

## Employment Law

MAY 2004

### Employment Law Consequences of Same-Sex Marriages in Massachusetts

On May 17, 2004, the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), will become effective. In that decision, the Supreme Judicial Court held that the definition of "marriage" under Massachusetts law includes marriage between persons of the same sex. This is contrary to the Federal Defense of Marriage Act which states that, for purposes of Federal law and regulations, "marriage" means marriage between members of the opposite sex only.

In the employment area, some of the effects of the *Goodridge* decision will be clear. However, because Federal law trumps, or "pre-empts," state law in many areas relating to benefits, and because the Federal definition of "marriage" is now different than the Massachusetts definition, some of the consequences of *Goodridge* will be complex or unclear.

The purpose of this Alert is to inform Massachusetts employers about the implications of *Goodridge* and what actions they should take to deal with *Goodridge*.

#### WELFARE PLANS

Insured welfare plans, such as insured medical (including HMO), dental, life, and disability plans, are generally regulated by Massachusetts insurance laws as well as Federal law. The word "spouse" in these plans will almost surely include spouses of same-sex marriages. However, since employers with insured plans can offer only the coverage that the insurance carrier makes available, employers should confirm that their insurance carrier will cover spouses of same-sex marriages. Employers should also ask their carriers whether it will be possible

for an employee to add a same-sex spouse other than during the open enrollment period.

Self-insured plans are regulated by Federal law but not by Massachusetts insurance laws. Employers with these plans can elect whether to cover or exclude spouses in same-sex marriages. Once that decision is made, the plan should be reviewed and, if necessary, changes made to achieve the desired result.

Employers with stop loss coverage should review that coverage, and confer with the stop loss carrier, to be sure that it is consistent with the employer's underlying plans.

There will be Federal tax consequences of extending medical insurance coverage to spouses of same-sex marriages. Since a spouse of a same-sex marriage is not a spouse for Federal income tax purposes, the value of any coverage an employer provides to a same-sex spouse will be includable in the employee's income for Federal tax purposes. The only exception is if the same-sex spouse is a dependent of the employee for Federal tax purposes.

Employer payments for benefits for a same-sex spouse will probably be non-taxable to the employee for Massachusetts tax purposes, although the Massachusetts Department of Revenue has not yet issued any guidance on this point.

#### CAFETERIA PLANS

An employer may be able to make certain benefits within a cafeteria plan available to a same-sex spouse. However, for Federal tax purposes, the employee will not be able to use pre-tax dollars to pay for those benefits.

## RETIREMENT PLANS

Defined benefit and defined contribution tax-qualified retirements plans are regulated by Federal law, which pre-empts state law. One would expect that because of the Federal Defense of Marriage Act, the definition of “spouse” in these plans could mean only a spouse in an opposite-sex marriage. However, many plan documents state that the word “spouse” means “spouse” as defined by state law, which under Massachusetts law would include a spouse of a same-sex marriage. This creates an uncertainty because we don’t know how the Federal agencies and courts will deal with these conflicting definitions of “spouse.”

Because of this uncertainty, employers should decide whether they want to include spouses in same-sex marriages as spouses for purposes of their tax-qualified retirement plans. After they make that decision, they should review, or have their advisor review, their plan documents and make whatever changes may be necessary so that the plan gives effect to the employer’s intentions. This may necessitate a change to the plan itself, or the issuance of rules or regulations by the Plan Administrator. It may also require redrafting the summary plan description.

Because of the Federal Defense of Marriage Act, it will not be possible for an employer to provide same-sex spouses with all the rights that opposite-sex spouses have under the employer’s tax-qualified retirement plans. For example, in the area of distributions, ERISA compels certain protections for spouses of opposite-sex marriages, protections which cannot be extended to spouses of same-sex marriages regardless of whether the plan defines “spouse” to include a same-sex spouse. Therefore, you should check with your Plan Administrator or plan advisor when asked to make a distribution to the same-sex spouse of an employee, or when beginning to make distributions where the form of payment has legal significance.

If you have employees who are spouses in a same-sex marriage, you should encourage them to complete the beneficiary designation forms quickly and precisely so that their intentions, rather than the uncertainty of the legal definition of a spouse, will be given effect when possible.

## HEALTH INSURANCE CONTINUATION COVERAGE

Continuation coverage is a particularly complex area. COBRA is a Federal law and spouses of same-sex marriages do not have a legal right to obtain continuation coverage

under COBRA. If an employer with an insured plan wants to allow spouses in same-sex marriages to have that right, they should discuss this issue with their insurance carriers. Employers with self-insured plans may have to amend their plans to grant continuation coverage to spouses of same-sex marriages.

Massachusetts has a “mini-COBRA” law (contained in Chapter 176J of the Massachusetts General Laws) which covers insured plans of employers with between 2 and 19 employees (but the definition contains many complexities). Since this is a Massachusetts law, these plans will undoubtedly have to include spouses of same-sex marriages within the continuation coverage options.

There is another set of Massachusetts laws which requires insured plans to give limited continuation rights in one or more of the following circumstances: the employee leaves the group; there is a plant closing or partial plant closing; an involuntary layoff; or the death, divorce, or separation of the employee. Spouses in same-sex marriages will be entitled to protection under these laws.

Massachusetts also has a law that authorizes judges to grant to an ex-spouse certain rights to insurance coverage under the other ex-spouse’s group insurance plan. Since this authorization is contained within Massachusetts law, it is likely that it will cover spouses in same-sex marriages, although it is not clear that this law will apply to self-insured plans.

## QUALIFIED DOMESTIC RELATIONS ORDERS

It is not legally permissible for a QDRO to cover a spouse in a same-sex marriage. Employers will need to confer with their counsel if they receive such an order.

## FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act requires that certain employers allow an employee to take time away from work to care for a spouse with a serious health condition. Since the FMLA is a Federal law, this will not mean a spouse of a same-sex marriage. However, if an employer wants to extend FMLA-like rights to an employee with a same-sex spouse, in its personnel policies it can define “spouse” for leave purposes as a spouse of a same-sex marriage.

The more complicated issue arises when an employer does not want to allow an employee to take leave to care for a same-sex spouse. Many employers in their employee handbooks or intranet sites describe their family and medical leave policy. If the handbook or intranet site states that the written

policy is intended only to be a statement of the Family and Medical Leave Act, it is unlikely that the policy will be extended to same-sex marriages. However, if it appears that the policy is an employer personnel policy, albeit grounded in the FMLA, it is quite possible that courts would interpret the policy to require extension of rights to spouses of same-sex marriages.

## MARRIAGE CERTIFICATES

Some employers may wonder if it would be acceptable to ask an employee who says that he or she has a same-sex spouse for a copy of the marriage certificate. Our judgment is that it would be acceptable only if the same request were made of everyone who says that he or she is married. Some employers have that policy now in order to reduce possible fraud on benefit plans.

## PERSONNEL POLICIES

As a general matter, all personnel policies that refer to a spouse will, because of the *Goodridge* decision, necessarily include spouses of a same-sex marriage. For example, an employer policy that allows an employee time off to attend the funeral of a father-in-law will encompass the father of a same-sex spouse. Or, an employer that allows employees to use sick leave when caring for an ill spouse will now have to allow the use of sick leave to care for a same-sex spouse.

It would be wise for employers to review their policies to be sure that they understand the impact of *Goodridge* and to be sure that they understand when “spouse” means the spouse of a same-sex marriage and when it does not. Where the definitions do not conform to the employer’s intentions, they should be changed if legally permissible, and where necessary, policies should be clarified to eliminate ambiguities.

In the same vein, employers which grant domestic partner benefits need to decide whether they want to continue to extend those benefits. Many employers grant domestic partner benefits only to those employees who are legally barred from being married. Since same-sex marriage will soon be lawful in Massachusetts, those policies must be rewritten if the employer wants to grant benefits to non-married same-sex partners.

## MASSACHUSETTS STATE EMPLOYMENT LAWS

There are a limited number of Massachusetts state laws in the employment area that refer to spouses and those laws will now cover spouses of same-sex marriages. For example, the Massachusetts Small Necessities Leave Act requires that employers covered by the FMLA grant employees limited time off to accompany an elderly relative to a routine medical appointment. Since the law defines a “relative” as someone related by blood or marriage to the employee, this would include in-law relations in a same-sex marriage.

## COMMUNICATION

After an employer has reviewed and where necessary revised its plans and policies, it should communicate all changes to its employees. This will help protect the employer from legal challenges and contribute to good employee relations.

**HENRY T. GOLDMAN**

*hgoldman@kl.com*  
617-951-9156

**FOR MORE INFORMATION**, please contact one of the following K&L lawyers:

<b>Boston</b>	Henry T. Goldman	617.951.9156	hgoldman@kl.com
<b>Dallas</b>	Jaime Ramón	214.939.4902	jramon@kl.com
<b>Harrisburg</b>	Carleton O. Strouss	717.231.4503	cstrouss@kl.com
<b>Los Angeles</b>	Thomas H. Petrides	310.552.5077	tpetrides@kl.com
	Paul W. Sweeney, Jr.	310.552.5055	psweeney@kl.com
<b>Miami</b>	Daniel A. Casey	305.539.3324	dcasey@kl.com
<b>Newark</b>	Marilyn Sneirson	973.848.4028	msneirson@kl.com
<b>New York</b>	David R. Marshall	212.536.4066	dmarshall@kl.com
	Rory J. McEvoy	212.536.4804	rmcevoy@kl.com
<b>Pittsburgh</b>	Stephen M. Olson	412.355.6496	solson@kl.com
	Michael A. Pavlick	412.355.6275	mpavlick@kl.com
	Hayes C. Stover	412.355.6476	hstover@kl.com
<b>San Francisco</b>	Jonathan M. Cohen	415.249.1029	jcohen@kl.com
<b>Washington</b>	Lawrence C. Lanpher	202.778.9011	llanpher@kl.com



**Kirkpatrick & Lockhart LLP**

*Challenge us.®*

[www.kl.com](http://www.kl.com)

BOSTON ■ DALLAS ■ HARRISBURG ■ LOS ANGELES ■ MIAMI ■ NEWARK ■ NEW YORK ■ PITTSBURGH ■ SAN FRANCISCO ■ WASHINGTON

This publication/newsletter is for informational purposes and does not contain or convey legal advice. Please note that information about prevailing law is limited to the particular state or federal jurisdiction(s) covered by the cited law and cases, and stricter rules may apply in some states. This newsletter should not be relied upon in regard to any particular facts or circumstances without first consulting a lawyer.