Goodridge's Impact on Workplace Policies, Employee Benefits, and Employee Relations Initiatives

In November 2003, the Supreme Judicial Court of Massachusetts ruled in *Goodridge v. Department of Public Health* that denying same-sex couples the right to marry violates the Massachusetts constitution. The decision takes delayed effect on May 17, 2004.

Same-sex marriages will affect the workplace in limited but potentially significant ways. Answers to some of the key questions raised by the *Goodridge* decision are summarized below. [1]

How does Goodridge affect employer non-discrimination policies generally?

Goodridge should have a very limited impact on a Massachusetts employer's non-discrimination and equal employment opportunity (EEO) policies. The recognition of same-sex marriage does not, of itself, require any new or amended EEO policies or practices. However, as employees enter into same-sex marriages, employers should be prepared to anticipate - and head off - inappropriate responses from supervisors and co-workers.

Goodridge does not create a new "protected class" of employees. The decision merely grants individuals the right to enter into same-sex marriages and enjoy those marital benefits which it is within the power of the Commonwealth to confer. It does not give them any benefits or privileges not enjoyed by individuals in opposite-sex marriages. Employees who enter into same-sex marriages do not thereby gain a special status or enjoy unique protections from discrimination in the terms or conditions of their employment.

Note that Massachusetts law does not protect employees against discrimination on the basis of their status as married or unmarried. An employer may deny unmarried employees benefits (such as bereavement leave, or access to employer-provided housing benefits) that it offers to married employees, and vice-versa. *Goodridge*, in conjunction with pre-existing Massachusetts law forbidding discrimination on the basis of sexual orientation, requires only that employers treat employees in same-sex marriages and employees in opposite-sex marriages equally.

While marital status is not a protected class for employment purposes in Massachusetts, Massachusetts law has long recognized sexual orientation as a protected class and has prohibited employment discrimination on the basis of an individual's sexual orientation. Employees who enter into same-sex marriages may have claims for sexual orientation discrimination if their terms and conditions of employment differ from the terms and conditions of employment for individuals in opposite-sex marriages. Employers should identify existing personnel policies and

practices that apply uniquely to married employees and be careful to apply those policies and practices equally to employees in same-sex and opposite-sex marriages (subject to the possible distinctions, discussed below, with respect to pensions and other benefit plans).

[1] This client update is provided solely for general educational purposes. It is not intended to be legal advice with respect to any particular situations or circumstances, as to which employers should consult with legal counsel.

How does Goodridge affect employer-sponsored pension plans?

Goodridge's impact on most employer-sponsored pension plans will be limited by the federal Defense of Marriage Act ("DOMA"). Most funded retirement plans (including 401(k) and 403(b) plans) are regulated by the federal Employee Retirement Income Security Act of 1974 ("ERISA") and subject to ERISA-based rules relating to the marital status of a plan participant. ERISA gives spouses certain protected rights: in some plans, the right to consent to forms of payment that do not include a spousal death benefit; in others, the right to consent to nonspousebeneficiary designations; in all plans, the right to seek court approval of a division of benefits in a divorce.

ERISA also broadly preempts state laws that "relate to" any employee benefit plan subject to ERISA. DOMA, passed by Congress in 1996, provides that "spouse" and "marriage" as used in federal statutes refer to the union of one man and one woman. Because of DOMA, ERISA's spousal protection rules do not reach samesex spouses, and ERISA preemption means that a same-sex spouse cannot invoke state law to gain equivalent rights. For example, a retirement plan subject to ERISA would not be required to provide death benefit protection to a surviving same-sex spouse.

Although ERISA's automatic protections cannot all be replicated by drafting or redrafting plan documents, an employer wishing to do so could voluntarily extend most spousal benefits to same-sex couples. For example, it should be possible to give same-sex spouses survivor benefits (many plans already permit participants to name non-spouse beneficiaries). Employers who wish to limit spousal benefits to opposite-sex marriages should also be able to do so. The first step in either case is to review plan documents to determine how "spouse" is defined or used.

Governmental plans, most church plans and many "supplemental" 403(b) plans are not covered by ERISA, although typically they are designed to comply with the Internal Revenue Code's tax-qualification rules. Some of the better known Code rules include those requiring spousal consent to certain distributions or beneficiary designations, those affecting "minimum required distribution" calculations, and the "QDRO" rules that assign plan benefits to a spouse or former spouse. In general, retirement plans that are not subject to ERISA will need to recognize same-sex spouses in Massachusetts as "spouses" for plan purposes. However, because the Code does not recognize same-sex spouses, some disparate results may apply. For example, a domestic relations order affecting a same-sex "former spouse" may still not be a "qualified order" under the Code. It is important to discuss these technical issues with counsel, as different kinds of non-ERISA plans are subject to some, but not all, of these Code-based rules.

What about other employee benefit plans, such as health insurance?

The impact of *Goodridge* on other employee benefit plans depends largely on whether the plans are insured. Aside from its so-called "COBRA" provisions, ERISA does not impose mandated benefit rules on health and welfare plans. The key question for these plans is whether ERISA preemption applies. Because of a statutory carve-out from the preemption rule for state insurance law, insured health care plans are generally subject to state - not federal - regulation. By contrast, ERISA preempts state law as applied to self-insured plans. Thus, sponsors of selfinsured plans cannot be forced to provide benefits to same-sex spouses.

The situation is more complex for employers who sponsor insured plans. For these plans, the as-yet unansweredquestion is whether the new definition of marriage in Massachusetts will be interpreted to be a matter of state insurance law. If so, ERISA preemption will not apply and employers can be required to provide coverage to same-sex spouses as "spouses" in Massachusetts.

How does *Goodridge* affect the tax treatment of benefits provided to same-sex spouses?

DOMA means that "spouse" as used in the Internal Revenue Code does not include same-sex spouses. One result is that

a participant in a same-sex marriage, or his or her spouse, may be taxed on typically excludable "spousal" coverages and benefits unless another basis for exclusion exists (e.g., in some but not all cases, status as a dependent). Although the IRS has not ruled on same-sex spouses, it has held that employees are to be taxed on the fair market value of domestic partner coverage where no other exclusion is available. Where retirement plans are concerned, same-sex spouses will have more limited benefit rollover options than is true of opposite-sex spouses, and a small number of internal plan limits will apply less advantageously to same-sex spousal benefits (where available) than to "qualified" opposite-sex spousal benefits. Employers extending benefits to same-sex spouses should prepare to account for and report these differences.

The Massachusetts tax treatment of same-sex couples is less clear. Although the Commonwealth has its own rules in some areas (for example, separate exemption rules), the starting point in determining liability under the personal income tax is *federal* gross income. The Department of Revenue has yet to issue guidance concerning possible federal-state differences arising from the *Goodridge* decision. Until guidance is issued, employers should assume that in areas where Massachusetts conforms to "income" determined under the federal Internal Revenue Code, federal rules will apply.

How are employee leave policies affected by same-sex marriage?

A. Eligibility for Leave under Family and Medical Leave Act to Care for Ill Same-Sex Spouse

Perhaps the most troubling employee relations (as opposed to employee benefits) policy issue that *Goodridge* raises is whether leave should be granted to an employee under the employer's family and medical leave policy to care for an ill same-sex spouse. This policy issue is complicated by the intersection of *Goodridge* and the federal Family and Medical Leave Act (the "FMLA"). That intersection raises two important issues: First, is this type of leave required by the FMLA? Second, if the FMLA does not require this leave, should employers grant it anyway?

The FMLA probably does not require an employer to grant leave to an employee to care for an ill same-sex spouse. Accordingly, employers should not be required to provide this type of leave, but may do so voluntarily. However, we anticipate that this issue will be litigated, and the issues surrounding the decision whether to offer this type of leave are complex and merit significant consideration.

The FMLA and *Goodridge* appear to be at odds with respect to the definition of a "spouse" for purposes of determining leave entitlement. The FMLA defines "spouse" as "a husband or wife, as the case may be." The U.S. Department of Labor's regulations implementing the FMLA add the following unusual gloss to that statutory definition:

"'Spouse' means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." The FMLA regulations (unlike the statute on which they are based) thus command employers to look to state law to determine the meaning of "spouse" for purposes of applying the FMLA. For this reason, an argument may be made that the FMLA requires employers to provide leave to employees to care for a same-sex spouse, as Massachusetts law recognizes same-sex spouses under *Goodridge*.

The analysis is not quite that simple, however. As noted above, DOMA restricts the definition of "spouse" in any federal legislation to include only opposite-sex spouses. By its terms, therefore, the definition of "spouse" contained in DOMA - which was passed three years after the FMLA's enactment - at least arguably replaces the definitions of "spouse" set forth in the FMLA and its implementing regulations to the extent that those definitions, by looking to Massachusetts law, would cover same-sex spouses. This interpretation is supported by a 1998 Department of Labor opinion letter in which the Department's Wage & Hour Division explicitly advised that DOMA restricts the FMLA's definition of "spouse" to opposite-sex spouses.

In light of DOMA, the better view (and the one which the Department of Labor has already expressed) is that the FMLA provides leave to employees to care for opposite-sex spouses only. Employers thus should not be found in violation of the FMLA by denying leave to employees who request time off to care for a same-sex spouse, while granting leave to employees who seek time off to care for an opposite-sex spouse. Moreover, denying this leave should not violate the Massachusetts laws forbidding discrimination on the basis of sexual orientation, so long as the employer's policy and practice is to provide employees with only the level of leave as is required by the FMLA. In such a case, the employer should not be found to have discriminated against an employee in a same-sex marriage for merely applying the FMLA non-discriminatorily to provide the required level of federal leave benefits. Here again, however, the issue will likely be a litigated one, and the ultimate outcome is by no means free from doubt.

Of course, some employers may wish to provide leave to employees to care for a same-sex spouse even if they are not required to do so. Providing this leave may promote positive employee relations or further other institutional goals. Likewise, an employer may well decide that the risk of litigation (premised either on a contrary reading of the FMLA, or on an application of the Massachusetts anti-discrimination laws) counsels a more generous policy in

this area. Clearly, the FMLA does not prohibit employers from providing this type of leave voluntarily. However, because this leave would fall outside the FMLA, the leave probably cannot be designated as FMLA leave. As a result, an employee who receives 12 weeks of leave during a 12-month period to care for an ill same-sex spouse would most likely be entitled under the FMLA to an *additional* 12 weeks of leave during that same 12-month period for any purpose that is specifically covered by the FMLA, including to care for his or her child or parent. Thisunusual result is significant and should be considered carefully by employers before setting a leave policy with respect to care for same-sex spouses.

B. FMLA Leave Eligibility for Same-Sex Spouses Employed By the Same Employer.

Another somewhat unsettled leave issue concerns the amount of leave that an employer must provide under the FMLA to same-sex spouses who both work for the same employer, in the event of the birth or adoption of a child or to care for a sick parent. In short, may an employer require employees to share this leave with their samesex spouse so that their total leave allotment will not exceed 12 weeks in a 12-month period, as employers may require of opposite-sex spouses who are both employees of the same employer? Or must the employer grant a

full 12 weeks of leave in a 12-month period to each of the same-sex married employees? The Department of Labor has not addressed this issue, leaving the point to speculation.

The FMLA's regulations specifically provide that where "a husband and a wife" are employed by the same employer, the total amount of leave time that they may take for the birth or adoption of a son or daughter or to care for a sick parent may be limited to a shared total of 12 weeks in a 12-month period. The employer may not require the spouses to share leave time for any other purpose (such as to care for a son or daughter with a serious health condition). This regulation is intended to eliminate any disincentive to hire spouses that the FMLA's leave provisionsotherwise might generate.

While the point may be subject to debate (or future litigation), it is reasonably clear that the current FMLA regulations do not permit an employer to require same-sex spouses to share their FMLA leave entitlement for the birth or adoption of a child or to care for a sick parent. This conclusion rests on two basic premises. First, the regulations by their terms apply only to the circumstance in which a "husband and a wife" work for the same employer, indicating that the only type of relationship that the regulations reach is an opposite-sex marriage. Second, and more significantly, because DOMA amends the definition of "spouse" to refer exclusively to opposite-sex spouses, all provisions applicable to spouses in the FMLA statute or regulations should be read to reach opposite-sex spouses only. Accordingly, for much the same reasoning underlying the conclusion that the FMLA probably does not provide employees leave to care for a same-sex spouse, the FMLA likewise most likely does not allow employers to require same-sex spouses to share FMLA leave for the birth or adoption of a child or to care for a sick parent.

C. Employee Eligibility for Small Necessities Leave

Since 1998, all Massachusetts employees who are eligible for leave under the FMLA have been eligible for an additional 24 hours of leave during a 12-month period under the state's Small Necessities Leave Act (the "SNLA"). Specifically, the SNLA entitles eligible employees to take leave to: (a) participate in school activities directly related to the educational advancement of the employee's child, such as parent-teacher conferences; (b) accompany the employee's child to routine medical and dental appointments; and (c) accompany an "elderly relative" of the employee to routine medical or dental appointments or other appointments related to the elder's care.

Goodridge affects the SNLA only with respect to leave provided for the purpose of accompanying an "elderly relative" to health care appointments. The SNLA defines "elderly relative" as an individual who is at least 60 years of age and is related to the employee "by blood or marriage". Following *Goodridge*, therefore, employers must provide an employee with leave under the SNLA to accompany an elderly relative who is related to the employee through a same-sex marriage.

What should employers do about domestic partnership benefits?

In recent years, many employers have offered so-called "domestic partner" benefits to their employees. These benefits typically include family health insurance coverage and other benefits that have been available under state and federal law only to employees in opposite-sex marriages. In many cases, the rationale for providing these benefits has been to allow an employee in a same-sex relationship access to many of the employee benefits that have been enjoyed by married employees. After *Goodridge*, that rationale for offering domestic partner benefits is obviously less compelling.

For employers considering what to do with domestic partner benefits, it is important to note that these benefits are not required under state or federal law. Before eliminating any current domestic partner benefits, however, employers should consult their benefit documents (including all relevant plan documents, employee handbooks and employment agreements) to ensure that benefit elimination would not violate any contracts or other legallybinding commitments to employees. A special "anti-cutback" rule applicable to pension plans may make elimination of an existing benefit more difficult. Employers also should consider the impact that eliminating domestic partner benefits might have on employee relations.

If an employer chooses to continue to offer domestic partner benefits to employees, the benefits (at least those not covered by ERISA) must be made available equally to employees in same-sex and opposite-sex domestic partnerships. Indeed, making domestic partner benefits available only to same-sex domestic partners would appear to constitute sexual orientation discrimination in violation of the state anti-discrimination statutes, as it would provide a benefit to employees in same-sex domestic partnerships that would be denied to employees in opposite-sex domestic partnerships, and would no longer be justifiable as bridging a gap (now closed by *Goodridge*) in the state's marriage laws. As to some ERISA plan benefits, such as retirement benefits and self- insured plans, however, application of the state's ban on sexual orientation discrimination may well be preempted, and "same-sex only" domestic partnership benefits may therefore be permissible. For insured plans, the continued legality of "same-sex only" domestic partner benefits and the effect of ERISA preemption, is hard to predict.

One factor that may complicate the issue of whether to continue domestic partner benefits is the geographic distribution of an employer's workforce. In that respect, employers whose entire workforce is in Massachusetts might want to eliminate domestic partner benefits entirely in light of *Goodridge*, as all employees - regardless of sexual orientation - can now attain state-mandated benefits through marriage. For multi-state employers, however, the choice is much more difficult. Specifically, because other states do not recognize same-sex marriage, an employer wishing to make benefits available equally to employees in all states might need to offer same-sex domestic partner benefits to employees working outside of Massachusetts merely to match the benefits available to employees in same-sex marriages in Massachusetts.

Ultimately, the decision whether to offer domestic partner benefits is as much one of policy as of law. If an employer wishes to offer domestic partner benefits, the law requires only that those benefits be offered equally to employees in same-sex and opposite sex domestic partnerships. If the employer wishes to discontinue those benefits, the law likewise requires only that the benefits be discontinued across the board, with respect both to samesex and opposite-sex domestic partnerships.

What should multi-state employers do?

As indicated by the preceding discussion of domestic partner benefits, multi-state employers will have to decide how, if at all, to restructure their policies and benefit arrangements in states other than Massachusetts in light of the changes mandated for Massachusetts residents under *Goodridge*. Multi-state employers who wish to do more than is required for same-sex spouses in Massachusetts (such as by expanding pension benefits, if possible) also will have to decide whether these additional benefits should be extended to same-sex or opposite-sex domestic partners in other states. These questions are matters of both employer policy and legal compliance. Employers should be mindful that any change in policy may require revision of employee handbooks and other documents, and employers should audit their personnel policies carefully to ensure that all necessary revisions are made promptly and communicated to employees.