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Same-Sex Marriage Rights Scheduled to Take Effect in the Commonwealth of Massachusetts on May 17, 2004.

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Same-Sex Marriage Legal in Massachusetts — What Does This Mean For Employers In And Outside of The Commonwealth of Massachusetts?

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The Goodridge Decision And Legislative Aftermath

On November 18, 2003, in the landmark decision of *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), the Massachusetts Supreme Judicial Court ruled that excluding same-sex couples from civil marriage violates the Commonwealth's constitutional due process and equal protection clauses. The court went on to define marriage in Massachusetts as "the voluntary union of two persons as spouses to the exclusion of all others" — thereby legalizing same-sex marriages in Massachusetts. The court allowed the state legislature 180 days to bring marriage and other statutes into line with the court's decision.

Subsequently, on March 29, 2004, the state legislature passed a proposed amendment to the Massachusetts Constitution that would simultaneously define marriage as a union between a man and a woman and provide civil union benefits to same-sex couples. However, such an amendment will take at least two years to pass through the legislature and would require ratification by the general electorate sometime in 2006, at the earliest, if it makes it that far in the legislative process.

Barring the imposition of a court ordered stay on the Goodridge decision, which many view as unlikely, on May 17, 2004, same-sex couples, meeting all other eligibility requirements, will be entitled to apply for and obtain marriage certificates within the Commonwealth of Massachusetts. While the entitlement of same-sex couples to marry in Massachusetts is clear, what this decision means for Massachusetts and out-of-state employers in administering their employment policies and benefits plans, remains far from clear.

Effect On Massachusetts Employers

As a result of the Goodridge decision and its conflict with federal law on the definition of marriage, described below, Massachusetts employers may soon find it difficult to administer employment benefits and policies. While it remains to be seen how many questions will be answered, the following areas are certain to raise complicated administrative issues for employers within Massachusetts.

Benefits To Same-Sex Spouses

Federal Law

Whatever the resolution in Massachusetts (and California, New York, Oregon and other localities that have recently permitted, legally or illegally, same-sex marriages to occur), the federal law is unchanged. In 1996, the United States Congress passed the Defense of Marriage Act ("DOMA"). Under DOMA, the word "marriage," as used in any federal statute, ruling or regulation, or interpretation of federal agency, means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. As a result, inside and outside of Massachusetts, same-sex marriages are simply not recognized as "marriages" and same-sex couples do not qualify for "spousal" benefits under federal laws. Federally regulated employment benefits include retirement plans and self-insured health and dental plans. However, employers are reminded that nothing in many federal laws prevents employers from voluntarily providing more generous benefits than required by federal law. Thus, in many cases, employers are permitted, but not obligated, to extend federal benefits to same-sex spouses.

Tax Implications

Federally regulated employment benefits also include an employee's use of pre-tax dollars to pay for certain benefits, like spousal health insurance premiums. However, as noted above, DOMA permits only opposite-sex marriages for federal purposes. Thus, under DOMA, same-sex couples in Massachusetts will not be able to use pre-tax dollars to pay for premiums associated with spousal coverage. Moreover, same-sex couples will be taxed on the imputed value of same-sex spousal benefits.

ERISA Preemption

In general, the Employee Retirement Income Security Act ("ERISA") preempts state laws regarding employer-sponsored benefits plans. Since DOMA permits only opposite-sex spouses for federal purposes (including ERISA), the legalization of same-sex marriages in Massachusetts will not grant spousal rights and benefits to same-sex spouses under ERISA retirement or welfare plans, or COBRA coverage stemming from ERISA welfare plans.

State Law

Although insurance plans are considered welfare plans under ERISA, the "insurance savings clause" exception to ERISA preemption allows Massachusetts to regulate group insurance plans issued within the Commonwealth. As a result, employers participating in group health and dental insurance plans will be legally required to extend spousal coverage to same-sex spouses of employees participating in such plans within Massachusetts. Under the state's "Mini-COBRA" law (which regulates insurance companies), employers may not be required to provide coverage to same-sex spouses, but should consider offering coverage anyway, to avoid liability.

Leave And Other Employer Policies

As discussed above, under DOMA, FMLA benefits need not be provided to same-sex spouses. However, for all state-created benefits, as of May 17, 2004, employers must recognize same-sex marriages and provide same-sex spouses the full range of employee benefits provided to opposite-sex spouses. This includes leave under the Massachusetts Small Necessities Leave Act, which provides 24 hours of leave per year for school activities and medical appointments for certain relatives (by blood or marriage). To be on the safe side, within Massachusetts all leave and other policies should be implemented in the same manner for same-sex spouses as for

other married employees. Massachusetts employers should review all of their policies carefully, paying particular attention to definitions within those policies, to ensure that benefits provided on the basis of marital status are provided to employees married to same-sex spouses.

In addition, employers should understand the differences between domestic partnership and same-sex marriage (domestic partnership is not marriage; it is an alternative to marriage), and resolve potential conflicts between existing domestic partner programs and spousal entitlements. For example, a domestic partner policy may extend eligibility to those who are living in a committed relationship but are denied the legal right to marry. Under this definition and the Goodridge decision, unmarried domestic partners will no longer qualify for these domestic partner benefits. Employers who maintain these types of programs should decide whether 1) to terminate existing programs and thereby compel same-sex domestic partners to legally marry to qualify as a "spouse" under existing benefit programs; or 2) to modify existing domestic partner programs to expand the eligibility criteria; and 3) whether a "grandfathering" provision is appropriate in the latter case.

Employment Discrimination Laws

Chapter 151B of the Massachusetts General Laws prohibits employers from discriminating based on age, disability, race, color, religious creed, national origin, sex, sexual orientation, genetic information or ancestry. Notably, the statute does not recognize marital status as a protected class. However, denial of employment benefits to same-sex couples married after May 17, 2004 may give rise to claims of sexual orientation discrimination, to the extent the same benefits are provided to heterosexual married couples. The Massachusetts Commission Against Discrimination is likely to expand its protection against sexual orientation discrimination to same-sex married couples to include the denial of other benefits as well, such as application of employer's leave policies. Employers need to be wary of this new potential theory of discrimination, as well as the comments of managerial and human resources personnel, when discussing the same-sex marriage issue and administering benefits and policies.

Out-Of-State Recognition Of Same-Sex Marriages Conducted In Massachusetts

The federal DOMA exempts states from being forced to recognize same-sex marriages from other states. In addition, no fewer than 38 states have enacted "defense of marriage" laws ("mini-DOMAs") that explicitly prohibit the recognition of marriages between same-sex partners. As a result, within states prohibiting recognition of same-sex marriages, state-sponsored benefits will not be extended to same-sex couples married in Massachusetts and employers will most likely be able to legally deny employment benefits to same-sex spouses of employees married in Massachusetts. For example, despite extensive domestic partner legislation and recent events in San Francisco, state law in California does not recognize same-sex marriages. Thus, a same-sex marriage from Massachusetts will not trigger the right to spousal benefits in California. However, Massachusetts' recognition of same-sex marriages lays the foundation for much anticipated legal challenges to DOMA and state equivalents, on constitutional and other grounds.

For employers operating in states without a mini-DOMA, and particularly those states prohibiting discrimination on the basis of marital status and/or sexual orientation, the impact of the legalization of same-sex marriages within Massachusetts becomes far more complicated. There is no sure answer as to whether such an out-of-state employer is obligated to recognize same-sex spouses married in Massachusetts.

Notably, Massachusetts has a law from 1913 that prohibits non-residents from marrying in Massachusetts if they are prohibited from marrying in their home state. However, whether that law will be utilized to prevent out of state same-sex couples from marrying in Massachusetts, and whether such a prohibition would constitute sexual orientation or some other form of discrimination under the Commonwealth's anti-discrimination statutes, remains to be seen. It is also unclear whether states other than Massachusetts will use this law to deny recognition, rights and benefits to their same-sex residents who marry in Massachusetts.

State Domestic Partnership And Civil Union Laws

Many states have attempted to extend legal benefits to same-sex couples by creating a new

legal status with separate entitlements. For example, Vermont enacted a civil union law that allows same-sex couples to participate in many state benefits. And as mentioned above, California has passed an elaborate web of domestic partner laws. For information about California's Domestic Partners Laws, please refer to the recent Littler ASAP entitled "Same-Sex Marriage Adds to Employers' Challenges under New California Domestic Partner Laws" available at www.littler.com. For more information about concerns arising from these state laws, we recommend that you contact a Littler attorney in the office nearest you.

What Should Employers Do?

The legal issues surrounding same-sex marriages, civil unions and partner benefits are evolving daily. Whether personally in favor of, or against, extending these types of benefits to same-sex couples, employers and human resources personnel administering employment policies must inform themselves of the changes in the law and administer their policies and benefits in a non-discriminatory manner that complies with current state and federal law. At a minimum, we recommend that every employer, in and outside of Massachusetts, do the following:

- Consult an attorney to obtain information about the status of the law in the states in which the company has employees;
- Consult with insurance carriers to determine availability and cost of coverage for same-sex spouses; and
- As legal events evolve, regularly review all employment benefits and policies to ensure that definitions of "spouse" are consistent with and conform to current applicable federal and state law.

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