Insights, News & Events

SAME-SEX MARRIAGE: WHAT DOES IT MEAN FOR HOSPITALITY EMPLOYERS?

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So far, six states have legalized same-sex marriages: Massachusetts; Connecticut; Iowa; Vermont; Maine; and New Hampshire. The Massachusetts, Connecticut and Iowa laws are already in effect. The other states have enacted laws that will take effect within the next six months: the Vermont law will take effect on September 1, 2009; the Maine law will take effect 90 days after the close of the legislative session, or approximately September 12, 2009; and the New Hampshire law will take effect on January 1, 2010.

These state laws raise a number of complex legal questions as well as a multitude of practical considerations for employers. Here's a quick overview of the legal landscape.

The Federal Defense Of Marriage Act
The federal Defense of Marriage Act (DOMA) provides that "marriage" means only a legal union between one man and one woman as husband and wife and defines "spouse" as a person of the opposite sex who is a husband or a wife. These definitions broadly apply to all federal statutes, regulations, rulings, and agency interpretations. This means that same-sex couples, even if legally married under state law, will not be considered "spouses" for purposes of any federal laws.

DOMA further provides that no state, territory, possession, or Indian tribe is required to recognize a same-sex marriage from another state, territory, possession or Indian tribe. As a result, hotels or restaurants doing business in states that recognize same-sex marriages may have to treat employees as married for some purposes but not for others.

The Constitutional Issue
The Full-Faith-and-Credit Clause of the U.S. Constitution obligates states to give effect to the laws and judicial proceedings of other states. A straight reading of the Full-Faith-and-Credit Clause would ordinarily lead to the conclusion that all states must recognize marriages (whether same-sex or opposite sex) that are legally performed in another state.

But the U.S. Supreme Court has carved out a public-policy exception to the principle of full faith and credit. Therefore, states that have adopted a statute or amended their constitutions to declare same sex-marriages impermissible, arguably can refuse to recognize same-sex marriages based on public policy. In addition, DOMA specifically provides that a state is not required to recognize same-sex marriage from another state.

Accordingly, if a same-sex couple is legally married in one state and works in another state that does not recognize same-sex marriages, then in most cases, the employer would not be required to recognize that marriage or provide spousal benefits. Notably, however, there are some jurisdictions, like New York and the District of Columbia, but which do not authorize same-sex marriages but do recognize same-sex marriages from other states and the attendant rights.

ERISA And IRS Rules
Many retirement, and health and welfare benefit plans (e.g., pension plans, medical and dental plans, cafeteria plans, and flexible spending accounts) are governed by the Employee Retirement Income Security Act (ERISA), which together with DOMA, excludes these plans from state laws on same-sex marriages. But ERISA does not preempt state laws governing insurance. In general, if a plan is self-insured, ERISA applies and the plan is subject to DOMA. If a plan is not self-insured, then state insurance laws typically apply. As a result, in those states which recognize same-sex marriages, employers participating in group health and dental insurance plans ordinarily will be required to extend spousal coverage to same-sex spouses of employees participating in those plans.

For federal tax purposes, benefits provided to an employee's same-sex spouse are governed by the Internal Revenue Code and, therefore, are subject to DOMA. Because DOMA only recognizes marriages between individuals of the opposite sex, a same-sex spouse will not be treated as a spouse for federal tax purposes. As a result, the value of employer-paid same-sex spousal benefits generally will be taxable to the employee.

In addition, premium payments for health-care coverage for an employee's same-sex spouse cannot be made on a pre-tax basis through a cafeteria plan. But in states that recognize same-sex marriages, an employee may not be subject to state tax on the value of the employer-provided group health plan coverage for a same-sex

spouse. The differing tax consequence of the federal and state laws creates an additional administrative burden for employers operating in states that recognize same-sex marriages.

In May of this year, the Tax Equity for Health Plan Beneficiaries Act was introduced in Congress. If this legislation is enacted, it will exclude the value of employer-provided health insurance for a domestic partner (or same-sex spouse) from an eligible employee's income. The proposed legislation also would allow a domestic partner (or same-sex spouse) to be included in pre-tax cafeteria elections.

COBRA

Under the Consolidated Omnibus Budget Reconciliation Act (COBRA), a group health plan must provide continuation coverage to "qualified beneficiaries" who lose coverage under the plan due to a qualifying event. The term "qualified beneficiaries" include employees, their spouses and dependent children. Because COBRA is a federal law, DOMA applies and limits the definition of "spouse" to a person of the opposite sex. Accordingly, same-sex spouses do not qualify as "spouses" for COBRA purposes, and, therefore, a group health plan is not required to provide continuation coverage to a same-sex spouse if he or she loses coverage due to what would ordinarily be considered a qualifying event.

A number of states, including Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont, have mini-COBRA laws that require continuation health coverage similar to COBRA. In a state that recognizes same-sex marriages, the mini-COBRA law likely will require that continuation coverage be offered to a same-sex spouse who loses coverage due to a qualifying event.

FMLA

The Family Medical Leave Act (FMLA) defines "spouse" as "a husband or wife as the case may be." The FMLA Regulations further define "spouse" to mean "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common-law marriage in States where it is recognized." Under a strict reading of the FMLA regulations, you would be required to grant leave to an employee to care for a spouse of the same sex in those states where same-sex marriages are recognized. But in a 1998 Opinion Letter the United State Department of Labor concluded that because the FMLA is a federal law, DOMA applies and limits the definition of "spouse" to a person of the opposite sex. Accordingly, employers are not required to grant FMLA leave to an employee to care for a spouse of the same sex.

In April of this year, the Family and Medical Leave Inclusion Act was introduced in Congress. If the proposed legislation is enacted, it will amend the FMLA to permit leave to care for same-sex spouses, domestic partners, and other extended family members.

In those states where same-sex marriages are recognized, state leave laws are gender-neutral and same-sex spouses are entitled to the same benefits as opposite sex spouses. This includes leave under Maine's Family and Medical Leave Law, the Massachusetts Small Necessities Leave Act, the Connecticut Family and Medical Leave Act, Vermont's Short Term Family Leave Law, and Vermont's Parental and Family Leave Law. These same rights would also apply to non-mandated leaves of absence that are available to an employee under an employer's standard employment policies.

Typically, when an employee takes a leave of absence under a state leave law, it will run concurrently with FMLA leave. But when an employee takes a leave that is recognized only under state law, then state law governs the employee's rights and responsibilities, and the leave is counted only against the state leave entitlement. For example, if an employee takes a leave of absence under a state law to care for a same-sex spouse with a serious health condition, that leave is only counted against the employee's state-leave entitlement because the FMLA does not provide leave under those circumstances.

As a result, if an employee takes leave under state law to care for a same-sex spouse, that employee will also be able to take FMLA leave for another qualifying event later (e.g., the employee's own serious health condition or to care for a parent or child with a serious health condition). In comparison, if an employee takes a leave of absence to care for a spouse of the opposite sex, that employee will be required to use FMLA leave at the same time he or she uses state-mandated leave.

Employment Discrimination And Related Tort Claims

State laws authorizing same-sex marriages have also resulted in the creation of new claims of discrimination. Fair employment practices statutes typically prohibit discrimination on the basis of sex, age, disability, race, color, religion, and national origin. A number of states, including Iowa, Maine, Massachusetts, New Hampshire, and Vermont, also prohibit discrimination on the basis of sexual orientation. Some states, like Iowa, Maine, and Vermont extend the definition of "sexual orientation" to include gender identity and gender expression. In addition, a few states, like Connecticut and New Hampshire prohibit discrimination on the basis of marital or familial status.

In those states where same-sex marriages are recognized, employers are likely to see new claims that arise out of the marital relationship and the denial of certain rights or benefits. For example, if you deny bereavement leave to an employee in a same-sex marriage under circumstances in which an employee in an opposite-sex marriage would have been granted leave, it could result in claims of discrimination based on sex, sexual orientation, marital status, or familial status. In addition, in those states where same-sex marriages are recognized, causes of action which are

based on spousal status, like wrongful death, loss of consortium and emotional distress, will now be available to same-sex couples.

Practical Tips
Here is our advice for negotiating your way through this tricky area:

- check to determine whether any of the states in which you operate authorize or recognize same-sex marriages;
- update personnel policies regarding discrimination and harassment to cover all applicable protected classes, including: sex, sexual orientation, gender identity and expression, marital status, and familial status;
- update personnel policies, if needed, regarding non-mandated and state leave laws to include leave for same-sex spouses;
- expand training for supervisors to cover the statutory rights and obligations of same-sex couples;
- consult with your insurance broker to determine the availability and cost of coverage for same-sex spouses;
- consider maintaining both domestic partner benefits and spousal benefits for same-sex couples if the company 1) operates in several states, 2) employs a mobile workforce, or 3) actively recruits employees from other states;
- review plan documents, summary plan descriptions, employee communications materials, administrative procedures and systems, and company policies to ensure that they cover the intended beneficiaries and comply with applicable state and federal laws.
- review policies and procedures to ensure that the same requirements are being applied to both same-sex and opposite-sex couples for purposes of establishing benefit eligibility (e.g., marriage license, domestic partner registration, civil union certificate).

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