



ROBINSON & COLE LLP

Employee Benefits & Compensation



Employee Benefit Ramifications of Same Sex Marriages

In *Goodridge vs. Department of Public Health*, the Massachusetts Supreme Judicial Court held that the Massachusetts Constitution prohibits the Commonwealth of Massachusetts from preventing individuals of the same sex to marry and requires that individuals married to a member of the same sex have the same rights as individuals who have a spouse of the opposite sex. As a result of this case, today, May 17, 2004, persons of the same sex will be allowed to get married in Massachusetts. At present, there are few clear answers to the numerous questions presented by this change in the law; however, it is clear that this development will have implications for employers within Massachusetts, as well as employers in other states. The legislature of the Commonwealth of Massachusetts has proposed an amendment to the Commonwealth's Constitution. If approved, the impact of this case may change. However, any such amendment cannot be effective until 2006.

Implications of Federal Laws – ERISA and the Defense of Marriage Act

ERISA, the federal law that governs employee benefit plans, generally preempts state laws that relate to ERISA plans, regardless of whether the state law provides greater rights than provided by ERISA. The Defense of Marriage Act (“DOMA”) provides that the terms “marriage” and “spouse”, for purposes of all federal laws, including ERISA and the Internal Revenue Code, means only an opposite sex marriage between an opposite sex husband or wife. Thus, unless there is an express exemption from ERISA preemption, a state cannot require an ERISA plan to provide benefits to a same sex spouse. However, an ERISA plan sponsor may elect to cover same sex spouses. Therefore, if the terms of an ERISA plan document can be interpreted as extending benefits to same sex spouses, it is unlikely that ERISA and DOMA will override the plan document or Summary Plan Description and same sex spouses may be entitled to benefits under the specific terms of the plan.

Accordingly, it is prudent to review ERISA plan documents, as well as the Summary Plan Descriptions and any other materials provided to participants regarding the plan, to ensure that it is clear whom the employer intends to benefit under the plan.

Since employee benefit plans sponsored by governmental entities or churches, unless the church has elected to be subject to ERISA, are not subject to ERISA, those plans must provide benefits in accordance with state law. Under the *Goodrich* decision, this includes the extension of all employee benefits to same sex spouses.

The ramifications of the *Goodrich* decision on ERISA plans are likely to evolve over the next few years as the interplay between state sanctioned same sex marriage, ERISA and DOMA is expected to be contested in the courts.

[Can an employer extend all spousal benefits to same sex spouses? Yes.](#)

Insurance Laws of the Commonwealth of Massachusetts

State laws that relate to insurance are exempt from ERISA preemption even if they impact ERISA plans. Consequently, insurance policies and insured benefit plans must provide coverage in accordance with that state's insurance laws even if that coverage would not be required under ERISA. The Division of Insurance of the Commonwealth of Massachusetts has indicated that insurance companies offering coverage to Massachusetts residents will be required to insure same sex spouses on the same terms as opposite sex spouses. Based on that position, plan sponsors of insured plans will be required to allow enrollment of same sex spouses on the same terms that are available to opposite sex spouses. As a result, it does not appear that employers will be able to exclude same sex spouses from insured coverage.

Consequences for Plan Sponsors

What benefits must Massachusetts employers offer to same sex spouses? It appears that the only benefits that Massachusetts employers are legally required to extend to same sex spouses are insured health and welfare benefits.

Qualified Retirement Plans

ERISA provides certain protections to spouses of qualified retirement plan participants: a spouse is automatically the beneficiary of qualified retirement plan benefits unless he or she consents, and a spouse has the right to certain annuity benefits under a pension plan. These protections provided to spouses under ERISA, read in conjunction with DOMA, conflict with the new Massachusetts law. Because of DOMA, a qualified retirement plan cannot be required to provide benefits to same sex spouses. Accordingly, due to ERISA preemption, a Massachusetts employer will likely not be required to recognize a same sex spouse as a spouse for purposes of benefits provided under a qualified retirement plan. However, a qualified retirement plan document may currently define the term "spouse" in a manner that does not clearly exclude same sex spouses. In such a case, a same sex spouse may be entitled to benefits under the terms of the plan document. In order to avoid potential issues where entitlement to benefits is unclear, employers should consider whether or not to extend qualified retirement plan benefits to same sex spouses and whether or not it is necessary to amend the plan document and employee communications, including Summary Plan Descriptions, to reflect this decision.

Since a same sex spouse is not recognized as a spouse under the Internal Revenue Code, upon the death of the employee, a same sex spouse will not have any right to the favorable distribution rules that are available to an opposite sex spouse, such as the right to roll over a deceased participant's account balance. If a same sex marriage is dissolved, the non-employee spouse may not be entitled to a portion of a participant's qualified plan benefit pursuant to a qualified domestic relations order.

Health Plans and Cafeteria Plans

Since ERISA does not preempt state insurance laws, if a Massachusetts employer offers an insured benefit, such as a medical or dental insurance plan, based on comments from the Division of Insurance of the Commonwealth of Massachusetts, those insured benefits must be offered to same sex spouses. Also, same sex spouses will be entitled to continuation of health insurance under the Massachusetts COBRA law to the extent an insured plan is subject to that law (generally, only if there are fewer than 20 employees). They will only be entitled to continuation coverage under federal COBRA if they are a dependent of the employee.

For employers outside of Massachusetts who offer domestic partner benefits, there may be additional considerations. Such employers should consider whether individuals who enter into a same sex marriage could inadvertently become ineligible for domestic partner benefits under current plan provisions. Another potential issue relates to instances where benefits provided to domestic partners are different than the benefits provided to spouses. For example, an employee may be required to reside with a domestic partner for a set period of time before the domestic partner is eligible for plan benefits, whereas there is no waiting period for spouses. In such a case, the plan document should be clear as to whether or not a same sex spouse qualifies for benefits as a spouse or as a domestic partner.

How does the Massachusetts law impact an employer's current domestic partner policy? If an employer currently offers domestic partner benefits, those policies should be carefully reviewed for potential changes in light of the Massachusetts law. For instance, do those benefits apply only to same sex domestic partners or to both same sex and opposite sex partners? Are there time limits imposed for domestic partner coverage? Issues such as these with respect to domestic partners should be identified and addressed.

If a same sex spouse is a tax dependent of an employee, medical and dental benefits can be provided free of federal income tax and Massachusetts income tax. If the same sex spouse is not a tax dependent, the value of medical and dental insurance is taxable income to the employee for federal income tax purposes and most state law purposes. Under the *Goodrich* decision, it will not be includable in income under Massachusetts tax law.

Massachusetts employers will encounter hurdles in administering employee contributions through cafeteria plans to pay for medical insurance on a pre-tax basis and to pay for medical and dependent care expenses through a flexible spending account. Expenses incurred by a non-dependent same sex spouse are ineligible for pre-tax reimbursement through a flexible spending account for federal income tax purposes. If an employee pays for medical and dental coverage on a pre-tax basis through a cafeteria plan, the portion of the premium that is attributable to a non-dependent same sex spouse can not be paid on a pre-tax basis for federal income tax purposes. If an employer's medical plan currently permits contributions to be made only on a pre-tax basis, the plan will require amendment and the employer's payroll system may need to be updated to permit after-tax contributions.

Welfare Plans

Based on the position of the Division of Insurance of the Commonwealth of Massachusetts, employers that sponsor insured welfare benefits, such as supplemental spousal insurance, must offer benefits to same sex spouses. If a Massachusetts employer's group life insurance plan or Accidental Death and Dismemberment policy provides that the spouse is the automatic beneficiary, such protection must be offered to same sex spouses.

Implications for Connecticut Employers

Today Connecticut's Attorney General issued an Opinion stating that Connecticut law does not allow for same sex marriage. The Opinion was issued in part due to a request by Massachusetts Governor Mitt Romney for other states to advise Massachusetts whether the state permits same sex marriage. Romney has taken the position that persons of the same sex will not be allowed to marry in Massachusetts if they reside in a state that does not permit same sex marriages. However, since some Town Clerks, the individuals who issue marriage licenses in Massachusetts, have indicated that they will not ask for proof of residency, it is likely that some Connecticut residents will enter into marriage in Massachusetts. Connecticut's Attorney General indicated that Connecticut's legislature must resolve the issue of whether or not a same sex marriage entered into in Massachusetts will be recognized in Connecticut.

Given current Connecticut law, it does not appear that Connecticut employers are required to extend benefits to the same sex spouses of Connecticut residents. However, it seems likely that cases will be brought where an employee of a Connecticut employer resides in Massachusetts and the employer's obligations are unclear in such a case. It is important for each employer to make a decision as to whether or not it is in the best interest of the employer and its workforce to extend employee benefits to same sex spouses where it is otherwise not required by law. The plan document and the Summary Plan Description should reflect that decision and should clearly define the terms "spouse" and "marriage".

What is the next step?

At this time, it appears that same sex spouses are likely entitled to benefits under some, but not all, of a Massachusetts employer's benefit plans. However, it may be administratively burdensome for Massachusetts employers to treat same sex spouses differently under each plan sponsored by the employer. There are many factors for plan sponsors to consider in making plan design decisions in response to same sex marriage. Since same sex marriages in Massachusetts become legal this week, employers may wish to be proactive and make the decision making process a priority, rather than be reactive and risk confusion over benefit plan terms.

This is an archive of past issues. As a result, it may contain information that is not current.

