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Same-Sex Marriage Adds to Employers' Challenges Under New California Domestic Partner Laws

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Recent moves toward legal recognition of same-sex marriage in two Canadian provinces and Massachusetts, as well as the issuance of same-sex marriage licenses by the City and County of San Francisco, have confused the picture for employers trying to understand their legal obligations under California's broad new domestic partnership law. Domestic partnership is not a marriage. It is an alternative to marriage. In general, employers whose employees marry same-sex partners in Canada (which currently allows same-sex marriage) and Massachusetts (which may soon) will not have any legal obligations as a result. The federal Defense of Marriage Act, like the laws of 38 states, does not recognize same-sex marriages from jurisdictions that may allow them. Until those laws change or a court rules otherwise, same-sex marriages will not be recognized in most places. However, given looming changes, this is an opportune time for employers to review their benefit plans and consider whether the definition of "spouse" needs to be clarified to reduce the potential for later disputes over its meaning.

While same-sex marriage has grabbed headlines, compliance with California's new domestic partnership law is a more immediate concern for employers. California does not authorize same-sex marriage (or recognize such marriages from other jurisdictions), and marriage does not trigger any rights or obligations under the new law. The law goes into effect January 1, 2005 and covers employees with state-registered domestic partners.

Over the past several years, California has recognized domestic partnerships and incrementally increased the rights accorded to domestic partners. In 2002, California created several rights for employees with domestic partners. It allowed employees to use sick leave for "kincare" for caring for a domestic partner or the child of a domestic partner, required health care insurers to sell domestic partner coverage to employers, exempted domestic partner benefits from state taxation, and extended unemployment benefits to an employee who quits to accompany or join a domestic partner at a new location. California also included domestic partners in its paid family leave program starting July 1, 2004. Senate Bill 2, enacted last year, requires employees with 200 or more employees working in California to provide or pay for health coverage for dependents--including domestic partners—beginning in 2006.

Two additional bills enacted last year significantly expand the rights of domestic partners. Assembly Bill 205 ("AB 205"), the California Domestic Partner Rights and Responsibilities Act of 2003, extends to domestic partners most all of the same rights and duties associated with marriage. It creates new employment-based rights for domestic partners, most significantly the right to family and medical leave to care for a domestic partner. Those provisions of AB 205 are effective January 1, 2005.

Separately, Assembly Bill 17 ("AB 17") prohibits many employers contracting with California state agencies from discriminating between employees with spouses and employees with domestic partners. It further requires that certain state contractors provide the same benefits to employees with domestic partners that they provide to employees with spouses. AB 17 is effective on January 1, 2007.

Equal Treatment Required for Spouses and Domestic Partners

Previous domestic partner legislation did not change the definition of "spouse" in California law. Now, AB 205 effectively does so. It requires that domestic partners be treated the same as spouses under California law. New Family Code section 297.5 provides: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same

responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provision or sources of law, as are granted to and imposed upon spouses." This provision is sweeping. It essentially amends references in California law to "spouse" to include "domestic partner."

Only Registered "Domestic Partners" Covered

AB 205 and AB 17 apply only to domestic partnerships registered with the California Secretary of State. While many localities in California offer domestic partnership registration, such registration alone is not sufficient to trigger the domestic partnership provisions in State law. A same-sex marriage license issued in California or another jurisdiction is not a domestic partnership registration, and a marriage license does not trigger domestic partnership rights under California law.

Registration with the Secretary of State is limited to same-sex couples, or opposite-sex couples in which at least one the individuals is over age 62. Approximately 21,000 couples have registered with the State.

AB 205 requires that some domestic partnership registrations from outside of California be recognized on the same basis as state-registered domestic partnerships. Those partnerships must be a "legal union of two persons of the same sex, other than a marriage" that is "substantially equivalent" to a California domestic partnership. The only such relationship that appears to meet this standard is Vermont's "civil union," a legal status created to give same-sex couples the same rights and responsibilities as a married couple.

Because the law excludes marriages, same-sex marriages from other states or Canada would not trigger domestic partner rights under California law. However, in the future other states may enact statutes that accord rights similar to rights under California's domestic partner law, and California may have to recognize those partnerships. In Massachusetts, which may soon allow lawful same-sex marriages, a state constitutional amendment has been proposed that would bar same-sex marriages but convert any such marriages to civil unions. It is likely that such "civil unions" would be recognized as domestic partnerships under California law.

Domestic Partners Included in FEHA, Family and Medical Leave

Legislative committee analyses express the intent to protect employees in domestic partnerships from discrimination in employment. In accordance with Family Code section 297.5, the Fair Employment and Housing Act ("FEHA") will protect domestic partners to the same extent as spouses. Thus, it is possible that the FEHA's protection against "marital status" might be extended to protect an individual based on his or her domestic partnership status. Under Government Code section 12940(a)(3)(A), employers still will be able to "reasonably regulate" domestic partners working in the same department, division, or facility.

Significantly, AB 205 includes domestic partners within the California Family Rights Act's ("CFRA") family and medical leave provisions. The CFRA currently allows an employee to take up to 12 weeks of unpaid leave a year to care for a "spouse who has a serious health condition." Considering Family Code section 297.5 and the CFRA together, the CFRA will allow an employee to take family and medical leave to care for a domestic partner.

No Benefits Mandated by AB 205

While AB 205 protects domestic partners from employment-based discrimination, it does not require employers to extend benefits to domestic partners. The FEHA does not mandate benefits for spouses, so in turn AB 205 does not itself mandate any benefits for domestic partners. Unlike AB 17 (discussed below), it is doubtful that AB 205 requires the extension of any spousal benefits to domestic partners, but AB 205 does not expressly address the issue. Most likely, the federal Employee Retirement and Income Security Act ("ERISA") would preempt California from mandating benefits under an ERISA-regulated plan (such as a retirement plan or self-insured health plan).

AB 17 Requires Equal Benefits For State Contractors

AB 17 prohibits certain state contractors from discriminating between spouses and domestic partners. It further requires that they provide the same benefits to employees' domestic partners that they provide to employees' spouses. Importantly, AB 17 does not mandate that employers provide any benefit to spouses or domestic partners. It only requires that, if an employer provides benefits for employees' spouses, those same benefits be available to employees' domestic partners.

These requirements apply to contracts with state agencies, for the acquisition of goods or services, with a cumulative amount of $100,000 or more during the state's fiscal year. The contracts will include a provision that the contractor complies with the equal benefits requirement, with the contractor certifying compliance by signing. Contractors who falsely certify may be subject to penalties if they do not come into compliance.

The requirements do not apply when there is only one prospective contractor willing to enter into a contract, the contract is necessary to respond to an emergency and no contractor in compliance is "immediately available," the requirements violate the terms of a grant, subvention or agreement and a good faith attempt has been made to change them, and certain contracts related to water, power, or natural gas.

Responding to extraterritorial concerns, AB 17 does not apply to all of a contractor's operations. It is limited to those operations within California, to property that the state owns or has a right to occupy outside of California if the contractor's presence at that location is connected to a state contract, and elsewhere in the United States where work related to a state contract is performed.

AB 17's requirement of the same benefits for domestic partners as spouses may be at least partially preempted by federal law. ERISA preempts state laws regulating employee benefit plans that are subject to ERISA, including pension and self-insured health plans (but not state laws regulating insurance). In a 1998 case involving contracts between airlines and the City and County of San Francisco at the San Francisco International Airport, a federal court held that federal law preempted application of San Francisco's Equal Benefits Ordinance to ERISA plans maintained by the airlines. Similarly, a court could find that AB 17 interferes with uniform federal regulation of ERISA plans and is preempted to that extent.

Regardless of how the courts decide on same-sex marriage, compliance with these new domestic partnership laws will continue to be of concern to employers in California and other states that recognize such partnerships or civil unions. For more information about this or any other employment matter, we recommend that you contact a Littler attorney in an office nearest to you.

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