Same-Sex Marriage in California: The Impact on Employers
June 2, 2008

In a landmark decision, the California Supreme Court recently granted same-sex couples the right to marry, *In re Marriage Cases*, No. S147999 (Cal. May 5, 2008). In addition to the right to marry, the Court's decision grants equal treatment under the law to married same-sex couples and married opposite-sex couples. The most immediate impact on employers is that same-sex couples must have access to many employment benefits that have traditionally been given to married heterosexual couples. The decision goes into effect on June 14, 2008.

Even before the recent decision, California law has granted state-registered domestic partners essentially the same legal rights as married couples (A.B. 205). Effective January 1, 2005, the domestic partner law created an institution parallel to marriage for both same-sex and opposite-sex couples. The domestic partner law has specific implications for employers. The law requires insurance companies that provide employers with coverage of employee spouses to offer the same health insurance coverage for employees' registered domestic partners. It also makes registered domestic partners eligible to collect California unemployment benefits when the employee relocates because of the requirements of his or her partner's employment. Moreover, under California Labor Code § 233, if an employer has a policy permitting employees to use sick leave to care for spouses, the employer is required to provide equal treatment to registered domestic partners.

The California Supreme Court in *In re Marriage Cases* did not invalidate the domestic partner law, but instead extended the rights and responsibilities granted to married heterosexual couples under California law to married gay and lesbian couples. Therefore, an employer must provide same-sex spouses with any benefits that the employer provides to opposite-sex spouses under state law or employer policy. Examples of state law employment policies that must now extend to same-sex spouses are leaves to care for a spouse and any coverage provided by an insurance policy an employer purchases in California. Examples of possible employer policies that must now extend to same-sex spouses are leaves of absence offered beyond those provided under state law and paying for travel for spouses of employees. An employer who fails to provide spousal benefits to same-sex spouses may be exposed to claims of sexual orientation discrimination under California's Fair Employment and Housing Act.

Although the *In re Marriage Cases* decision permits same-sex marriage in California, and grants state law rights to same-sex couples, tension remains between that ruling and applicable federal law. Under the Defense of Marriage Act (DOMA), enacted in 1996, a California same-sex spouse does not qualify as a spouse under federal law. Therefore, benefits covered by federal law, such as ERISA retirement plans subject to the Internal Revenue Code, will not automatically apply to a same-sex spouse. However, the DOMA does not prevent an employer from voluntarily...
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DOMA also provides that states that do not legally authorize gay marriage are not required to recognize same-sex marriages performed in another state. However, because California now permits same-sex marriage and grants legal rights and benefits to same-sex spouses, California employers must recognize gay marriages performed in either California or other states. Notably, several states (including states that do not legally permit same-sex marriage) now recognize same-sex marriages performed in other states or use domestic partnership laws to grant same-sex partners all or some of the rights and responsibilities granted to spouses. In *Martinez v. County of Monroe*, 2008 NY Slip Op 00909 (4th Dep't Feb. 1, 2008), a New York appellate court ruled, for example, that a public employer’s denial of health care benefits to the same-sex spouse of an employee violated the New York Constitution and the New York Human Rights Law, which prohibits employers from discriminating against employees on the basis of sexual orientation. Moreover, New York Governor David Patterson recently gave state agencies until June 30, 2008 to recognize same-sex marriages performed in other states. While *Martinez* concerned a public employer, and Governor Patterson’s order addressed state agencies, private employers in New York should be aware that failure to grant equal treatment to opposite-sex and same-sex marriages may expose them to claims of sexual orientation discrimination under the New York Human Rights Law.

Employers should take active steps to ensure that their policies are in compliance with state law regarding same-sex marriage. First, employers should determine whether their state: (1) permits same-sex marriages, (2) recognizes same-sex marriages performed in other states, or (3) has a domestic partnership law that grants domestic partners some or all of the same rights granted to spouses. Employers should then survey all employment policies and benefits provided under state law or employer policy to determine if they provide rights or benefits to an employee’s spouse. If so, the employer should ensure that those benefits are also provided to same-sex spouses or domestic partners. An employer should also carefully review federally-regulated benefits, such as ERISA benefit plans, in order to determine to what extent the employer should extend those benefits to same-sex spouses or domestic partners.