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The U.S. District Court for the Northern District of California has ruled following a bench trial that California Proposition 8 barring same sex marriages is unconstitutional. Following an appeal filed with the Ninth Circuit, same sex marriages in California are still on hold. However, with changes in other states recognizing same-sex marriages, it is important for employers to continue to monitor developments in this and related cases.

California Proposition 8 Barring Same-Sex Marriage Ruled Unconstitutional – What the Ruling Means for Employers

By Nancy L. Ober

On August 4, 2010, Chief Judge Vaughn Walker of the United States District Court for the Northern District of California issued an order permanently enjoining enforcement of Proposition 8, a voter initiative that amended the California Constitution that stated, "Only marriage between a man and a woman is valid or recognized in California." The court's order followed a trial in a case brought by two same-sex couples who claimed that Proposition 8 violated the United States Constitution. The district court agreed, ruling that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. The case is *Perry v. Schwarzenegger*.

While other courts have ruled on the constitutionality of laws prohibiting same-sex marriage, *Perry v. Schwarzenegger* is unique because the ruling came after a full trial in which the plaintiffs and the proponents of Proposition 8 presented evidence in support of their respective positions. The Governor and the Attorney General of California declined to defend Proposition 8. In the absence of any governmental defender, that role fell to a group of five private individuals and one organization that led the Proposition 8 campaign, and were allowed to intervene in the court proceeding.

In a subsequent order issued on August 12, 2010, the court declined to stay its order while the proponents of Proposition 8 pursue an appeal in the Ninth Circuit Court of Appeals, expressing doubt that the proponents even have standing under Article III of the Constitution to appeal if the governmental defendants do not, because standing requires a showing that the proponents have suffered an injury as a result of the court's injunction against Proposition 8 – a showing that the proponents have not made. (The proponents were not required to demonstrate that they had constitutional standing in order to intervene in the case.) On August 16, 2010, the Ninth Circuit granted a stay thus delaying same-sex marriages in California at least until the week of December 6, 2010, when the Ninth Circuit has ordered the case

to be calendared for a hearing. The Ninth Circuit has specifically requested that the proponents of Proposition 8 demonstrate why they have standing to pursue an appeal.

Background to Proposition 8

The court's decision holding Proposition 8 unconstitutional is the latest development in a 10-year struggle over same-sex marriage in California. In November 2000, California voters passed Proposition 22, an initiative that amended the California Family Code by providing that only marriage between a man and a woman is valid or recognized in California. In February 2004, San Francisco officials began issuing marriage licenses to same-sex couples. The California Supreme Court ordered the city to stop issuing such licenses in the absence of a judicial determination that Proposition 22 was unconstitutional. The court further ordered that the licenses that were issued and the marriages that were performed were null and void. In May 2008, the California Supreme Court held in *In Re Marriage Cases* that Proposition 22 violated the California Constitution by denying same-sex couples the fundamental right to marry and the equal protection of the laws and ordered local officials to issue marriage licenses to same-sex couples.

In November 2008, the voters passed Proposition 8, which became effective immediately and ended same-sex marriage in California. Opponents immediately challenged the initiative in the California Supreme Court, arguing that Proposition 8 violated the rules for amending the constitution. In May 2009, the California Supreme Court upheld the constitutionality of Proposition 8, but did not nullify the 18,000 same-sex marriages that took place between its May 2008 ruling and the passage of Proposition 8.

The Federal Court's Ruling on Proposition 8

The federal district court based its decision holding Proposition 8 unconstitutional on an extensive trial record, including the testimony of both expert and lay witnesses for both sides. In its decision the court made extensive findings of fact, including findings regarding the history of marriage in the United States. For example, the court found that marriage in the United States has always been a civil, not a religious matter; that marriage requires two parties to give their free consent to form a relationship; that neither California nor any other state has ever required willingness or ability to procreate as a condition of marriage; that laws formerly restricting an individual's choice of marriage partner due to race have been deemed unconstitutional; and that California has eliminated marital obligations based on the gender of the spouse, including coverture, in which a woman became legally and economically subservient to her husband upon marriage.

The court also found that same-sex couples are no less able to form successful marital unions than opposite-sex couples; that California law permits gays and lesbians to become parents through adoption, foster parenting and assistive reproductive technology; that domestic partnerships – which California has made available to same-sex and some opposite-sex couples since 1999 – do not provide gays and lesbians with a status equivalent to marriage; that permitting same-sex couples to marry will not affect the number of opposite-sex couples who marry, divorce or have children or the stability of opposite-sex marriage; that Proposition 8 has a negative fiscal impact on state and local governments by imposing costs such as loss of tax revenue, higher use of means-tested programs provided by the state, and higher costs for health care for uninsured same-sex partners; that children do not need to be raised by a male parent and a female parent to be well-adjusted; that gays and lesbians have been victims of a long history of discrimination and stereotypes; and that the Proposition 8 campaign relied on fears and stereotypes.

The court concluded that Proposition 8 violates the fundamental right to marry and to choose one's marital partner regardless of gender that is protected by the Due Process Clause. The court concluded that gender is no longer an essential part of marriage, and that the plaintiffs were not seeking recognition of a new right, but the same right that opposite-sex couples enjoy, to marry. The court ruled that the availability of domestic partnerships under California law does not satisfy the requirements of due process because domestic partnerships do not have the same social meaning and were created solely to differentiate same-sex unions from marriage.

The court also concluded that Proposition 8 violates the Equal Protection Clause, even under the most deferential standard of review, which requires that a law creating a classification be rationally related to some legitimate government interest. It found that Proposition 8 targets gays and lesbians due to their sexual orientation and due to their relationship to one another, their sex, but does not advance any legitimate governmental interest. The court concluded that Proposition 8 was premised solely on a “private moral view” that opposite-sex couples are morally superior to same-sex couples, and that such a view is not a rational justification for denying rights to gays and lesbians.

Implications for Employers

The court’s ruling is likely to have limited effect on employers so long as federal law does not recognize same-sex marriage. California law already extends the same rights and obligations to registered domestic partners as to spouses, including, for example, the right to take family leave due to the serious illness of a domestic partner. AB 2208, which became effective in 2005, requires health and other insurance issuers to provide equal coverage for registered domestic partners and spouses. If same-sex couples who did not already have coverage as domestic partners under insured plans are able to get married under state law and seek coverage as spouses, this will result in a net gain in same-sex couples receiving coverage. However, self-insured health plans and retirement plans that are subject to federal law, ERISA, would not be required to extend benefits to same-sex spouses so long as the federal Defense of Marriage Act (DOMA) limits federally recognized marriage to the union of one man and one woman. As in the case of domestic partners, health benefits provided to same-sex spouses would be taxable under federal law (but not under California law).

Legal Challenge to DOMA

DOMA itself was recently declared unconstitutional in two cases decided by the federal district court of the District of Massachusetts on July 8, 2010 (*Gill v. Office of Personnel Management and Commonwealth of Massachusetts v. United States Department of Health and Human Services*). The court held that Section 3 of the statute, defining marriage to exclude same-spouse spouses, violates the equal protection clause of the Fifth Amendment, imposes an unconstitutional condition on the receipt of federal funding and interferes with state regulation of marital status, an attribute of state sovereignty. If affirmed on appeal, the decisions would extend federal law spousal benefits to same-sex spouses and allow same-sex spouses to receive employer-provided health benefits tax-free.

Same-Sex Marriage in Other States

Six other jurisdictions – Connecticut, the District of Columbia, Iowa, Massachusetts, New Hampshire and Vermont – currently recognize same-sex marriage.

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