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Same-Sex Marriage: What Does It Mean for Massachusetts Employers?

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When Massachusetts' highest court ruled last November that same-sex couples have a constitutional right to be married, few employers in Massachusetts were thinking about the practical effects of this decision on the workplace. Now, as the debate over same-sex marriage spreads to other jurisdictions, employers across the country have begun to consider what same-sex marriage will mean for them. For Massachusetts employers this question has immediacy because same-sex marriage will be legal in the Commonwealth on May 17. Unless or until a state or federal constitutional amendment defining marriage as the union of a man and woman is ratified, same-sex marriage will remain legal in Massachusetts for the indefinite future. The debate will rage in the corridors of Beacon Hill and Washington, D.C., long past May 17, but for Massachusetts employers, same-sex marriage is coming soon, and they need to be prepared for the complex issues they will face when it does.

Understanding the New "Protected Class"

The Commonwealth's highest court, the Supreme Judicial Court (SJC), issued two strongly worded same-sex marriage opinions. In *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), and the subsequent decision rejecting the legislature's proposed Civil Union Bill, 440 Mass. 1201 (2004), the SJC unmistakably cloaked same-sex marriage in the language of civil rights. In *Goodridge*, the SJC held that homosexual couples are constitutionally entitled to the same benefits and protections as heterosexual couples, relying on the due process and equal protection clauses of the Massachusetts Constitution. In *Goodridge*, and again when rejecting the Civil Union Bill, the court declared that denying same-sex couples the right to marry was tantamount to giving same-sex couples second-class status:

[G]roup classifications based on unsupportable distinctions...are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that



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separate is seldom, if ever, equal....

That there may remain personal residual prejudice against same-sex couples is a proposition all too familiar to other disadvantaged groups. That such prejudice exists is not a reason to insist on less than the Constitution requires.

Op. of the Justices, 440 Mass. at 1206, 1209.

By construing same-sex marriage in terms of equality and prejudice, the SJC leaves open the questions of whether there is a new protected class in Massachusetts, and if so, what is it, and how do we refer to it? Same-sex marriage implicates a multitude of concepts and classifications, including sexual orientation, gender and gender identity, marital status, religion, political allegiances and ideology, morals, and social values. Discriminatory conduct involving same-sex marriage could include one, some, or all of the foregoing, not all of which are protected classes under current Massachusetts law. *See* M.G.L. c. 151B, §4 (recognizing sexual orientation, gender, and religion as protected classes under the Massachusetts Fair Employment Practices Law). Although same-sex marriage implicates sexual orientation, bias involving same-sex marriage may not necessarily be motivated by discriminatory animus towards homosexuals. In the workplace, discrimination involving same-sex marriage could occur in subtle ways that may not depend on sexual orientation *per se*. For example, a manager who is ordinarily flexible with time-off requests denies an employee's request for time off to attend or participate in a same-sex wedding solely because of that manager's moral, religious, or political belief that same-sex marriage goes too far. Such conduct might be considered marital status discrimination and may or may not involve sexual orientation bias, depending on the particular facts.

The SJC, by demanding that same-sex marriage be treated as equal to heterosexual marriage, has effectively handed employers a protected class that involves not only sexual orientation, but also other concepts and classifications not currently recognized by current Massachusetts statutes, most notably marital status. Perhaps, then, the proper term to describe the protected class generated by same-sex marriage is 'marital orientation' —a hybrid of marital status and sexual orientation. This term is not part of the current vocabulary of discrimination law, but until recently neither was same-sex marriage.

This question of protected class terminology is not academic for Massachusetts employers. An employer is charged with putting its employees on notice of the types of discriminatory conduct it prohibits. Company diversity statements and discrimination policies frequently list the protected classes identified by Massachusetts law (principally Chapter 151B) and may or may not include a catch-all phrase such as "or any other category protected by law." Since marital status is not currently a protected category under Massachusetts antidiscrimination law, many Massachusetts employers do not include marital status in their policies. The defeated Civil Union Bill included a provision that would have revised Chapter 151B to include marital status as a protected class, and there have been other legislative efforts in recent years to add a marital status classification. Whether the Massachusetts' legislature will ultimately revise Chapter 151B in light of *Goodridge* and add marital status as a classification remains to be seen. Even without a revision, in cases that do not involve sexual orientation discrimination, an employee claim might be brought under the Massachusetts Civil Rights Act, which provides a remedy for violations of constitutional rights in limited cases where

Chapter 151B is unavailable, although the burden of proof is higher. M.G.L. c. 12, §§11H, 11I (providing cause of action where person interferes or attempts to interfere by threats, intimidation, or coercion with the exercise or enjoyment of any constitutional right).

In any event, Massachusetts employers should not wait for a revision to Chapter 151B to protect themselves. Employers should examine the language in their diversity statements and discrimination policies to see that it is broad enough to encompass a prohibition against discrimination related to same-sex marriage. This may mean adding new classification language, such as marital status or marital orientation, or ensuring that existing policies contain sufficiently broad terminology to put employees on notice of prohibited conduct. Employers should also consider expanding their discrimination and harassment training. Many employees are not accustomed to thinking about marriage in the light of discrimination and could easily stumble into prohibited ground. Overall, increased awareness, training, and caution are in order.

Navigating the Opposing Definitions of “Spouse” under State and Federal Law

As of May 17, the word “spouse” will include heterosexuals and homosexuals for the purposes of all Massachusetts laws affecting or regulating employers. The change in state law will not affect federal law definitions. Under the federal Defense of Marriage Act (“DOMA”), the word “spouse” is defined as “a person married to the opposite sex who is husband and wife” and defines “marriage” as “between one man and one woman.” Pub. L. No. 104-199 (Sept. 21, 1996) §7, 110 Stat. 2419. The contrast between Massachusetts and federal law puts Massachusetts employers in the unique and difficult position of recognizing an employee as married for some purposes but not for others. The fault line will be strongest in the area of benefits, and there are many unanswered questions.

The following is a nonexhaustive list of the trouble areas facing employers in Massachusetts:

- **Health insurance.** A same-sex spouse participating in family coverage under a group health or dental plan will not be entitled to a federal pretax deduction for the cost of the entire premium, even though such a person is entitled to family coverage for his or her spouse under state law. M.G.L. c. 175, §108. This will be a minefield for the payroll departments of employers who are not presently providing domestic partner coverage and therefore are not already familiar with the tax rules governing the benefits of same-sex couples.
- **COBRA.** Same-sex couples, either married or divorced, do not have an entitlement to COBRA for the nonemployee same-sex spouse. 29 U.S.C. §§1161-1168. It is unclear whether insurance companies will provide continuing coverage nonetheless. Insurance companies are subject to both COBRA and state insurance regulation, and COBRA provides that continuing coverage conform to state standards. This will not be an issue for employers with fewer than twenty employees who are governed by Massachusetts’ “Mini-COBRA” law. M.G.L. c. 176J, §9(F).
- **ERISA Plans.** A same-sex spouse will not be recognized under an ERISA-based plan to the extent the plan preempts state law. This issue will affect

retirement plans, self-insured health and dental plans, certain severance plans, and any other ERISA-based plan. Thus, a same-sex spouse could designate his or her spouse as a beneficiary of an employer-sponsored life insurance policy, as life insurance is state-regulated, M.G.L. c. 175, §133, but may not be able to designate his or her spouse as a 401K plan beneficiary.

- **FMLA and SNLA.** An employee will not have the right under the Family Medical Leave Act (FMLA) to take time off to care for his or her same-sex spouse. The FMLA would not bar an employer from providing the time off, and there might be good business reasons to do so. Furthermore, employers who tend to provide over-expansive FMLA coverage, for example, by shortening the employee eligibility period, should be wary of denying coverage to employees requesting coverage for same-sex spouses. For some employers, expanding the scope of FMLA coverage will be unattractive, notably those employers operating in multiple states. In determining how to proceed, employers should also be mindful of the Massachusetts Small Necessities Leave Act (SNLA). M.G.L. c. 149, §52D. SNLA provides twenty-four hours of leave per year for school activities and the medical appointments of children and elderly relatives; relatives by blood or marriage are included. Thus an employee could request time off under SNLA to care for a sick parent of a same-sex spouse, but once that time ran out, he or she could not request additional time under FMLA, unless the employer chose to provide expanded coverage.

In dealing with the foregoing issues, human resources and payroll departments not only need to be aware of the differences between state and federal law, but also need to be sensitive when they explain these differences to employees. Employees may be frustrated or upset by the limitations federal law imposes; employers do not want to exacerbate those emotions by appearing callous, annoyed, or biased when faced with questions. The utmost discretion and neutrality is called for in such discussions. Proper training and procedures for handling these issues is essential.

Changes to Health Insurance Plans

Employers in group health insurance plans should see their coverage expanded to include same-sex married couples. To the extent that handbooks and personnel policies contain plan summaries, those summaries should be reviewed to ensure that no language appears that would bar same-sex married couples from plan participation. Employers should also consult with their insurers to determine if they will be facing premium increases.

Employers who currently provide domestic partnership coverage must decide whether to maintain such coverage or to terminate it now that family coverage will be available to same-sex married couples. This will be a particularly difficult decision for employers who currently provide such coverage to both same-sex and heterosexual couples. Once these decisions are made, handbooks and personnel policies will likely need revision.

Additional Issues to Consider

Many rights and benefits concerning marriage and spouses do not touch federal law. As the SJC noted in *Goodridge*, the state believes that there are “hundreds of statutes” related to marriage and marital benefits potentially impacted by same-sex marriage. In the employment context, beyond the various statutes discussed thus far, some of these laws are:

- Entitlement to wages owed to a deceased employee. M.G.L. c. 149, §178A.
- Health continuation coverage for thirty-nine weeks where a spouse is laid off or dies. M.G.L. 175, §110G.
- Workers’ compensation benefits to a surviving spouse. M.G.L. c. 152, §31.
- Preferential options under the state pension system. M.G.L. c. 32, §12(2).
- Right to bring claims for wrongful death and loss of consortium. M.G.L. c. 229, §§1 and 2; M.G.L. c. 228, §1.

In addition to statutory considerations, employers subject to collective-bargaining agreements should recognize that provisions in their union contracts may be affected.

Overall, Massachusetts employers need to be aware that the impact of same-sex marriage on employers is an uncharted area. Massachusetts employers will face difficult questions over the coming months, and it is important to be prepared. An *ad hoc* approach to policy formulation and application, employee questions, and difficult issues is strongly discouraged. For employers operating in multiple jurisdictions, a well-thought-out approach will be especially important given the inconsistent recognition of same-sex marriage from state to state and the rapidly changing landscape.

If you have questions about how same-sex marriage will impact your workplace, or require further information regarding this or other matters, please call Ellen M. Majdloch in the Boston office of Nixon Peabody at 617-345-6143 or any member of the Nixon Peabody Labor and Employment Practice Group.

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