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Considerations for Employers in Light of Evolving Same-Sex Partner Rights and Prohibitions Against Sexual Orientation Discrimination

As rights pertaining to gay and lesbian people continue to evolve in 2011, employers must consider the impact of these changes on their workforce and develop policies that will continue to attract and retain qualified employees without running afoul of the changing law. In the same-sex partner area, with the passage of the New York State Marriage Equality Act (which became effective July 24, 2011), there are now six states and the District of Columbia that recognize same-sex marriage, which provides same-sex partners with the same rights as opposite-sex married partners under the laws of the state.[1] On July 1, 2011, civil unions became legalized in Rhode Island, now the fifth state to recognize these partnerships. Recognition of domestic partnerships also continues to evolve as these relationships may be recognized by a city, county, or state, or simply achieve employer-recognized status that may be conferred on same-sex partners or even opposite-sex partners. Another development that employers must be aware of is the challenge to the federal Defense of Marriage Act of 1996 (DOMA), which defines marriage as a legal union between a man and a woman, that is currently happening in the United States District Court for the Northern District of California. In Golinski v. United States Office of Personnel Management, a suit involving a lesbian federal court employee who was denied medical coverage for her wife, the Department of Justice (DOJ) has filed a brief strongly arguing that DOMA is unconstitutional.[2] The DOJ brief provides a detailed description of the history of discrimination by the government against lesbians and gay men and states that the passage of DOMA in 1996 was motivated by prejudice against gay people.

In light of the varied state and local laws and guidelines, many employers have developed company-wide employment and benefits policies to provide their gay and lesbian employees with access to health insurance or leave time. Many employers, however, have no policies at all or have only designed these programs to comply with laws in certain locales where they may have employees who have been extended such rights under state or local law. Such decisions may have been made based on the lack of any federal law requiring that such rights be extended to gay and lesbian employees. Certainly, the continued increase in state same-sex marriage laws and the challenges to the constitutionality of DOMA, which will continue in our court system, should cause employers to take notice. The purpose of this article is to set forth recent trends that employers should be aware of as they design or revisit their company policies affecting gay and lesbian employees, as well as to offer preliminary action items that employers may wish to consider in order to implement or update their current policies.

Considerations for Employment Law Policies

Defending a lawsuit alleging discrimination or harassment can be expensive and time-consuming. In a 2005 Workplace Fairness Survey conducted by Lambda Legal, 39 percent of gay and lesbian workers reported experiencing harassment or discrimination in the workplace. In a 2007 study conducted by The Williams Institute, up to 68 percent of gay and lesbian people report experiencing employment discrimination. Federal, state and local laws can protect gay and lesbian people in the workplace. Below is a summary of certain developments and trends employers should be aware of.

Family and Medical Leave Inclusion Act

H.R. 2364, a bill that would amend the Family Medical Leave Act of 1993 (FMLA) to permit up to 12 weeks of unpaid leave to care for a domestic partner or same-sex spouse with a serious health condition, is pending in Congress. The Family and Medical Leave Inclusion Act would also make other amendments to the FMLA, including permitting employees to take the same leave to

care for a parent or adult child of their domestic partner or same-sex spouse. Under this amendment, the term domestic partner would include more than persons who are registered domestic partners or in a legal same-sex marriage. In states where same-sex marriages are not recognized, it would include a person who is in a committed, personal relationship with the employee, who is not a domestic partner of any other person, and who is designated to the employer as that employee's domestic partner. This bill was introduced in the House of Representatives on June 24, 2011, but has not yet proceeded to a vote. Nevertheless, many employers already elect to include same-sex partners for purposes of family leave in their employment policies. At least 182 Fortune 500 companies extend FMLA benefits to include leave for a same-sex domestic partner or spouse.

Bereavement and Funeral Leave

Some states have laws that entitle same-sex partners to bereavement or funeral leave. For example, New York enacted a law in 2010 that requires employers to offer paid bereavement and funeral leave for "same-sex committed partners" if the employer offers this leave to opposite-sex couples. Under the New York law, same-sex committed partners are couples who are financially and emotionally interdependent. Much like FMLA leave discussed above, some employers are proactive by including same-sex partners in their leave policies even if a law does not require them to do so.

Laws Prohibiting Discrimination Based on Sexual Orientation

No federal law expressly forbids workplace discrimination against gay and lesbian people. The Employment Non-Discrimination Act (ENDA), which would provide basic protections against workplace discrimination based on sexual orientation, has been introduced in Congress on numerous occasions but has yet to pass. However, 21 states and the District of Columbia ban such workplace discrimination. For instance, New York, Illinois, and California have enacted statutes that ban sexual orientation discrimination both in the private and public work sectors. Moreover, a number of cities and counties have enacted laws against discrimination based on sexual orientation. Over 175 cities or counties have passed ordinances outlawing sexual orientation discrimination in the workplace. These cities include Los Angeles, Atlanta, Pittsburgh, Dallas, and Cleveland. In response to these laws, many employers have established policies prohibiting discrimination and harassment in the workplace based on sexual orientation. As of March 2011, over 85 percent of the Fortune 500 companies had implemented equal employment policies that include sexual orientation.

Action Items

To avoid pitfalls of violating laws protecting gay and lesbian people individually and same-sex couples, employers should consider taking the following steps:

- Monitor the Family and Medical Leave Inclusion Act, and be prepared to revise applicable employment policies to include same-sex partners and/or incorporate additional family leaves that will be permitted under the FMLA if the amendment is enacted.
- Update other personnel policies (*e.g.*, bereavement and funeral leave) to include same-sex couples.
- Be aware of and follow laws prohibiting discrimination on the basis of sexual orientation. This includes expressly identifying sexual orientation as a protected status in employment law handbooks and policies.
- Conduct workplace trainings that address and include protections based on sexual orientation and same-sex partner status.

Considerations for Employee Benefits

To date, many employers have developed domestic partner/same-sex partner employee benefit policies from the standpoint that because of DOMA, benefit plans governed by other federal laws such as the Employee Retirement Income Security Act of 1974 (ERISA) do not need to offer certain spousal rights to same-sex partners. Further, since the Internal Revenue Code (IRC) is a federal law, there are federal income tax consequences to employees who receive same-sex partner benefits that are otherwise not incurred with regard to spouses as defined under federal law (i.e., the value of any employer-provided health coverage for a same-sex partner of an employee who is not otherwise a federal tax dependent of the employee must be included in the employee's income for federal tax purposes). In addition, from a health insurance perspective, there is a difference in the treatment of employee benefits depending on whether the benefits are insured versus self-insured and whether state law can require provision of such benefits. Recent 2011 Department of Labor Bureau of Labor Statistics reports indicate that approximately 36 percent of full-time workers in private industry were offered access to employer-provided health insurance benefits for their same-sex partners. Of course, employer policies and these statistics could drastically change if DOMA is found to be unconstitutional. In the meantime, employers should be aware of the following considerations:

Health and Welfare Benefits

DOMA requires that in applying any federal statute, ruling, or regulation, the term "spouse" is to refer only to a married person of the opposite sex. In addition, ERISA preempts all state laws relating to employee benefit plans, with certain limited exceptions. Therefore, state

laws that directly relate to employee benefit plans—including the New York Marriage Equality Act (the Act)—will generally not have an effect on ERISA benefit plans. A major exception to ERISA preemption is in the area of any state laws relating to the regulation of insurance. Thus, health insurance contracts issued in a state with a same-sex marriage law will be subject to state regulation. Thus, the effect of the Act and similar state laws on health and other welfare benefits is as follows:

- If an employee welfare benefit plan is offered *through the purchase of an insurance contract* from a licensed insurer, the plan will be required to comply with the Act, or similar laws regulating insurance in another state that governs the contract. Therefore, to the extent prescribed under state law, a same-sex spouse (or, if applicable, a domestic partner or partner in a civil union) can be treated in the same way as an opposite-sex spouse.
- If an employee welfare benefit plan is self-funded, paid for *directly by the employer or from a fund* set aside to pay the welfare plan benefits, so benefits are not provided by means of an insurance contract, federal law applies and the Act or similar laws will have no effect. Therefore, only an opposite-sex spouse will be recognized as a "spouse" with all the rights that status provides. This applies both to active employees and to continuation of coverage under federal law (referred to as COBRA coverage), although state mini-COBRA laws may dictate otherwise. In this scenario, employers have the option to design their self-funded programs to offer same-sex benefits. However, employers should still be mindful that a decision not to offer such same-sex benefits where otherwise extended by state law is not entirely without risk from a litigation perspective, especially as this area continues to evolve.
- Medicare coverage, which is a federal program, similarly will not be affected by the Act or other state legislation; however, domestic partners may be treated as "family members" for purposes of determining Medicare entitlements.
- An employee welfare benefit plan may voluntarily offer "spouse-like" benefits to same-sex spouses, domestic partners, and members of civil unions, and many employer plans currently do so. However, there is a federal tax impact to an employee for the value of any employer-provided health coverage of a same-sex spouse, domestic partner, or member of a civil union, either under an insured or self-insured plan, if the covered person is not also defined as a dependent under the IRC. If the covered person is not a dependent, any employee contribution toward the person's coverage must be paid with after-tax dollars (and not through a Section 125 Cafeteria Plan), and the value of employer-paid coverage will be taxed as earned income to the employee. Similarly, amounts set aside through a Section 125 Cafeteria Plan Flexible Spending Account may not be used to pay medical expenses for a nondependent who is not an opposite-sex spouse.

Retirement Benefits

Because retirement plans are not offered through the purchase of insurance, ERISA preemption applies to them. Some pension plans use insurance for funding purposes, but this does not bring the plan itself under state insurance laws and into the exception to ERISA preemption. Therefore, federal spousal rights, such as a spouse's right to a qualified joint and survivor annuity under a pension plan or to be the primary beneficiary of a profit sharing/401(k) account, unless specifically waived, is only available to an opposite-sex spouse. Thus, considerations must be given to rights under plans that are available only for spouses as defined under federal law versus non-spouse beneficiaries or otherwise qualifying dependents. Also, in the event of a separation or divorce, a portion of an employee's ERISA-covered retirement benefit may not be assigned to the same-sex spouse, domestic partner, or member of a civil union using a qualified domestic relations order if such individuals cannot otherwise qualify as an alternate payee under applicable guidance.

Similarly, Social Security benefits, which are provided under federal laws, will not be affected by the Act or other state legislation. Therefore, a same-sex spouse will not be entitled to survivor benefits with regard to the partner's Social Security payments, although there may be certain benefits that a partner is entitled to as a "family member."

An employer retirement plan may voluntarily offer "spouse-like" benefits or rights to same-sex spouses, domestic partners, and members of civil unions. For instance, a pension plan may offer a contingent annuity, where someone other than a spouse may be named to receive a survivor benefit, in addition to the qualified joint and survivor annuity that must be offered to an opposite-sex spouse. Also, almost all profit-sharing/401(k) plans allow a participant to name any death beneficiary the participant chooses. The key difference from an opposite-sex spouse, however, is that these contingent annuitants or designated beneficiaries have no right to demand these benefits nor, therefore, is their consent required for the participant to name someone else. A plan sponsor must be mindful of how "spouse" is defined in plan documents in order to interpret spousal rights appropriately.

Action Items

In light of the foregoing, employers should take the time now to review existing benefit programs.

Initial steps employers should take include:

- Create or review and update company-wide domestic partner benefit policies, and related materials, including partnership affidavits and explanations of the current law in each locale.
- Review the proofs required from employees regarding legal same-sex marriages or dependent status of such partners, including determining whether to require marriage or civil union certification in states that now permit it.
- Update payroll practices and tax reporting/withholding to properly account for imputed income on a federal and state level to an employee in connection with employer-provided health coverage for a same-sex partner, which may also vary by state depending on where the employer does business. New York employees with health coverage for a same-sex spouse will be subject to bifurcated tax treatment (the benefit for the nonemployee spouse will not be imputed to the employee's income for state tax purposes but will be imputed to the employee's income for federal tax purposes unless the spouse qualifies as a dependent of the employee for federal tax purposes [e.g., New York employers will not need to withhold tax for New York State, New York City, or Yonkers income tax purposes, even though it is subject to federal withholding]).
- Consider whether to offer a gross-up to offset any unequal tax treatment incurred by employees who elect to cover their same-sex partners in their health insurance plans.
- Review and update benefit plan documents and related communication materials and procedures to address rights offered to same-sex partners and more clearly define what is meant by "spouse" under the plan terms for purposes of eligibility and coverage.

Considerations in the Collective Bargaining Process

Those employers who have union-represented employees—and therefore negotiate with respect to wages, benefits, and other terms and conditions of employment and who operate and/or have covered employees in New York and the other states that now recognize same-sex marriage, civil unions, and domestic partnerships—will need to take these developments into account in contract negotiation and administration. While in many respects this will entail the same types of review and action as described above and elsewhere in this article, an employer's duty to bargain with the union representing its employees before taking most actions that would change terms and conditions poses unique challenges in addressing these developments.

For example, typically the questions of which, if any, dependents will be eligible for coverage under an employer's group health and medical insurance programs, and the terms on which such coverage will be offered, are subjects addressed though collective bargaining, and an employer may not make unilateral changes in the terms of coverage or the basis on which it is offered during the term of a contract. Depending on whether a particular collective bargaining agreement provides for medical benefits to be provided directly by the employer, either through a self-insured or insured program, the employer will have to follow one of the courses outlined above. However, in the unionized context it is also common for medical coverage to be provided by way of employer contribution on behalf of eligible employees to a multi-employer trust fund that provides benefits for employees of multiple employers.

Most collective bargaining agreements also address the range of other employment practices and policies that are impacted by the recognition of same-sex marriage, civil unions, and domestic partnerships, such as family leave, nondiscrimination policies, and availability of bereavement or funeral leave in connection with the death of a relative or member of an employee's household. This means that employers will need to review their agreements with respect to each of the issues addressed in this article and determine which policies and practices addressed in or covered by their contracts will need to be changed to comply. As most collective bargaining agreements do not provide for reopening or renegotiation of contract terms during the term of the agreement, an employer will need to assess, on a case-by-case basis, whether to propose to the union that the parties voluntarily reopen the agreement to address changes necessary to comply with changes in law, to modify their practices to comply, or to address the issues at the time their contract next comes up for negotiation.

The foregoing considerations are merely a starting point to assist employers in the development of their companywide same-sex partner policies. Same-sex partner rights are an important issue in our society and an issue that employers must address fairly in order to promote an inclusive work environment. As the landscape continues to evolve, employers should take the time now to consider how to develop and maintain effective employment and benefit policies that will foster a productive work environment. ◎

Notes

1. California is not a state that currently recognizes same-sex marriages. However, there are approximately 18,000 same-sex couples, who married during a period in 2008 when California did recognize same-sex marriage, that are considered legally married. On May 15, 2008, the California Supreme Court ruled that same-sex couples should have the right to marry. The ruling took effect mid-June 2008. Same-sex marriages performed in California between mid-June 2008 until the November 2008 passage of Proposition 8, which banned same-sex marriage in California, are considered valid. Employers must be aware that this group of valid marriages exists.

2. The constitutionality of the Arizona state constitution's definition of marriage as a union of one man and one woman, which has served to exclude same-sex partners from eligibility for state employee benefits, is also under attack. In *Diaz v. Brewer*, the U.S. Court of Appeals for the Ninth Circuit recently upheld a preliminary injunction that temporarily bans Arizona from terminating health benefits for state employees' same-sex partners until there is resolution on the constitutionality of the state's benefits ban.

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