars through payroll deduction.

Since cafeteria plans are a creation of federal law, employers do not have to offer the same benefits to same-sex spouses as they do to opposite sex spouses. In fact, some authorities have opined that to allow employees to use these plans on behalf of same-sex spouses would cause all contributions to the plan to become taxable.

Moreover, while the value of a same-sex spouse's health insurance paid by the 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 taken. Similarly, payments made by an employee for a spouse's coverage are deductible under state income tax law and not deductible under federal law.

All changes to these plans must be accompanied by appropriate notices to employees and revised ERISA summary plan descriptions, where required.

Retirement Plans

The Goodridge decision does not affect retirement plans. Employers may, however, choose to extend some, but not all, rights and benefits to same-sex married spouses as "spouses" under their plans.

FMLA

The Goodridge decision does not affect the Family Medical Leave Act and employers are not required to allow employees to take leave to care for same-sex spouses. An employer may do so if it wishes.

Such an employer should note that an employee in a same-sex marriage would be able to take FMLA leave and a non-FMLA leave to care for a same-sex spouse, both in the same 12-month period while an employee not in a same-sex marriage would not be entitled to two leaves. This may be considered discriminatory to heterosexual couples, who are also protected based upon their sexual orientation.

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, allowing short leaves for specified purposes, will cover same-sex married employees and their spouses.

Recommended General Approaches

In summary, Massachusetts employers will have to make a number of decisions concerning benefit coverage. It is likely that employers in other New England states will have to do the same. The Vermont Attorney General has stated that Vermont will probably treat these Massachusetts marriages as civil unions. Maine has a state Defense of Marriage Act, so same-sex marriages will likely not be recognized there, but the issue is unclear in the other New England states.

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. Employers that now allow such coverage for employees in domestic partnerships must decide whether to revoke it, grandfather current employees in such relationships, or continue prior practice.

Some employers are recognizing domestic partnerships only if the partners are prohibited by state law from marrying. In making such decisions, employers with employees in states other than Massachusetts will have to consider the effect of such policies on non-Massachusetts employees and the need for uniformity.

Additionally, there may be contractual or quasi-contractual obligations to employees in place that would prohibit such a change. Finally, if an employer recognizes same-sex domestic partnerships for benefit purposes in Massachusetts after May 17, opposite sex domestic partnerships will also have to be recognized. NEIH