



For your information

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Same-Sex Marriage: Legal and Legislative Update

Recently, there have been a number of developments relating to same-sex marriage. Specifically, the United States Court of Appeals for the Ninth Circuit rejected a request to rehear its finding that California's ban on same-sex marriage (Proposition 8) violates the United States Constitution. The United States Court of Appeals for the First Circuit found the Defense of Marriage Act (DOMA) unconstitutional. This is the first appellate decision to address the constitutionality of DOMA. In addition, voters in Washington State will have the opportunity to approve or reject the state's new law defining certain same-sex relationships as a marriage. As state and federal law continues to evolve, it is important that employers offering benefits to same-sex domestic partners understand and monitor how state and federal laws affect these benefits.

Background

It is increasingly common for employers to extend health coverage and other benefits to same-sex domestic partners of employees. States enact and enforce their own family and domestic relations laws. Although many states have a constitutional or statutory ban on same-sex marriage, others are implementing provisions that recognize and extend the same rights and responsibilities to same-sex domestic partners that are afforded to opposite-sex married couples, such as providing the same tax exclusion for employer-provided health coverage. In California, voters and the courts have addressed this issue. In November, voters in a number of states, including Washington State, will also consider a same-sex marriage law.

DOMA is a federal law providing that the word "marriage" means only a legal union between one man and one woman and "spouse" refers only to an individual of the opposite sex who is a husband or wife. As a result, same-sex domestic partners cannot receive federal benefits even when legally married under state law. Generally, the value of employer benefits provided to same-sex domestic partners must be included in the employee's gross income for federal tax purposes. In February 2011, the Department of Justice (DOJ) announced that it would not defend the constitutionality of DOMA. The DOJ considers DOMA -- when applied to same-sex couples legally married under state law -- to be unconstitutional. However, while the DOJ will no longer pursue these cases, the Bipartisan Legal Advisory Group of the House of Representatives has repeatedly defended the constitutionality of

DOMA. Thus, issues arising from DOMA continue to be litigated and could eventually be resolved by the United States Supreme Court.

Recent Developments

Ninth Circuit Declines to Reconsider Constitutionality of California's Ban on Same-Sex Marriage. In February 2012, a three-judge panel of the Ninth Circuit upheld a lower court decision that California's Proposition 8, a 2008 ballot measure that limits marriage to one man and one woman, violates the Fourteenth Amendment. Registered domestic partners in California have all the same substantive rights and benefits as married spouses, except the right to marry. For a short period (June 17-November 4, 2008) prior to the passage of Proposition 8, California recognized same-sex marriage. After an appeal to a larger panel of the court's judges, the appellate court recently [announced](#) that it will not reconsider the constitutionality of the law. Proposition 8 proponents are likely to appeal the decision to the Supreme Court. The appellate court's decision striking down the law will not go into effect until the appeals process is completed. If Proposition 8 is overturned and California formally recognizes same-sex marriages, DOMA litigation (discussed below) is likely. Currently, however, employee benefits extended to registered same-sex domestic partners in California are excluded from state taxation.

First Circuit Rules Defense of Marriage Act Unconstitutional. In the first appellate [decision](#) to address the constitutionality of DOMA, the First Circuit found that the denial of federal benefits to same-sex couples lawfully married in Massachusetts is unconstitutional. The decision resolves appeals from two lower court cases, consolidated for purposes of this appeal. After reviewing DOMA's legislative history, the appellate court concluded that Congress' reasons for enacting DOMA did not support nor further the purpose of the law (e.g., strengthen opposite-sex marriages). Anticipating an appeal of its decision and a likely review of DOMA by the Supreme Court, the appellate court delayed implementing its decision. Had the appellate court not delayed its decision, DOMA would not apply in Maine, Massachusetts, New Hampshire, and Rhode Island (the states under the jurisdiction of the First Circuit), but would continue to apply to all other states. However, as a result of the appellate court's delay, the treatment of federal benefits extended to same-sex domestic partners remains uniform throughout the country.

Washington State Voters to Approve or Reject Same-Sex Marriage Law. Since 2007, Washington State has provided certain legal protections to domestic partnerships. Domestic partnerships are available to same-sex couples over the age of 18 and to heterosexual couples in which at least one individual is over the age of 62. In 2009, the protections afforded to domestic partnerships were expanded to provide that for all purposes under state law, state-registered domestic partnerships must be treated the same as married spouses. In February 2012, Washington State legalized same-sex marriage. The new law, slated to become effective on June 7, 2012, provides that marriage in Washington "is a civil contract between two persons." Washington was the seventh state to legalize same-sex marriage. Opponents have [succeeded](#) in delaying the effective date of this law. A referendum, requiring the state's voters to approve or reject the same-sex marriage law, will appear on the November 2012 general election ballot. If voters approve same-sex marriage, such unions will be

allowed 30 days after the vote. However, because the current law in Washington already treats same-sex domestic partners the same as married spouses, from a state law perspective, the delayed effective date has minimal impact on employer-provided benefits.

INSIGHT

While there may be further appeals, DOMA currently remains law. A same-sex domestic partner may not be entitled to the tax-free benefits provided under the Internal Revenue Code. For example, the value of the health coverage provided to a same-sex spouse who is not a tax dependent must be included in the employee's taxable income at the federal level.

Conclusion

Developments in this area continue. Additional challenges to DOMA are pending and more are anticipated as states, like Washington, recognize a same-sex domestic partner as a spouse. A lower court decision, also finding DOMA unconstitutional, has been appealed in the Ninth Circuit, and the appellate court is expected to hear arguments in September 2012. While the Supreme Court could address the constitutionality of DOMA right away, it seems more likely it will wait for more appeals and a conflict among the federal appellate courts. As seen in the First Circuit, when same-sex couples are legally married under state law, a court could rule in favor of same-sex couples challenging DOMA if it believes that DOMA unfairly denies to legally married, same-sex couples the same benefits afforded to similarly situated opposite-sex couples. These ongoing challenges, as well as changes in state statutes, should be tracked by employers that offer benefits to same-sex domestic partners.

Buck Can Help

- Update personnel policies to reflect changes in state (and possibly federal) law
- Review and, if needed, update state payroll policies regarding state income tax treatment of employee benefits
- Monitor and help ensure compliance with DOMA and state same-sex marriage legislation and referenda