

## Slew of Same-sex Marriage Developments Heaps More on Plan Administrators' Plates



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Recent judicial and legislative outcomes mean 2009 is shaping up to be a year of significant change in the ongoing debate over same-sex marriage. In recent weeks same-sex marriage was legalized in Iowa, Vermont, and Sweden and pending legislation may soon lead to the legalization of same-sex marriage in New Hampshire and the recognition of same-sex marriages in the District of Columbia. Employers should take note of these legal developments, which are likely to cause an increase in requests for spousal benefit coverage from employees who legally married their same-sex partner in one of the states or seven foreign countries where same-sex marriage is legal.

Some employers may find themselves required to provide benefits to employees with same-sex spouses, because governments below the federal level offer marriage licenses to same-sex couples, even if federal law does not recognize such a marriage. This may happen either because the employer has employees in a state which has legalized same-sex marriage or in a state that, although its own statutes do not recognize same-sex marriages, recognize such marriages that were validly

performed in other states or countries. (See ¶377 of the Handbook for more on the interplay between employee benefits and the same-sex marriage laws of various jurisdictions.)

### Iowa

Iowa became the third state (after Massachusetts and Connecticut) to legalize same-sex marriage on April 3, the day the Iowa Supreme Court unanimously ruled that a state law limiting marriage to opposite sex-couples was unconstitutional because it violates the equal protection clause of the state constitution. The ruling removes language from Iowa's state Defense of Marriage Act (DOMA) that limited marriage to a union between a man and a woman and instructs that all state laws should be read to permit same-sex couples to marry. The Court's decision took effect on April 24.

The ruling is in response to a lawsuit filed in 2005 by six same-sex couples after their marriage license applications were rejected. A lower court previously ruled that the state DOMA was unconstitutional, but refused to permit same-sex marriages to be performed until after the Iowa Supreme Court ruled on the appeal. The Supreme Court held that prohibiting same-sex couples from legally marrying constituted sexual orientation discrimination and warranted examining the state DOMA under a heightened level of scrutiny. In affirming the lower court's ruling and striking down the law as unconstitutional, the Court reasoned, "We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not further any historical governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification."

Although there already have been some calls for an amendment to the Iowa constitution that would limit marriage to opposite-sex couples, amending the state

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constitution is not a quick process. Iowa law requires constitutional amendments to be approved by both houses of the state legislature in two consecutive sessions before the amendment can be sent to voters for ultimate approval. As a result, unless Iowa legislators take action in the next few weeks to introduce such an amendment, the earliest that an amendment to the state constitution could be in place is 2012. Republican lawmakers tried to introduce a similar amendment last year, but it was blocked by Democratic lawmakers who argued a constitutional amendment should be considered only after the Iowa Supreme Court ruled on this case.

The ruling is likely to lead to same-sex marriages performed not only for citizens of Iowa, but also for out-of-state residents. Because Iowa does not require proof of state residency in order to obtain a marriage license, the Court's decision will permit same-sex couples from other states to legally marry in Iowa. Whether such marriages will be valid in the same-sex couple's state of residence depends on local law. For example, New York will recognize such marriages, but most other states will not.

### **Vermont**

Just four days after same-sex marriage was legalized in Iowa, the Vermont legislature voted on April 7 to override Gov. Jim Douglas' (R) veto of a bill that extended the right to marry to same-sex couples. The bill had to be supported by two-thirds majorities of both the Vermont Senate and House of Representatives in order to override. While the Vermont Senate surpassed the required super-majority with a vote of 23-5, the Vermont House of Representatives barely met the minimum number of votes needed with a tally of 100-49. The bill will take effect on Sept. 1, 2009, and same-sex marriages will be performed at that time. The Vermont development is particularly significant because, unlike Massachusetts, Connecticut and Iowa where same-sex marriage was legalized by judicial ruling, Vermont is the first state to legalize same-sex marriage by legislative action.

Vermont was the first state to recognize "civil unions" that grant same-sex couples the same rights as opposite-sex spouses but without the title of "marriage." Civil unions entered into before Sept. 1, 2009 will continue to be recognized under Vermont law; however, no new civil unions will be permitted once the new marriage laws take effect. Since Vermont's civil union law was passed in 2000, similar laws granting spousal equivalent rights to same-sex couples have been passed in California, the District of Columbia, New Hampshire, New Jersey and Oregon.

### **New Hampshire**

New Hampshire is also in the midst of the debate over same-sex marriage after the New Hampshire House of Representatives voted March 26 to approve a bill legalizing same-sex marriage. The bill is now being considered by the New Hampshire Senate.

Gov. John Lynch (D), who openly opposes same-sex marriage, has not indicated whether he will veto the bill. Civil unions, legalized in New Hampshire in 2007, provide same-sex couples with all of the rights of marriage but without the title. The bill would change the name of these unions from civil union to marriage.

### **District of Columbia**

Same-sex marriages performed in other jurisdictions may soon be recognized in the District of Columbia. The District City Council voted unanimously on April 7 in a preliminary vote to recognize same-sex couples who are married in other states, as spouses under District law. The Council is expected to take a final vote on the legislation next month, which may bring the issue before the U.S. Congress, which has authority to approve the District's laws. The District currently permits same-sex couples to register as domestic partners.

### **New York**

Although New York law does not permit same-sex marriages to be performed in the state, out-of-state same-sex marriages are recognized in New York pursuant to a February 2008 appellate court order mandating such (see ¶377). However, the recognition of these marriages continues to be debated since no state law explicitly requires such recognition and the New York Court of Appeals, the state's highest court, refused to hear an appeal of the ruling.

The recognition of same-sex marriages in New York was further strengthened in October 2008 when Gov. David Paterson (D) directed state agencies to revise rulings and regulations in order to provide same-sex spouses with equal rights, benefits, and responsibilities as opposite-sex spouses under state law. In recent months, the state courts have followed the mandate to recognize these marriages in separate rulings which granted a divorce to a same-sex couple who had married in Canada and permitted a surviving spouse in a same-sex marriage also performed in Canada to inherit his deceased spouse's estate. In addition, the New York Attorney General's Office announced in March 2009 that a prominent national adoption service provider had ceased doing business in the state following the state's investigation of the organization's discriminatory practice of denying adoptions to same-sex couples and unmarried individu-

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als. Finally, as a first step in what some believe could mean the legalization of same-sex marriage in New York in the near future, a bill to legalize same-sex marriage has been proposed in the New York state legislature.

### Challenge to the Federal Defense of Marriage Act

A lawsuit challenging the federal DOMA was filed on March 3 on behalf of eight married same-sex couples and three surviving spouses from same-sex marriages performed in Massachusetts. The plaintiffs argue that although they are legally married under Massachusetts law, the federal DOMA unconstitutionally denies them the protections and benefits extended to spouses under federal law. The lawsuit specifically focuses on the right to Social Security survivor payments, spousal benefits under federal income tax laws, employee benefits provided to federal workers and retirees, and the issuance of passports for non-citizen spouses.

The lawsuit challenges Section 3 of the federal DOMA which states that irrespective of how “marriage” is defined under state laws, “marriage” is defined as “only the legal union between one man and one woman as husband and wife” and “spouse” is defined as “only a person of the opposite sex who is a husband or a wife” for all purposes of federal law. The plaintiffs argue that

the discriminatory effect of the federal DOMA violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution since only same-sex couples legally married under the laws of Massachusetts, Connecticut, Iowa and Vermont will have their marriages disregarded under federal law. The lawsuit does not challenge a separate provision in the federal DOMA which says that states are not required to recognize same-sex marriages performed in other states. This important DOMA challenge lawsuit is currently pending before the U.S. District Court in Massachusetts.

### Sweden

The Riksdag, Sweden’s legislature, voted April 1, 2009 to adopt a new gender-neutral marriage law that will legalize same-sex marriage throughout the country. The new law took effect May 1. Same-sex couples previously could register their partnership under Swedish law in order to obtain many of the rights and benefits of marriage. The new law will remove references to gender under Sweden’s marriage laws, thereby extending same-sex couples the right to marry. Registered partnerships in existence prior to May 1, 2009 will continue to be recognized under Swedish law, though the registered partners may legally convert their relationship to a marriage. Sweden now joins Belgium, Canada, the Netherlands, Norway, South Africa and Spain as the seventh country worldwide to legalize same-sex marriage. 🏠



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