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“I Now Pronounce You... A Challenging Problem”



Same Sex Marriages Result In Employer Confusion

By Richard Meneghello,
with Callan Carter, Corbett
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The subject of gay marriage has brought confusion and uncertainty to employers across the country in the past several months. As local jurisdictions in California, Oregon, New York and New Mexico issue marriage licenses to same sex couples, and Massachusetts readies itself to do the same later this spring, employers have begun to face difficult questions about how to handle situations involving same sex marriages. Employers in other states may feel immune from this current controversy because local jurisdictions are not issuing licenses in their state, or because your state is in the majority and prohibits same sex marriages.

But, it's not so easy to escape this conflict - employees can travel to another state to get married and then return back to their own state seeking recognition of that marriage. After all, if one of your straight employees goes out-of-state to get married, you accept the marriage as valid - now same sex couples may be seeking that same recognition. Also, several of the states barring gay marriage are facing legal challenges about the constitutionality of those laws, adding an element of doubt to the legal landscape. In other words, this is a controversy that could land on the desk of any employer in any part of the country, and every employer should be prepared.

Where Will Potential Problems Develop?

The flashpoint will come when an employee who has married a same sex partner comes to you and seeks recognition of this relationship in a legally significant manner. The employee may want the new same sex spouse added as a dependant on your employer-provided medical benefits plan. Or the employee may request FMLA leave in order to care for the same sex spouse

with a serious health condition or bereavement leave for the same sex spouse or a relative. Or your first exposure could be a request for symbolic recognition - an announcement in the company newsletter, an invitation to the company retreat reserved for spouses only, or an office celebration, if that's your tradition when other employees get married. Any way you look at it, the employer who has resisted acknowledging domestic partners is now faced with a question - what should I do?

Employee Benefits Coverage - A Potential Legal Minefield

For employers who have been asked to extend coverage under their employee benefits programs to same sex spouses, the first place to look is at the language of the benefit plan documents. Some benefit plans define “spouse” as the person to which an employee is legally married. For employers with such plans, the question becomes whether same sex couples are “legally married.” Currently, there is no jurisdiction in the country where same sex marriages are unquestionably legal. This will change, however, when same sex marriages become legal in Massachusetts on May 17, 2004. Accordingly, those employers who do not want to extend benefits coverage to same sex spouses (because of the added cost involved or other reasons) should review the language of their benefit plan documents as soon as possible to determine whether such language needs to be amended. Otherwise, they soon may have little choice but to extend benefits coverage to an unquestionably legal same sex spouse.

If an employee seeks benefit coverage based on a same sex marriage that took place in a local jurisdiction granting same sex marriage licenses and you do not want to extend coverage, you may want to ask the employee to wait until the situation has been resolved before making a final determination rather than rejecting the benefits request outright. Although this may satisfy some employees who understand that this is a time of uncertainty, others may decide to push ahead

F&P Publishes WARN Act Booklet - 14th In Series

Most employers would like to do nothing but grow their businesses. Unfortunately, economic realities sometimes mean that employees are laid off, and departments or even entire facilities are shut down. When that occurs, the changes may trigger requirements under the federal Worker Adjustment and Retraining Notification Act, better known as WARN.

F&P has just published an informative book explaining the important provisions of WARN. Written in plain English and aimed at human resource professionals and busy executives who need to get information quickly to see if they have a problem, this booklet should prove invaluable. It joins others in our popular series of similar booklets on labor and employment topics, including OSHA, sexual harassment,

the Fair Labor Standards Act, the National Labor Relations Act and many more.

As with all the booklets in our series, WARN is free of charge in individual copies. Bulk orders are also available for a nominal price of \$2.50 per issue. If you are a current client of F&P you should already have received your copy of WARN in the mail. Clients can also download a free copy under the "client access" section of our website at www.laborlawyers.com. If you have not yet received your copy, or to order one, contact David Dilworth in our Atlanta office at (404) 240-4143, or just ask your regular F&P attorney.



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with the request and force your hand. For those employers, we recommend contacting your Fisher & Phillips attorney to discuss the risks and ramifications in your own state.

Other plans may specifically deny benefits coverage to same sex partners, defining "spouses" in a way that precludes same sex couples (i.e., "one man and one woman"). While employers with such plans may feel comfortable denying coverage based on the language of the plan, same sex spouses may take issue with this language and bring a discrimination suit to challenge the validity of denying benefits for legal same sex spouses. Where state law and an insurance plan differ, employers are caught in the middle.

One thing for sure is that an employer should be cautious in amending the language of its plan to exclude coverage for same sex spouses after an employee has requested an addition of his or her legal same sex spouse. Amending your plan in such a way to specifically exclude a certain identified person could result in a costly ERISA violation.

This may also be a good time for you to review other language in your plan documents (for example, your COBRA language) to make sure it conforms to your wishes and provides proper coverage. Contact an attorney in our Employee Benefits Practice Group for more information.

Federal Law Does Not Recognize Same Sex Marriages

In 1996, President Clinton signed the Defense of Marriage Act, defining marriage as a union between a man and a woman, and a spouse as a person of the opposite sex. Because of this law, all federal statutes and regulations regarding marriage can be currently read to exclude same sex marriages. Employees who file joint tax returns or submit W-4s seeking recognition of their same sex spouse would be rejected by the federal government. For this same reason, even a willing employer could not extend certain rights or benefits to employees with same sex spouses. Gay employees cannot receive the pension benefits or Social Security benefits of their same sex spouses upon death.

If employees seek FMLA leave to care for their same sex spouse, you are under no current obligation to offer such leave (although some states have family leave laws that offer leave for domestic partners. In such cases you should continue to offer such leave even if the domestic partners do not take part in a same sex marriage). The constitutionality of the Defense of Marriage Act is being called into question in at least one lawsuit filed in Washington state, and other lawsuits are sure to follow. However, an employer relying on federal law at this time is unlikely to be punished if the federal law is later found to be unconstitutional.

Domestic Partner Status May Be A Reasonable Compromise

Many employers already recognize domestic partner status and treat same sex domestic partners as they do straight married couples. A survey by Mellon Financial showed that 35% of employers in the U.S. offer domestic partners benefits, as compared with only 6% in 1996. These employers generally cite enhanced recruitment, increased morale, and industry competitiveness as reasons for offering domestic partner programs. For these employers, the formula for future action is simple...continue to do what you have already done, and treat same sex married couples as you do all other couples where possible. However, you should be aware that the fair market value of domestic

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Supreme Court Cuts Back Age Discrimination Lawsuits

By Michael S. Mitchell

The Supreme Court issued a long awaited ruling last month in a significant case involving what some have called “reverse age discrimination.” It wasn't quite that, but the ruling was welcome nonetheless, as it gives employers some breathing room when making decisions that affect their older workers.

The Facts

In 1997 General Dynamics negotiated with the United Auto Workers to eliminate health benefits to employees who would be subsequently retiring, but made an exception for current workers who were at least 50 years old. Dennis Cline, and several other employees, sued the company, claiming they were being discriminated against under the Age Discrimination in Employment Act (ADEA) because they were over the age of 40, and thus in the protected age group, but under 50, and therefore were being denied benefits. *General Dynamics Land Systems v. Cline, et. al.*



Cline and the others filed a charge with the Equal Employment Opportunity Commission (EEOC), which issued a “cause” determination, finding the employees had been discriminated against in terms of employment “because of [their] age.” In a subsequent lawsuit, a federal district court ruled against the employees, since they were in effect claiming reverse age discrimination which no court had ever upheld.

However, on appeal, the U.S. Court of Appeals for the Sixth Circuit reversed the district court, and found for the employees. Their reasoning was that the language of the ADEA was clear on its face: there shall be no discrimination against “any individual...because of such individual's age.”

Now, the Supreme Court has overturned the 6th Circuit, holding clearly that rules which favor older employees over younger ones, are lawful.

The Law

The ADEA is an anti-discrimination statute, like many others, including Title VII of the Civil Rights Act of 1964 or the Americans With Disabilities Act. Like those laws, ADEA creates a “protected category” of employee, and prohibits discrimination because someone is in that category.

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partner benefits is considered imputed income if paid by the employer, and must be paid with after-tax dollars if paid by the employee. Just because an employer allows domestic partners to be covered by its benefits program does not mean that it can do so in a tax-free manner.

Symbolic Recognition May Be Necessary

What about employees who seek symbolic recognition of a same sex marriage, through employer announcements or company-organized parties? For those employers who wish to extend such courtesies, there is no legal reason not to do so. Although certain co-workers may not be enamored with the practice, and may even claim that such recognition conflicts with their religious beliefs, there is no legally-cognizable claim they could bring against an employer who acts in such a manner.

For those employers who object to extending such recognition to same sex couples, the laws of each particular state may determine whether this strategy is risky or not. Some states have statutes or court decisions establishing sexual orientation as a protected classes, essentially offering gay employees the same anti-discrimination rights commonly understood to extend to other protected classes like race, religion, age, and disability. The safest course of action for employers in those states

would be to treat same sex couples the same as straight couples, avoiding harassment or discrimination allegations.

Monitor “Water Cooler” Talk To Prevent Harassment/Discrimination

An unintended consequence of this story's dominating national and local news is that it is sure to generate plenty of water cooler talk. These conversations may develop into arguments among employees who disagree about gay marriage. Keep an eye out to make sure that these discussions do not result in harassment claims filed by gay employees who feel offended by co-employees or managers, or by religious employees who feel their legitimate beliefs are being attacked.

If the Monica Lewinsky fiasco taught us anything, it taught us that just because a story is in the news does not mean that it always serves as a proper topic of workplace conversation. Make sure that managers avoid making comments that might serve as evidence that they have a predisposition against gay or lesbian employees, or against certain religious beliefs. These are interesting times, but not every issue deserves a forum in your workplace.

For more information contact the author at (503) 242-4262 or rmeneghello@laborlawyers.com, or any member of F&P's Employee Benefits Practice Group.

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Unlike Title VII, however, the protected group in ADEA is artificial-ly created; employees who are not in it one day are included the next.

The protected category under ADEA is those employees aged 40 and up. Since employees 39 and under are not protected, they could - at least under this federal law - be considered "too young" for a job with no violation of the law. Those within the group, even employees of advanced years, can never be considered "too old" for a job.

However, within the protected group, there are still relatively younger and relatively older employees. To say to an employee aged 50, "you are too young for the job, I prefer someone at least 65" would be a kind of true reverse discrimination, under the ADEA - discrimination on the basis of (relative) youth. That is not what was at issue in this case, however. Here the relatively older employees in the group were favored, while the relatively younger employees in the same category were being treated less favorably.

According to the Supreme Court, that is not a violation of the law.

The Opinion

The Supreme Court dealt with the 6th Circuit's reasoning directly. The Court agreed that "in the abstract" the word age as used in the statute carries no modifier, and therefore could be read to look two ways, as meaning either youth or old age.

Putting the word in context, however, including not only the context of the statute but also of the legislative history of the Act, makes it clear that the Congressional intent was to protect older workers, not younger ones, and that the word "age" meant the same thing as "old age," not something different. Justice Souter, writing for the Court, put it this way:

Congress used the phrase "discriminat[ion] ... because of [an] individual's age" the same way that ordinary people in common usage might speak of age discrimination any day of the week. One commonplace conception of American society in recent decades is its character as a "youth culture," and in a world where younger is bet-

ter, talk about discrimination because of age is naturally understood to refer to discrimination against the older.

But what about the fact that the word "race" as used in Title VII means *all* the various races, including Caucasian, and not just minorities, or the fact that "sex" in the same law, means both sexes and not just women? Justice Souter dealt with that as well, pointing out that age is not comparable to the other terms:

"Race" and "sex" are general terms that in every day usage require modifiers to indicate any relatively narrow application. We do not commonly understand "race" to refer only to the black race, or "sex" to refer only to the female. But the prohibition of age discrimination is readily read more narrowly than analogous provisions dealing with race and sex. That narrower reading is the more natural one in the textual setting, and it makes perfect sense because of Congress's demonstrated concern with distinctions that hurt older people.

The Impact

Age discrimination lawsuits are becoming more frequent as the workforce ages. Decisions involving broad reductions in force frequently hit older employees harder, or may appear to. The impact of this case is that employers may choose to try and limit their exposure to lawsuits from older employees by offering a buyout or other incentive targeted at older workers.

In this particular situation, General Dynamics was accused of providing a benefit to its older workers that it was denying to relatively younger ones, albeit employees who nonetheless fell into the protected group. In the blunt words of the General Dynamics decision: "the statute does not mean to stop an employer from favoring an older employee over a younger one."

For more information, contact the author at (504) 529-3830 or mmitchell@laborlawyers.com.

Last Chance To Register

There's still time to register for the firm's national seminar - "Solutions at Work: 2004 Employer Conferences".

Held in Atlanta at the J.W. Marriott Hotel on April 14-16, and in Irvine at the Irvine Marriott Hotel on April 28-30, there will be several keynote speakers, multiple breakout sessions, and the opportunity to "Spend an Hour with Your Lawyer for Free" (a panel of F&P lawyers will be available to consult individually with clients to address specific questions they have). This is a program that no business owner or executive, in-house counsel or HR professional should miss!

Keynote speaker Dr. Kevin Frieberg is the author of the best-selling book "Nuts," the story of the unorthodox management techniques that have made Southwest Airlines a big success. He just published another book, called "Guts," which describes the unique management tactics employed by several other very successful companies. Nike Corporation's Vice President of Human Resources Oscar Cardona and Monique Matheson, Senior Director of Human Resources for Nike, will speak on

the strategic role human resources has played in the growth and success of that worldwide company. As a luncheon speaker, Sean Carter, Humorist-at-Law, will present "Do Unto Others Before They Sue Unto You." Sean is a Harvard Law School graduate and former Wall Street lawyer and in-house counsel who gave up the practice of law for a career in comedy.

Other keynote presentations include "Hire Smart, Hire Right" and "Strategic Diversity Management".

The cost to attend is \$295 per person or \$275 if two or more people attend from the same company. A limited number of rooms are available at reduced rates at both hotels when rooms are reserved by March 26 (Atlanta) or April 14 (Irvine). Call 800.228.9290 to make room reservations at either hotel. Room rates are \$179 at the J.W. Marriott Hotel in Atlanta (April 14-16) or \$109 at the Irvine Marriott Hotel (April 28-30).

For more information, visit www.laborlawyers.com or contact Jackie Greenbaum at (866) 644-5610.