



MASSACHUSETTS SAME-SEX MARRIAGES: POTENTIAL EFFECTS ON EMPLOYEE BENEFIT PLANS

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In its November 2003 decision of *Goodridge v. Department of Public Health*, the Supreme Judicial Court of Massachusetts concluded that the Massachusetts Constitution prevents the Commonwealth from limiting the “protections, benefits and obligations of civil marriage to opposite sex couples.” Accordingly, the court legalized same-sex marriages in Massachusetts and, as noted in the news, Massachusetts began issuing same-sex marriage licenses on May 17, 2004. This development raises a number of important employee benefit issues for employers based in, or with operations in, Massachusetts, as well as for employers in other states whose employees in same-sex relationships travel to Massachusetts to marry.

Potential Employee Benefit Issues

Employers are faced with a myriad of issues with respect to the benefit entitlements of the purported same-sex spouses of employees. For example:

- Is an employee who has entered into a Massachusetts same-sex marriage “legally married”? Barring an amendment to the Massachusetts Constitution, it seems clear that from now on Massachusetts residents who enter into same-sex marriages will be legally married as long as they remain in Massachusetts. However, Massachusetts Governor Mitt Romney, citing a 1913 state law prohibiting marriage between residents of another state where that state would not recognize the marriage as valid, has directed local Massachusetts municipalities not to issue marriage licenses to out-of-state residents unless they certify that they intend to relocate to the Commonwealth. A number of municipalities are issuing licenses to out-of-state residents in defiance of this order, but, for the time being, the legal validity of such marriages (similar to those that recently occurred in San Francisco and in certain New York municipalities) is questionable.

- What is the legal status of the same-sex marriage of a Massachusetts resident who moves to another state? Most states have enacted statutes expressly providing that same-sex marriages entered into in other jurisdictions will not be recognized as valid if the individuals move to those states. Other states without such statutes may choose to recognize such marriages as valid; New York State, for example, appears willing to do so.

- Would the spouse of an employee in a legal same-sex marriage be eligible for spousal benefits under the company’s benefit plans? This issue would be decided primarily by the terms of the applicable plans. For example, in a plan that simply provides for coverage or benefits for an employee’s “spouse” without defining that term, or that defines spouse as “legal spouse” or “the person to whom the employee is lawfully married,” it is possible that the same-sex spouse of an employee married in Massachusetts could claim entitlement to benefits. Thus, the plan should be clarified, if the employer wishes to do so, to provide that the term “spouse” excludes a same-sex spouse. Employers that do not recognize same-sex marriages should anticipate that they may be challenged under state laws prohibiting discrimination on the basis of sexual orientation. Such challenges may succeed against plans not covered by the Employee Retirement Income Security Act’s

(ERISA's) broad preemption provisions, such as church plans, governmental plans and bereavement policies. However, ERISA-covered plans will likely be able to make this decision free from state regulation. Alternatively, the employer may wish to recognize the same-sex spouse as the employee's lawful spouse for benefits purposes, particularly where the employee is located in Massachusetts or in a state that recognizes a Massachusetts same-sex marriage as valid (subject, in the case of an insured plan, to ensuring that the terms of any relevant insurance contract would permit coverage).

- What are the federal and state income tax consequences to the employee of enrolling the employee's same-sex spouse in the employer's medical plan? Under the 1996 federal Defense of Marriage Act, same-sex marriages are not recognized as valid for purposes of any federal statute, including ERISA and the Internal Revenue Code, even if they are valid under one or more state laws. Therefore, for federal income tax purposes, same-sex spouses will be treated the same as domestic partners who are provided benefits – that is, the benefits will be taxable to the employee unless the same-sex partner qualifies as a “dependent.” Treatment under state tax law will likely turn on whether the state recognizes the marriage as lawful.

- Is the employer's medical plan required to offer COBRA coverage to the employee's same-sex spouse? Under federal COBRA, continuation coverage would not need to be extended to a same-sex spouse. However, depending on the legal status of the marriage in the employee's home state, that state's “baby COBRA” statute (if it has one) might require that continuation coverage be provided, unless that statute is preempted by ERISA, as would likely be the case for a self-insured medical plan (other than one sponsored by an ERISA-exempt employer, such as a governmental entity or a church-related employer).

- Are there special issues involved in treating a same-sex spouse as a “spouse” under a qualified retirement or 401(k) plan? Yes. Because the terms of such plans are heavily regulated by ERISA and the Internal Revenue Code, and because, as noted, those federal statutes would not recognize a same-sex spouse as a “spouse,” employers must be cautious in electing to treat same-sex spouses as spouses under such plans. For example, conditioning an employee's selection of a benefit option or a death beneficiary on the consent of a same-sex spouse may jeopardize the plan's qualification.

- How do same-sex marriages affect an employer that provides domestic partner benefits? An employer with employees in Massachusetts that extends benefits to domestic partners may want to consider whether such benefits should be eliminated in favor of “spousal” benefits for only those Massachusetts employees with same-sex partners who choose to get married (particularly where the policy does not cover Massachusetts opposite-sex domestic partners). For plans not covered by ERISA, it is unclear whether an employer that limits its domestic partner policy to same-sex domestic partners can continue to do so in Massachusetts in light of the Commonwealth's prohibition on discrimination on the basis of sexual orientation. Employers with employees in other states may wish to consider as well the impact of Massachusetts marriages on their domestic partner policies.

What Should Employers Do?

An employer, particularly one with employees in Massachusetts or in contiguous or nearby states, should take a number of immediate steps in response to these developments:

- Determine the status of Massachusetts same-sex marriages in the states where the employer has operations.
- Review all benefit plans and other relevant documents (SPDs, insurance contracts, handbooks/policy manuals) and consider whether and how those documents define “spouse,” and whether they ought to be clarified.

- Examine any domestic partner policies and consider whether those policies should be revised to the extent they apply to employees located in Massachusetts.

- If spousal benefits are to be extended to same-sex spouses, consider (i) relevant tax-reporting and -withholding issues, (ii) whether such coverage is permitted under relevant insurance contracts, (iii) potential effects on qualified plan status, and (iv) where employees are covered by a collective bargaining agreement, whether there is a duty to bargain with the union regarding such extension of benefits.

If you have questions, please contact the Morgan Lewis lawyer with whom you regularly consult or any of the following:

Office	Name	Title	Phone	E-mail
Philadelphia	Robert L. Abramowitz	Partner	215.963.4811	rabramowitz@morganlewis.com
	Steven D. Spencer	Partner	215.963.5714	sspencer@morganlewis.com
Pittsburgh	John G. Ferreira	Partner	412.560.3350	jferreira@morganlewis.com
San Francisco	Mark H. Boxer	Partner	415.442.1695	mboxer@morganlewis.com
	Eva P. McComas	Of Counsel	415.442.1249	emccomas@morganlewis.com
Washington, D.C.	Gregory L. Needles	Partner	202.739.5448	gneedles@morganlewis.com
	Margery S. Friedman	Of Counsel	202.739.5120	mfriedman@morganlewis.com
New York	Gary S. Rothstein	Partner	212.309.6360	grothstein@morganlewis.com
	Craig A. Bitman	Of Counsel	212.309.7190	cbitman@morganlewis.com
Los Angeles	Frank H. Smith, Jr.	Partner	213.612.1016	fsmith@morganlewis.com