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An update on nationwide same-sex marriage and domestic partnership laws, rights, and employer obligations.

Still Tied in Knots: An Employer Update On Same-Sex Marriage And Domestic Partner Issues

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Across the nation, the legal landscape for domestic partnerships and same-sex marriage keeps changing. Massachusetts authorizes same-sex marriages, but judicial challenges to state marriage laws are pending in other states. Connecticut has joined Vermont in extending civil unions to same-sex couples. Other states have enacted domestic partnership laws. These developments continue to raise new questions for employers about their legal obligations. The following is an update for employers on the current status of the law.

Massachusetts Marriage Decision

For the past year, Massachusetts has allowed same-sex marriages as a result of a decision by that state's highest court. It is the only state that presently allows same-sex marriages. Massachusetts voters may, however, face a proposed constitutional amendment to undo the 2003 ruling. The amendment would convert same-sex marriages to civil unions, with the same rights as marriage. The measure passed the Massachusetts Legislature last year, but must be approved again this year before it can go to voters.

California Marriage Decision

In California, proponents of same-sex marriage have sued to expand the state's marriage law. The San Francisco Superior Court ruled in March that California's marriage law violates the California Constitution by not allowing same-sex marriages. That decision has been stayed pending appeal to the California Court of Appeal. Meanwhile, there are efforts by opponents to amend the California Constitution to moot the case.

Marriage Decisions in Other States

Courts in other states also issued decisions on same-sex marriage recently. In April, the Oregon Supreme Court held that same-sex marriage licenses issued in 2004 by Multnomah County were void. The court held that a local county had no authority to issue the licenses without a judicial determination that the state's marriage laws are unconstitutional. A 2004 constitutional amendment in Oregon bars same-sex marriage.

The Washington Supreme Court recently heard arguments in a case challenging Washington's marriage law, which limits marriages to a union between a man and a woman. A decision is pending. Several trial courts in New York State have reached different decisions regarding the constitutionality of New York's marriage law, which contains a similar limitation; appeals are pending. Appellate courts in Indiana and Arizona have rejected challenges to those states' marriage laws that are likewise limited to opposite-sex marriages.

Connecticut Recognizes Civil Unions

In a significant development, Connecticut has enacted a civil union law effective October 1, 2005. It allows same-sex couples to enter into civil unions as an alternative to marriage. Under the new law, couples in civil unions "shall have all the same benefits, protections and responsibilities under law... as are granted to spouses in a marriage." The law did not include any provisions specifically concerning employment. Vermont is the only other state with a civil union law.

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California's Domestic Partner Law Upheld

In April, the California Court of Appeal rejected a challenge to the state's domestic partner law. AB 205 redefined "spouse" under California law to include domestic partners registered with the California Secretary of State. The law extends most of the rights and obligations applicable to spouses under California law.

Opponents claimed that California's law violates Proposition 22, a measure approved by California voters in 2000 to bar same-sex marriage in the state and the recognition of same-sex marriages from other jurisdictions. In rejecting the challenge, the California Court of Appeal held that "the Legislature has not created a 'marriage' by another name or granted domestic partners a status equivalent to married spouses."

California first enacted a domestic partner law in 1999. It incrementally expanded the law, culminating in AB 205. Through the end of 2004, 25,525 couples registered as domestic partners with the California Secretary of State. In 2005, AB 205 extended community property law to domestic partnerships, along with other incidents associated with marriage. In 2004, more than 2,500 couples terminated their domestic partnerships, including 1,188 in the month before AB 205 took effect.

Recognizing Marriages and Domestic Partnerships from Other States

Massachusetts and several Canadian provinces allow same-sex marriage. The federal Defense of Marriage Act does not recognize same-sex marriages under federal law. Most states also have laws refusing to recognize same-sex marriages from elsewhere.

Most states do not have provisions recognizing domestic partnerships or civil unions from elsewhere. But California recognizes a legal relationship from another state that is a "legal union of two persons of the same sex, *other than a marriage*" and "substantially equivalent" to a California domestic partnership. While California will not recognize Massachusetts same-sex marriages, it most likely would recognize civil unions from Vermont and Connecticut because those states' laws provide for the same rights and responsibilities of marriage. It remains uncertain whether the same recognition would apply to domestic partnerships from New Jersey or "reciprocal beneficiaries" from Hawaii, as neither state provides rights that are as extensive.

Update on the Benefits Landscape for Employers

California: California's domestic partner law, AB 205, does not require private employers to provide benefits to registered domestic partners of employees, where the benefits are derived from non-statutory or regulatory sources, such as employer policies. In contrast, AB 17, which will go into effect in 2007, amends the public contract law to prohibit employers who contract with the State of California to sell goods or services valued at \$100,000 or more annually from discriminating between domestic partners and spouses in the provision of benefits.

AB 205 requires equal treatment of spouses and domestic partners where rights or benefits are derived from law. For private employers, this means:

- Family leave under the California Family Rights and Responsibilities Act (CFRA) must now be extended to time off for the illness of the employee's domestic partner.
- California's mini-COBRA law, Cal-COBRA, will now apply to domestic partners as well as spouses. Cal-COBRA covers small employers (two to 19 employees) below the federal COBRA threshold. Cal-COBRA requires insurers and HMOs to provide continued health coverage to the employee's eligible "dependents," defined as the employee's spouse and children.

AB 205 has a broader effect on the benefit programs of public employers. The law provides that public agencies may not discriminate on the ground that a person or couple are registered domestic partners rather than spouses. Public employers accordingly are required to treat their employees' domestic partners the same as similarly-situated spouses for benefits purposes, including health and retirement plans. While ERISA, a federal law, would preempt application of AB 205 to pension or welfare plans maintained by private employers, ERISA does not apply to the benefit plans of state and local governments.

Other California legislation, AB 2208, the California Insurance Equality Act, does affect the insured plans of private employers. AB requires health care service plans (HMOs) and insurers providing hospital, medical or surgical benefits or coverage to provide coverage for domestic partners equal to that provided to spouses. Issuers of other types of insurance must also cover domestic partners to the same extent as spouses. AB 2208 applies to health policies or contracts issued, amended, delivered or renewed effective on or after

January 2, 2005. It applies to other types of insurance effective with policies issued, amended, delivered or renewed on or after January 1, 2005. Although it purports to regulate only insurers and HMOs, AB 2208 indirectly requires insured employer-sponsored plans to provide domestic partner coverage equal to spousal coverage.

AB 2208 does not apply to self-insured plans under which employers reimburse medical expenses of covered individuals. Likewise, it does not apply to continuation coverage under federal COBRA, even for insured plans. AB 2208 expressly provides that is not intended to alter any rights and obligations under federal COBRA law. There is no federal COBRA coverage for domestic partners.

Connecticut: Under the new Connecticut civil union law, the parties to a civil union have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses. Similar to AB 205 in California, the Connecticut civil union law will require parties to a civil union to be treated like married couples for purposes of benefit policies and plans created by law or regulation for public employees. The law will not require private employers to extend benefits to parties to a civil union.

Like California, Connecticut has a mini-COBRA law. That law will require employer plans — at least those not subject to federal COBRA — to provide continuation coverage to civil unions on the same basis as similarly-situated marriages.

Outlook for Further Future Developments

Although it is not possible to predict their outcome, what is certain is that legal challenges to both existing marriage laws and efforts to expand marriage or equivalent rights to same-sex relationships will continue to be raised and fought on the State level. It therefore remains critical for employers to keep themselves apprised of the ongoing legal developments in this area.

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