Proposition 8 Overturned In California—What Does This Mean For Employers?

On August 4, 2010, Judge Vaughn R. Walker, Chief Judge of the U.S. District Court in San Francisco, held that California's Proposition 8 is unconstitutional. The ruling came in the highly publicized case of *Perry et. al. v. Schwarzenegger et. al.* (C09-2292 VRW). Proposition 8, enacted by the voters in 2009, amended the California Constitution to provide "only marriage between a man and a woman is valid or recognized in California." Judge Walker invalidated the amendment for two reasons: it (1) denies individuals the fundamental right to marry without a compelling reason to do so, violating the Due Process clause of the federal Constitution, and (2) violates the Equal Protection clause by discriminating based on sex and sexual orientation.

For a brief period before Proposition 8 was enacted, marriage was legal in California for same-sex couples. In addition, such couples were, and still are, able to register as "domestic partners," a legal status that provides virtually all the same rights, responsibilities and protections available to opposite-sex, married couples. So, this ruling leaves California employers asking themselves, "What are the practical implications of this ruling to California businesses?"

For the moment, there is no direct impact for employers, or anyone else. The decision was immediately and temporarily stayed while Judge Walker considers whether his order should be suspended pending an appeal. Lawyers on both sides are presenting arguments either in favor of, or opposed to, allowing same-sex weddings to resume.

If the ruling is not stayed, and same-sex weddings are allowed to proceed pending appeal of the *Perry* decision, the impact on California employers will center on entitlements, including employee benefits, that are granted to spouses in situations where the affected employees are not also registered domestic partners. These, and other issues, are discussed below.

Domestic Partnerships Remain A Legal Relationship Status

Judge Walker's decision does not address California's domestic partner law. That law remains intact, and continues as a parallel institution to marriage. This adds complexity to some employers' policies and benefits plans. Before same-sex marriage was performed in the Golden state, California employers were left to compare two seemingly different classes of relationships—registered domestic partners and opposite-sex married spouses. If the ruling is not stayed, employers will have to contend with employees who have opposite-sex married spouses, registered domestic partners and same-sex married spouses, as was the case between May 2008, when the California Supreme Court held that all California counties were required to issue marriage licenses to same-sex couples, and November 2009, when Prop 8 was passed.

Benefits May Cause Employers Heartache, But Not Heartbreak

The next issue will inevitably be whether an employer must offer benefits to employees with same-sex spouses. The Employee Retirement Income Security Act of 1974 (ERISA) generally preempts state laws affecting employee benefits, including, for example, self-insured or self-funded employee health and welfare plans. Accordingly, employers who have chosen to limit spousal benefits to traditional opposite-sex spouses under ERISA-covered plans have been allowed to do so, even where state law recognizes same-sex marriages.

There are limits to ERISA's preemption of state law, however. ERISA does not preempt state laws governing insurance. Moreover, employee benefit plans maintained by a governmental or church employer normally fall outside the scope of ERISA entirely. For those benefits that are not governed by ERISA, state and local laws will not be preempted, and employers will be subject to state and local coverage requirements.

California law already mandates that insurers must offer group health plans, health insurance and other forms of insurance that provide equal coverage to spouses and registered domestic partners. Given the applicability of California's domestic partner laws to insured arrangements, it is likely that same-sex marriages will impact insured arrangements similarly to the domestic partner laws, i.e., same-sex spouses must be covered under insured arrangements, such as HMOs. The decision will also affect other employee benefits plans that fall outside the scope of ERISA, including paid time off arrangements and uninsured short-term disability plans.

Employers will also need to review benefit plan language. Many plan documents define "spouse" by reference to state law (for example, any "spouse who is legally married" or "in a marriage recognized under state law"). Employers should also be aware of how federal COBRA and Cal-COBRA will operate. Cal-COBRA requires continuation coverage for registered domestic partners, and in light of the recent decision, new same-sex spouses should be entitled to the same continuation coverage. For federal COBRA purposes, however, same sex spouses and domestic partners will not be considered qualified beneficiaries unless the plan provides for it.

Employees In Other Jurisdictions

The federal Defense of Marriage Act ("DOMA") defines marriage as between one man and one woman for purposes of federal law and provides that no state shall be required to give full faith and credit to a same-sex marriage performed in another state. Under DOMA, a state may recognize same-sex marriages from other states, but is not required to. Therefore, although Judge Walker's decision affords same-sex couples the same substantive rights under California law in marriage, the decision does not modify the applicable provisions of federal law.

There are, however, a patch-work of state laws that recognize same-sex relationships. Connecticut, District of Columbia, Iowa, Massachusetts, New Hampshire and Vermont all recognize same-sex marriage. For marriages entered into in these jurisdictions, California recognizes marriages between same-sex couples entered before November 5, 2008, and provides same-sex couples who married out-of-state on or after November 5, 2008 with all of the rights, benefits, and responsibilities of marriage except for the name "marriage." In addition, Maryland and New York recognize same-sex marriages from out of state. Finally, six jurisdictions in addition to California provide civil unions or comprehensive domestic partnerships, including Connecticut, District of Columbia, Oregon, Nevada, New Jersey and Washington.

Based on the myriad state laws governing relationship recognition, multi-state employers may have employees who obtain a marriage certificate in California (or another state), but seek to have it recognized in a different state. Those employers will need to determine if a particular state recognizes same-sex marriages from other states, or if it is a jurisdiction that legally recognizes other form of same-sex relationship. It is important to note that, in many states, referendums and constitutional amendments are now in place to prevent the recognition of same-sex marriages formed in other states. To date, 30 states have passed constitutional amendments that ban same-sex marriage and can be expected to vehemently oppose recognition of California marriages of same-sex couples.

Other Considerations: State Leave Laws and Anti-Discrimination Statutes

Although the biggest impact from the decision will be in the area of benefits, employers have other legal requirements to consider, primarily state employment laws and regulations governing legal entitlements for employees with "spouses."

First, employers will be required to recognize same-sex marriages with respect to state leave laws. For example, the California Family Rights Act's family and medical leave provisions allow an employee to take up to 12 weeks of unpaid leave for an employee to care for a spouse, or the child of a spouse, who has a serious health condition. This would extend the benefits of this law to same-sex "spouses." In addition, employees with same-sex spouses would also be entitled to Paid Family Leave (PFL) benefits of up to six weeks of wage replacement payments for a permitted leave.

Second, employment discrimination on the basis of sexual orientation and marital status has long been prohibited under California's Fair Employment and Housing Act. The marriage decision does not change or expand those protections, however it allows employees in newly recognized same-sex marriages to assert a claim for "marital status" discrimination.

While this is not an exhaustive list, various other miscellaneous state labor and employment laws provide benefits to employees with "spouses." Employers and their counsel should take note of these requirements when dealing with employees who have entered into a same-sex marriage and who are not also registered domestic partners:

- California Labor Code Section 230.2 requires that an employer allow an employee who is the spouse of a victim of certain enumerated crimes to be absent from work in order to attend judicial proceedings related to that crime.
- Labor Code Section 233 requires that, where employers provide paid sick time, employers must permit an employee to use in any calendar year an amount equal to not less than six-months accrual of sick leave to care for a sick in injured spouse of the employee.
- Labor Code Section 300 grants a spouse rights in wage assignments.
- Labor Code Section 3501(b) provides enhanced worker's compensation benefits to a surviving spouse who earned $30,000 or less in the 12 months preceding the death of an employee.
- California Unemployment Insurance Code Section 1296 provides unemployment insurance benefits to a spouse who must quit his or her job to relocate to accommodate his or her spouse's job.

Following the Prop 8 decision, there will be heightened public awareness regarding same sex couples marrying. This may cause employees to raise questions at work regarding benefit entitlements. It may also lead to heightened tensions in the

workplace. Employers should take this opportunity to update policies, and ensure that they are providing timely training on discrimination and harassment.

Overall, although Prop 8 remains effective while the *Perry* decision is stayed, we expect further developments in this area. The court's ruling will not be the last word. The Ninth Circuit Court of Appeals will be the next to weigh in.

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