

New York and Connecticut Courts Advance Recognition of Same-sex Marriages

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Courts in New York and Connecticut have issued two significant decisions affecting same-sex marriage. This article discusses the impact of those decisions on employee benefit plans and actions employers need to take in light of them.

The Latest New York Decision

In May, New York Gov. David Paterson (D) ordered state agencies to recognize same-sex marriages validly performed in other jurisdictions, even though same-sex marriages cannot be performed in the state. In June, same-sex marriage opponents represented by the Alliance Defense Fund, a group based in Arizona, challenged the governor's directive in state court, saying that it exceeded his lawful authority.

A judge dismissed that lawsuit in a September order filed in the Supreme Court (the state's trial court), Bronx division. Justice Lucy A. Billings, in rejecting plaintiffs' arguments that the governor was usurping the legislature's authority under the state's separation of powers doctrine, wrote, "The governor's directive is entirely consistent with this doctrine's principles. In fact, it recognizes that the policy decisions have been made, implements them, and refrains from anything but 'fill[ing] in the interstices' in agency regulations and other policy statements to make them consistent with those decisions."

The Alliance Defense Fund plans to appeal the ruling, according to news accounts.

The New York Directive

Paterson's directive took the form of a May 14 memorandum from David Nocenti, then counsel to the governor, stating that state agencies' failure to extend "comity or full faith and credit to same-sex marriages that are legally performed in other jurisdictions" could subject them to liability. The directive requires agencies to "ensure that the terms 'spouse,' 'husband' and 'wife' are construed in a manner that encompasses legal same-sex marriages, *unless some other provision of law would bar your ability to do so.*"

Earlier this year, a New York appellate court unanimously ruled that New York's marriage recognition law required recognition of same-sex marriages validly performed elsewhere, as New York has a long tradition of recognizing out-of-state marriages validly performed elsewhere, even when they cannot be performed in New York.

The Impact of the New York Directive

The full impact of Paterson's directive is not clear. For example, the directive likely will require insurers to provide coverage for same-sex spouses. On the other hand, New York's personal income tax structure is built on the federal personal income tax structure, subject to certain adjustments. Under the federal Defense of Marriage Act (DOMA), same-sex marriages are not recognized for purposes of federal law, and the terms "marriage," "husband" and "wife" only include opposite-sex

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marriages. Therefore, same-sex spouses likely will not be able to file joint New York income tax returns, absent a change by the legislature.

Connecticut Supreme Court Holds Same-sex Marriage Ban Unconstitutional

The New York decisions have increased relevance now that the Connecticut Supreme Court has ruled that the its ban on same-sex marriage is unconstitutional. On Oct. 10, that court held in *Kerrigan v. Commissioner* that the ban on same-sex marriage violated the state constitution's equal protection provisions. While the litigation was winding through the courts, the Connecticut legislature enacted a civil union statute, similar to the Vermont civil union statute, providing same-sex couples with all the rights and burdens of marriage, but under a different name. The Connecticut Supreme Court ruled that the "marriage vs. civil union" nomenclature alone constituted unfair treatment, for which the state failed to provide sufficient justification. The decision becomes final and will be officially released on Oct. 28, 2008.

The Connecticut Supreme Court decision cannot be appealed, as that court has the final review of all matters under the Connecticut Constitution. The parties in the Connecticut litigation did not make any federal claims; therefore, the U.S. Supreme Court will not review the decision. The only recourse to overturn the Connecticut decision would be a state constitutional amendment. A ballot question will appear in next month's election

as to whether Connecticut should hold its first constitutional convention in 40 years.

Same-sex Marriage Recognition Issues Complicate Benefit Plan Administration

To date, five countries (Canada, Belgium, The Netherlands, South Africa and Spain) and the states of Massachusetts, California and now Connecticut have legalized same-sex marriage. Neither Canada, Massachusetts, California nor Connecticut require the individuals to be residents for the marriage to be performed. Under its marriage recognition rule, New York will recognize these marriages. In addition, two courts, in New Jersey (2006) and Vermont (1999), ruled that same-sex couples should have the benefits of marriage, but not the title. As described above, the Connecticut legislature also adopted civil unions. Iowa's highest court is expected to decide a same-sex marriage case next year.

The legalization of same-sex marriage in Canada and Massachusetts has had significant consequences for employers throughout the United States, since some of their employees travel to these destinations to wed a same-sex partner. So far in Canada, more than 7,500 same-sex couples from the United States have married and more than 10,000 in Massachusetts. In California, with a population almost six times that of Massachusetts (approximately 12 percent of the U.S. population) and no ban on out-of-state couples marrying there, same-sex marriages undoubtedly will have an even greater impact on employee benefits throughout the United States. Connecticut's proximity to New York will also have a significant impact.

Same-sex marriages present benefits-related difficulties for employers because federal and state governments have given mixed messages regarding the status of same-sex couples throughout the United States. Consider the following:

- Three states now allow same-sex marriage (Massachusetts, California and Connecticut), four states allow same-sex couples to enter into civil unions (Vermont, New Hampshire, Connecticut and New Jersey) and four other states allow same-sex couples to register as domestic partners (Hawaii, Maine, Oregon and Washington).
- However, the federal DOMA allows states to refuse to recognize other states' same-sex marriages, and, in addition to the federal DOMA, 43 states (now that California and Connecticut statutes have been held invalid) have laws or constitutional provisions (often called mini-DOMAs) prohibiting the performance of same-sex marriage in their states and the recognition of same-sex marriages performed in other

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states (California, Connecticut, New Jersey, New Mexico, Massachusetts, New York, Rhode Island and the District of Columbia are exceptions).

- Some state courts (including those in Massachusetts, Iowa, Connecticut and California) have found their state laws defining “marriage” as the union of one man and one woman unconstitutional. Similarly, many states have offered domestic partner benefits to their own government employees. At the same time, other states (including Michigan and Ohio) have passed state constitutional amendments defining “marriage” as between one man and one woman and, in some instances, even banning certain employers from offering benefits to employees’ domestic partners.
- More confusingly, some states have inconsistent rulings. For example, although same-sex couples may not legally marry in New York, New York recognizes same-sex marriages that were performed elsewhere.

In light of these conflicting trends and the prevalence of spousal rights and features in employee benefit plans, employers should consider the following issues as they design and administer their plans.

Why an Employer Should Formulate a Policy Now

Given the current legal flux, some employers question whether they should establish same-sex marriage policies at all. However, individuals are marrying same-sex partners right now and will make demands (or already have made demands) for employee benefits for their same-sex spouses. Employers that are not prepared to address this issue may find themselves ill-equipped to retain and compensate their valuable employees.

What Employers Can Do: Three Questions to Ask

The most common employee requests for same-sex spouse benefits are for coverage under health and dental plans and spousal survivor annuity coverage under defined benefit pension plans. When asked to provide benefits to same-sex spouses under any employee benefit plan, an employer should ask these questions:

Question One: Where was the marriage performed?

The jurisdiction in which the same-sex marriage was performed affects the “legality” of the marriage, and thus, the plan’s obligation to recognize it. Was the employee legally wed in California, Massachusetts, Connecticut or Canada, for example? Or did the employee participate in a marriage of “civil disobedience” performed in San Francisco in 2004 and counties in New

Mexico, New Jersey, Oregon and upstate New York but not recognized by any state?

Question Two: Where does the employee live?

The employer’s response may also depend on whether the employee lives in a state with a mini-DOMA or a state with no mini-DOMA. If the employee lives in a mini-DOMA state, the employer does not have to recognize same-sex marriages for plan eligibility purposes, although many employers voluntarily choose to extend eligibility in this situation. If eligibility is extended, it is considered an optional benefit akin to a domestic partner benefit program. (Note the tax consequences below.)

If the employee resides in a state without a mini-DOMA, the employer may have to recognize same-sex marriage for plan eligibility purposes, depending on whether the plan is a self-insured plan or a fully insured plan. This is because self-insured plans (that is, plans that pay benefits out of company general assets) are governed only by federal law (including ERISA and the tax code) and have the flexibility to recognize or not recognize otherwise valid same-sex marriages.

However, insured plans are subject to state law benefit mandates and may have to recognize same-sex marriages depending upon where the policy is issued. For example, under the California Insurance Equality Act, insurance policies issued in California must cover registered domestic partners, and insurance policies in Massachusetts now cover same-sex spouses. Presumably, California’s insurance policies will have to cover same-sex spouses after June 14, 2008.

Question Three: What is the plan’s definition of ‘spouse’?

In addition to determining what law applies to the plan, employers must also decide how to define or interpret the term “spouse.” If the plan does not define the term or simply incorporates a state-law definition of spouse, it should be amended to clarify the definition the employer wishes to use.

Tax Consequences

If an employer does cover same-sex spouses under its plans, it must understand the related tax consequences. The federal DOMA provides that, for all purposes of federal law, the definition of “marriage” is limited to the legal union between one man and one woman as husband and wife, and the word “spouse” means only a person of the opposite sex. For example, the federal DOMA prevents same-sex spouses from receiving benefits offered under federal statutes, including the Family and Medical Leave Act, ERISA and the tax code. As

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a result, same-sex spouses (for example, those legally married in Canada, Massachusetts, California and now Connecticut) will not receive any federal tax advantages associated with employee benefit plans unless the same-sex spouse meets the tax code definition of “dependent.”

Unless the same-sex spouse otherwise qualifies as a dependent for federal income tax purposes, the employer must impute income to the employee equal to the fair market value of the health coverage given to the same-sex spouse. In addition, the employee may not make pre-tax contributions to a Section 125 cafeteria plan on behalf of the same-sex spouse (that is, contributions for the spouse must be after tax) and may not receive reimbursement for the expenses of the same-sex spouse from flexible spending accounts, health reimbursement accounts or health savings accounts.

State tax treatment depends, again, on whether the employee resides in a mini-DOMA state or a state without one. In mini-DOMA states and states whose tax codes track the federal tax code, employers must impute income for state tax purposes equal to the fair market value of the benefits provided to same-sex “spouses” as they do for federal tax purposes. (The New York State Department of Taxation and Finance recently issued two

advisory opinions confirming this treatment for New York residents.)

On the other hand, in the states that do not have laws or constitutional provisions limiting marriage to one man and woman and do not track the federal definition of marriage for tax purposes (for example, California, Massachusetts and New Jersey) and in states that have special laws favoring domestic partners or civil union partners (for example, California, Massachusetts, Vermont, Connecticut, New Hampshire, New Jersey, Oregon and the District of Columbia), employers may have to subtract, for state tax purposes, any income imputed to the employee for federal tax purposes, thereby creating an additional administrative hurdle.

Steps Employers Should Take Now

Whether or not faced with a request for benefits from a same-sex couple, employers should consider the following issues in formulating their policies:

Analyze Existing HR Policies

If the employer has a policy banning sexual orientation discrimination, the employer may wish to cover same-sex spouses, regardless of legal requirements, in order to avoid the possibility of lawsuits by same-sex spouses for sexual orientation discrimination. Regarding non-ERISA plans, the employer may want to consider whether state or local laws prohibit employment discrimination based on sexual orientation. Numerous states (including Illinois) have such laws that could easily apply to a failure to provide employee benefits. In New Hampshire, for example, a district court found that a public employer’s refusal to provide health and leave benefits to same-sex couples violated the state’s anti-discrimination statute.

Determine the Home State’s Legal Requirements

If the employer’s home state recognizes same-sex marriages, the employer may have to cover same-sex spouses in its fully insured plans, and the employer should consider amending its plans to cover same-sex spouses. If, however, the employer’s home state does not recognize same-sex marriages, then the employer’s plans may not have to cover same-sex spouses. In this case, the employer should consider amending its plans to reflect the DOMA definition of “spouse.” Obviously, this analysis can be very complicated for employers operating in multiple states.

Talk to the Health Insurance Provider

Determine what action vendors and insurers are taking and where the insurance policies are sited. Depending on which state insurance laws govern the insurer, the

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insurer may require the employer to provide coverage of domestic partners and/or same-sex spouses that the employer has not considered.

Review Plan Documents, SPDs, Enrollment Forms And Administrative Procedures

Inventory where the employer's plan documents use the term "spouse." Consider adding, clarifying or amending the definition of "spouse" and requiring additional proof of employee marriages (for example, spouse's sex, state of marriage and licenses). Ensure that all plan documents have appropriate language providing for plan administrator discretion in interpreting the plan.

Coordinate Plan's Same-Sex Spouse and Domestic Partner Coverage

If the employer has a domestic partner plan, then the employer may wish to enroll same-sex spouses as domestic partners, even if the employer is in a mini-DOMA state. Note that "spousal" coverage under an employer's health plan may cost less and have different state income tax treatment than domestic partner coverage. The employer also should carefully consider the potentially discriminatory consequences of imposing any domestic partner eligibility requirements on same-sex couples that the employer does not impose on opposite-sex couples. If the employer does not have a domestic partner plan, then the employer may

wish to rely on the federal and/or state DOMAs to exclude same-sex spouses from its plans.

Ensure the Payroll Department Can Address Taxation Issues

To the extent that the employer will provide any sort of same-sex or domestic partner coverage, it will need to work with its payroll department to ensure that the department can accurately comply with the tax consequences described above.

Communicate to Employees

If the employer chooses to cover same-sex spouses and/or domestic partners, the employer should consider how to best communicate its offering. There may be employee recruiting and retention advantages and possibly customer contracting advantages the employer may want to highlight. However, these benefits may offend some employees, shareholders or customers, so the employer may decide that a more "low key" rollout is appropriate.

Stay Abreast of Local and National Legislation

This area of law is constantly evolving and new developments occur on an almost weekly basis. For instance, one week prior to the California Supreme Court ruling, the Michigan Supreme Court ruled that a 2004 amendment to Michigan's constitution prohibited public entities in the state from providing domestic partner benefits. 🏠



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