Employer's Handbook: Complying with
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California Decision Portends Broad Changes in Spousal Eligibility

Michigan, New York Developments Join the Conundrum

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An employer has much to do to keep up with all that's going on concerning same-sex marriage and whether it can provide benefits to any same-sex spouses or partners its employees may have. Recent developments in three states highlight the complicated and often conflicting state, federal and local regulations applicable to same-sex partner benefits. (See ¶370 of the *Handbook* for more on domestic partner benefits.)

- On May 15, California became the second state (after Massachusetts) in which the state's highest court issued a ruling allowing full marriage rights for same-sex partners.
- On May 14, citing a ruling by a New York State Appellate Court, the governor of New York directed all state agencies to revise their policies and regulations to recognize same-sex marriages validly performed in other jurisdictions.
- On May 7, Michigan's Supreme Court said the state's voter-approved ban on same-sex marriage precludes public employers from providing health benefits to same-sex domestic partners.

California

The door to same-sex marriage in California is now open, as the California Supreme Court has declared that a voter-approved ban violated the state constitution. On May 15, California became the second state in which the state's highest court issued a ruling allowing full marriage rights for same-sex partners.

The court found that California legislative and initiative measures limiting marriage to opposite-sex couples violated same-sex couples' rights under the state constitution (despite an existing state registration and rights regime for domestic partners). The court did not rule that California must allow same-sex couples the right to enter into marriage; rather, it found that if the state allows opposite-sex couples to enter into marriage, same-sex couples must be treated equally — which has the same practical effect. The state supreme court refused to issue a stay of its decision, so effective June 16 it directed state officials to ensure that state and local offices permit same-sex couples to marry.

Who this affects

The ruling affects more than 100,000 same-sex couples in California (approximately a quarter of whom have children), although it does not revive the approximately 4,000 same-sex marriages performed at San Francisco City Hall in 2004, and later annulled by court order. Unlike Massachusetts, the California ruling does not prevent out-of-state couples from coming to California to get married. (See ¶377 for a discussion on the effect of state marriage laws on domestic partner benefits.)

The ruling will have little direct effect on California's current domestic partnership regime. Barring further legal changes, domestic partners presumably would not need to dissolve domestic partnerships in order to marry, and the domestic partnership regime would continue for those who do not wish to marry.

See *Domestic Partnerships*, p. 2

Domestic Partnerships (continued from p. 1)

In reaching the same-sex marriage decision, the California Supreme Court is the first court to rule that a state's constitution forbids discrimination based on sexual orientation to the same extent as bias based on race, sex or religion. The court found that sexual orientation, like race, sex and religion, represents a "suspect classification" and same-sex couples have as fundamental a right under California's state constitution to have their family relationship recognized as do opposite-sex couples. The California Supreme Court is one of the most influential state courts in the United States, so the legal arguments cited in the ruling may have an effect on similar issues brought before other state supreme courts.

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Future uncertain

California same-sex marriage opponents have submitted enough signatures, if verified, to put a state constitutional amendment on the November 2008 state ballot that would ban same-sex marriages by expressly defining "marriage" as between a man and a woman. The amendment, which would need majority approval from voters, would overturn the May 15 ruling on the right to marry, although the portion of the decision banning discrimination based on sexual orientation would remain. The ballot initiative does not clarify whether it would retroactively annul marriages performed before November. On May 22, a petition was filed before the court asking that the ruling be stayed until after the November elections; the court denied it.

The case was *In re Marriage Cases* (see *Finding out More)*.

Michigan

On May 7, 2008, the Michigan Supreme Court interpreted that state's constitutional ban on same-sex marriage as precluding public employers in the state from providing health benefits to their employees' same-sex domestic partners. The decision in *National Pride at Work v. Gov. of Michigan* (see *Finding out More)* does not, however, affect the ability of private employers in Michigan to offer same-sex domestic partner benefits.

On Nov. 2, 2004, Michigan voters approved adding a provision to the state constitution to provide that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Because the constitutional amendment prohibited not only same-sex marriage, but also prohibited the recognition of unions similar to marriage, in 2008 the Michigan Supreme Court analyzed whether domestic partnerships were being recognized as unions similar to marriage. In rendering its decision, the court held that by requiring partners be of a certain sex (the same sex) and that they not be closely related by blood, public employers were recognizing domestic partnerships as unions similar to marriage. "[M]arriages and domestic partnerships appear to be the only such relationships that are defined in terms of both gender and the lack of close blood connection," the court said.

Who this affects

This decision could affect the ability of up to 20 public universities, community colleges, school districts and local governments in Michigan to institute employee benefit plans covering same-sex couples. However, the court's reasoning provides room even for public employers to provide benefits for same-sex domestic partners if they are part of a larger group receiving benefits.

For example, Michigan State University and the city of Kalamazoo have both developed programs under which employees who do not cover a spouse under their employer's benefit plans may select another individual to receive such benefits, regardless of whether that individual is of the same or opposite sex (see September 2007 newsletter, page 3). By eliminating the requirement that the covered individual be of a certain sex, these programs have removed one of the two criteria that the court relied upon in determining that these types of arrangements were recognizing unions similar to marriage.

New York

Five countries (including Canada, which is adjacent to New York state) and the states of Massachusetts and California have legalized same-sex marriage. On Feb. 1, 2008, the New York Supreme Court, Appellate Division, Fourth Department found that recognition of a same-sex marriage performed outside of New York (in this case, in Canada) is not against the public policy of New York, even though same-sex marriages cannot be performed in New York (The case is *Martinez v. Monroe County*; see *Finding out More*). Having found the same-sex marriage to be valid, the court went on to hold that the plaintiff's employer's decision to deny the plaintiff's application for spousal health benefits violated New York discrimination laws that forbid an employer from discriminating against an employee because of the employee's sexual orientation.

See *Domestic Partnerships*, p. 3

Domestic Partnerships (continued from p. 2)

The defendant appealed, and on May 6, the New York Court of Appeals (the state's highest court) declined to hear the appeal due to a procedural issue. The case could be re-appealed following the trial court's damages determination. Nevertheless, on May 14, Gov. David Paterson (D) directed all state agencies to revise their policies and regulations to recognize same-sex marriages validly performed in other jurisdictions. All state agencies were to report back to the governor's legal counsel by June 30 on whether they have any rules or regulations that would conflict with recognition of same-sex marriages. It is not entirely clear what the directive means for regulations the courts enforce (for example, child custody or the protection against compelling one spouse to testify against another) rather than those state agencies enforce.

Paterson's action marked the second time a New York governor ordered state agencies to recognize the same-sex spouses of New Yorkers who had valid marriage licenses from other jurisdictions. In April 2007, then-governor Eliot Spitzer (D) did so, but Paterson's directive goes further because it applies to rights of married couples beyond employment benefits, although pending the agencies' reports back to the governor, it is not clear which rights and benefits will be affected (to read a copy of the directive see *Finding out More*).

Challenges for Employers

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. Each decision listed above is one thread in the complicated fabric of same-sex benefits laws applicable to employers. Consider the following:

- Two states now allow same-sex marriage (California and Massachusetts), four states allow same-sex couples to enter into civil unions (Vermont, New Hampshire, Connecticut and New Jersey), five states (California, Hawaii, Maine, Oregon and Washington) and the District of Columbia allow same-sex couples to register as domestic partners, and other states (including Arizona as described below) provide at least some domestic partnership benefits to state employees' domestic partners.
- The federal Defense of Marriage Act (DOMA) allows states to refuse to recognize other states' same-sex marriages performed in states where it is legal. In addition to the federal DOMA, 45 states have laws or constitutional provisions (often called mini-DOMAs) that prohibit same-sex marriage being performed in their states and do not recognize same-sex marriages performed in other states (California, Massachusetts, New Jersey, New Mexico, New York, Rhode Island and the District of Columbia are exceptions).
- Some state courts (including those in Massachusetts, Iowa and California) have found their 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, many 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.
- Perhaps most confusing, some states require certain types of same-sex benefits but reject others. For example, as described above, same-sex couples may not legally marry in New York, but that state nonetheless recognizes same-sex marriages that were performed elsewhere (and therefore recognizes a right to benefits provided to married couples under certain public employee benefit plans in New York); similarly, same-sex marriages are illegal in most states, but a number of those states — now including Arizona — offer their public employees domestic partner benefits.

In light of these conflicting trends, the prevalence of spousal benefits rights and features in employee benefit plans, and a variety of tax consequences, all employers should consider reviewing how their benefit plans define "spouse," and the following plan design and administration issues. (See ¶371 for the IRS definitions of "spouse" and "dependent.")

Why an Employer Should Formulate a Policy Now

Some employers question whether they should establish any same-sex marriage policies. However, with same-sex marriages taking place right now — and with more likely after California's supreme court ruling became effective June 16 — these employees already have or will make demands for employee benefits for their same-sex spouses.

For example, the number of same-sex couples reporting themselves as "unmarried partners" has quintupled since 1990, from 145,000 to nearly 780,000 (see *Finding out More)*. Moreover, same-sex marriage legalization in Canada and Massachusetts has had significant consequences for employers throughout the United States, since some of their employees travel to these destinations

See *Domestic Partnerships*, p. 4

Domestic Partnerships (continued from p. 3)

to wed a same-sex partner. Thus far, more than 8,000 same-sex couples from the United States have been married in Canada, 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 coming to the state to marry, same-sex marriages will undoubtedly have an even greater impact on employee benefits. Employers that are not prepared to address this issue may find that they face challenging circumstances.

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 presented with a request to provide benefits to same-sex spouses under any employee benefit plan, an employer should ask the following 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 or Canada, for example? Or, did the employee participate in a marriage of "civil disobedience" performed in various locations around the United States (including 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 (see Box 1 on page 5). 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 discussed 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 self-insured or fully insured. 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 Internal Revenue 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; insurance policies in Massachusetts now cover same-sex spouses. Presumably, California's insurance policies will have to cover same-sex spouses after June 16, 2008.

Question three: How does the plan define '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," the employer should amend the plan to clarify the definition it 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 Internal Revenue Code. As a result, same-sex spouses (for example, those legally married in California, Massachusetts or Canada) will not receive any federal tax advantages associated with employee benefit plans unless the same-sex spouse otherwise meets the tax code definition of "dependent" (see Fig. 371-A).

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 (FMV) of the health coverage given to the same-sex spouse (see April newsletter, page 3 and ¶372). In addition, the employee may not make pre-tax contributions to a Code 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 state with or without a mini-DOMA.

See *Domestic Partnerships*, p. 5

Domestic Partnerships (continued from p. 4)

In mini-DOMA states, employers must impute income for state tax purposes equal to the FMV of the benefit coverage provided to same-sex "spouses" as they do for federal tax purposes. (The New York State Department of Taxation and Finance issued two advisory opinions in April 2008 confirming this treatment for New York residents; see *Finding out More*.)

Box 1

Where DOMAs Exist — and Do Not

In addition to the federal DOMA, 45 states have their own laws or constitutional provisions (often referred to as "mini-DOMAs"), which ban same-sex marriage by defining "marriage" as between one man and one woman or declaring same-sex marriages void or invalid.

Every state except Massachusetts, New Jersey, New Mexico, New York and Rhode Island has passed a law or constitutional amendment limiting marriage to couples of the opposite sex.

On the other hand, the five states that do not have laws or constitutional provisions limiting marriage to one man and woman might recognize same-sex marriage. In the seven states (California, Massachusetts, Vermont, Connecticut, New Hampshire, New Jersey, Oregon) and the District of Columbia that have special laws favoring domestic partners or civil union partners, 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 they face a request for benefits from a same-sex couple, employers should consider the following issues in formulating their policies (also see Box 2):

Analyze existing HR policies

If an employer has a policy banning discrimination based on sexual orientation, it 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, an employer may want to consider whether state or local laws prohibit employment discrimination on that basis. Numerous states (including Illinois) have such laws that could easily apply to a failure to provide employee benefits to same-sex spouses. 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 an employer's home state recognizes same-sex marriages, the employer may have to cover same-sex spouses in its fully insured plans, and should consider amending its plans to do so. If, however, an 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 federal DOMA definition of "spouse." Obviously, this analysis can be very complicated for employers operating in multiple states.

Box 2

Steps Employers Should Take Now

- Analyze existing HR policies
- Determine home state's legal requirements
- Talk to health insurance providers
- Review plan documentation
- Coordinate plan's same-sex spouse and domestic partner coverage
- Ensure payroll department can handle taxation issues
- Communicate to employees
- Stay up to date on local and national developments

Talk to the health insurance provider

Employers that have fully-insured benefit plans, in particular, should determine what action vendors and insurers are taking and where the insurance policies were issued. Depending on which state insurance laws govern the insurer, an 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 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 such as that discussed in the *Firestone* ruling that provides for plan administrator discretion in interpreting the plan. (See *Finding out More;* and see ¶378 for sample plan language.)

See *Domestic Partnerships*, p. 6

Domestic Partnerships (continued from p. 9)

Coordinate plan's same-sex spouse and domestic partner coverage

If an employer has a domestic partner benefit plan, it may wish to enroll same-sex spouses as domestic partners, even if it 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.

An employer also should carefully consider the potentially discriminatory consequences of imposing any domestic partner eligibility requirements on same-sex couples that it does not impose on opposite-sex couples. If the employer does not have a domestic partner benefit plan, it 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 an employer will provide any sort of same-sex or domestic partner coverage, it will need to work with its payroll department to ensure that department can comply accurately with the tax consequences described above.

Communicate to employees

If an employer chooses to provide coverage to same-sex spouses and/or domestic partners, it should consider how to best communicate its offering. There may be employee recruiting and retention — 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. Not only do new developments occur almost weekly, there is no uniformity regarding what takes place. The way one particular locality or state treats the matter easily could be the exact opposite of how an adjacent jurisdiction addresses it. The United States is a highly varied patchwork quilt of policies, laws and regulations concerning domestic partner benefits and same-sex marriage.

The past month's developments serve as an excellent reminder that an employer needs to pay close attention to how the community and/or state where it is located addresses these topics. And of course, an employer must remember that no matter what the stance of the community or state is, it exists against a federal backdrop that is far from favorable to domestic partner benefits and same-sex marriage.

Finding out More

The California case was *In re Marriage Cases*, No. S147999 (Cal. Sup. Ct. May 15, 2008).

The Michigan case was *National Pride at Work v. Gov. of Michigan* (Nos. 133429, 133554), 748 N.W.2d 524 (Mich., 2008).

The two advisory opinions from the New York State Department of Taxation and Finance can be found at:

- TSB-A-06(2)I:4/06, John Galanti, Petition No. I050208A (April 4, 2006): http://www.tax.state.ny.us/pdf/advisory_opinions/income/a06_2i.pdf.
- TSB-A-06(3)I:4/06, Martin Farach-Colton, Petition No. I060208B: http://www.tax.state.ny.us/pdf/advisory_opinions/income/a06_3i.pdf.

Gov. Paterson's May 14, 2008 directive took the form of a memo from David Nocenti, counsel to the governor. A copy can be found on the Web site of the New York State Bar Association at http://www.abcny.org/pdf/memo.pdf.

Martinez v. Monroe County (N.Y. Slip Op. 00909), 50 A.D.3d 189, 850 N.Y.S.2d 740 (New York App., Feb. 1, 2008), is the case Gov. Paterson cited in his May 14, 2008 directive.

For the study on the number of same-sex couples reporting themselves as "unmarried partners," see the November 2007 report by UCLA's The Williams Institute at http://www.law.ucla.edu/williamsinstitute/publications/ACSBriefFinal.pdf.

The ruling that discusses plan language is *Firestone Tire & Rubber Co. et al. v. Bruch et al.*, No. 87-1054, Supreme Court of the United States, 489 U.S. 101 (1989).