

# ClientAlert

An informational bulletin from Goodwin Procter LLP

## Same-Sex Marriage in Massachusetts: Employee Benefits and Employment Law Implications

### Introduction

As a result of the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Public Health*, same-sex marriages are authorized to occur in the Commonwealth as early as May 17, 2004. While the court made clear that same-sex marriages must be treated in the same manner as opposite-sex marriages for purposes of Massachusetts law, the *Goodridge* decision did not provide any direct guidance regarding the implications that same-sex marriage will have in the areas of employment and employee benefits.

Although *Goodridge* will plainly have a substantial impact on Massachusetts laws, employers with Massachusetts employees are subject to federal laws as well. Under federal law, Congress has established a rule directly contrary to the result in *Goodridge*. In addition, multi-state employers face the possibility that a marriage in one state will not be treated as a marriage in another state.

This *Client Alert* is intended to help employers recognize how same-sex marriages may affect their employee benefit plans and employment practices and identify the policy choices that will be available to them. An employer's failure to recognize and respond to the impact of *Goodridge* in this area could result in confusion and consequences inconsistent with the employer's intended policy choices. Regardless of whether an employer's policy choice is to treat same-sex

marriages and opposite-sex marriages the same or differently, the employer may need to amend the documents governing its benefit plans and employment practices, to avoid ambiguity and unintended consequences.

Employers can reduce the uncertainty and complexity associated with these issues by: first, becoming familiar with three basic principles relevant to these issues; second, deciding on an overall approach to dealing with same-sex marriage; and third, applying these principles by reviewing and revising benefit plans and employment practices to ensure consistency with the overall approach.

### Three Basic Principles

- Federal law, which dominates the area of employee benefits, does not recognize same-sex marriage.

Most benefit plans are governed by a federal law, the Employee Retirement Income Security Act ("ERISA"), which generally preempts the application of state law that relates to ERISA-covered plans. Therefore, *Goodridge* cannot compel employers to treat same-sex spouses in the same manner as opposite sex spouses for ERISA purposes. Another federal law, the Defense of Marriage Act ("DOMA"), provides that, for purposes of federal statutes and regulations, the term "marriage" means only opposite-sex marriages and "spouse" means only an opposite-sex husband or wife. Consequently,

any rights or requirements under federal statutes or regulations that are based upon being married or being a spouse will not apply to same-sex married couples. This is true for purposes of ERISA, federal income tax rules relating to employee benefits, and federal employment laws.

- There are certain areas in which state law (and the recognition of same-sex marriage) may nevertheless have an impact.

For example, ERISA does not preempt state laws that regulate insurance, even though they may affect benefit plans. Therefore, Massachusetts insurance laws that extend rights of coverage to spouses (or ex-spouses) of employees will probably be read to provide those rights to spouses (or ex-spouses) in same-sex marriages. Moreover, employment policies and practices that do not constitute ERISA plans (*e.g.*, bereavement policies) are governed by state law, and will have to take same-sex marriages and spouses into account. Further, even under an ERISA plan, state law could be relevant if the plan document by its terms provides rights to a plan participant's "spouse." If the term "spouse" is not defined by the plan, or is defined by reference to "applicable state law," the document could be interpreted as providing rights to same-sex spouses, even though (as noted above) the plan is not required to do so under federal law.

- An employer generally may, through the provisions of the plan document, extend benefits to individuals (including spouses under same-sex marriages), even where not required by law.

In general, ERISA would not prohibit an employer from amending its ERISA plans to provide benefits to same-sex spouses of plan participants even though, as noted above, *Goodridge* does not require employers to extend "spousal" benefits under ERISA statutory provisions to those same-sex spouses. Providing benefits to same-sex spouses of participants, through amendment of the plan document, would be similar to

the actions many employers have taken in the past to extend spousal-like benefits (*e.g.*, medical coverage) to "domestic partners." While a Massachusetts employer may elect to modify its ERISA plans to provide benefits to same-sex spouses of participants, it is not required to do so under *Goodridge* or under Massachusetts anti-discrimination laws prohibiting sexual orientation discrimination in terms and conditions of employment because ERISA preempts state law with respect to most benefit plan provisions.

## Deciding on a General Approach

Employers will have some flexibility to make choices regarding the extent to which their benefit plans and employment policies will recognize same-sex marriage. These choices may be based on a range of factors, including employee relations, potential effect on recruiting, financial impact, the desirability of uniformity, and administrative considerations. Whatever approach the employer decides to adopt should be clearly reflected in the documents governing the employer's plans and policies. For example, if an employer determines that it wishes to recognize same-sex marriage only to the extent absolutely required by law, the employer's ERISA plans must be reviewed and amended as necessary to eliminate any ambiguity, *e.g.*, in the plan's references to "spouse" that could be interpreted as extending rights to same-sex spouses. Conversely, if an employer decides that it desires to extend to same-sex spouses all of the benefits enjoyed by opposite-sex spouses, it is critical that the documents clearly provide for that result. In any event, the decision the employer makes and incorporates into the plan should be communicated to employees.

Simply taking no action in response to same-sex marriage would not be a prudent course for employers, as there is a significant risk that inaction will result in unintended consequences and confusion in the administration of the employer's benefit plans and employment policies.

## Impact on Specific Benefit Plans and Employment Policies

The questions and answers below describe the concrete impact same-sex marriage will have on primary employee benefit plans, the employment policy issues that employers will face, and the choices that employers will have.

### Effects on Retirement Plans and QDROs

*Q. Is it necessary to amend a 401(k) or other retirement plan in light of the Goodridge decision?*

A. There is no legal requirement to amend the plan, but it may be advisable to amend the plan for purposes of clarity. Although ERISA requires these types of plans to provide certain death benefits to spouses (unless the spouse consents to waiver of the benefit), under the DOMA same-sex spouses will not be considered to be “spouses” for purposes of these federal statutory rules. However, in general, an employer is free to extend these spousal protections to same-sex spouses if it chooses to do so (although, in certain cases, due to technical IRS rules, not all of the distribution forms available to opposite-sex spouses can be provided to same-sex spouses). In any event, the plan document should be reviewed carefully, and amended as appropriate, to ensure that the language clearly reflects the employer’s position regarding whether same-sex spouses are entitled to spousal rights under the plan. That position should be communicated to plan participants, *e.g.*, through the relevant summary plan descriptions.

*Q. Will a court order issued in connection with the divorce of same-sex spouses qualify as a QDRO?*

A. In the case of a 401(k) plan or other retirement plan governed by ERISA, benefits generally may not be transferred to anyone other than the participant. However, a divorce order may provide for the transfer of benefits to a former spouse if it qualifies as a QDRO – *i.e.*, a “qualified domestic relations order.” Under ERISA’s definitions, and in

light of the DOMA, an order issued in the divorce of two same-sex spouses could not qualify as a QDRO. Consequently, it will not be possible for an order issued in connection with the divorce of a same-sex couple to require an ERISA retirement plan to transfer plan benefits of a participant to the participant’s former same-sex spouse.

### Effects on Medical and Other Welfare Plans

*Q. Will same-sex spouses be entitled to coverage under an insured medical plan or life insurance plan?*

A. Although there is as yet no specific guidance on this issue, the *Goodridge* decision could be read to require that references to “spouse” under Massachusetts insurance laws and in insurance policies covering Massachusetts residents be interpreted to include same-sex spouses. ERISA would not preempt these state insurance laws. This would mean that insured plans will automatically cover same-sex spouses. Employers that have insured plans should consult with the relevant insurer (or HMO) regarding this issue, and revise employee communications regarding the plan, as appropriate.

*Q. Will same-sex spouses have a right to coverage under a self-funded medical plan?*

A. Because self-funded medical plans are governed exclusively by federal law, there is no requirement that employers extend coverage under those plans to same-sex spouses. However, an employer could choose to extend coverage to same-sex spouses. In that case, any relevant stop-loss insurance contract should be reviewed and revised to include coverage for liability on same-sex spouse benefits. In any event, the plan document should be amended to reflect unambiguously the employer’s decision on this issue, which should be communicated clearly to participants. Employers that fund medical benefits through a VEBA (*i.e.*, a voluntary employees’ beneficiary association) should note that, under IRS rules, “substantially all” of the medical benefits paid by the VEBA must be provided to

employees and their spouses and dependents. Because this is a federal requirement, same-sex spouses would not be considered to be “spouses” for this purpose.

*Q. Will covering same-sex spouses under a medical plan raise any special tax issues?*

A. Yes. Although plans are not prohibited from providing coverage to same-sex spouses, under the DOMA a covered same-sex spouse will not be considered to be a “spouse” for federal income tax purposes. Consequently, the value of the coverage provided to an employee’s same-sex spouse will be included in the employee’s gross income for federal income tax purposes (and treated as wages for federal employment tax purposes), unless the same-sex spouse qualifies as a “dependent” of the employee under IRS rules. This is the same tax rule that has applied to employees who have obtained medical coverage for domestic partners. As with domestic partners, the value of the medical coverage provided to an employee’s same-sex (non-dependent) spouse must be reported as wages for federal tax purposes on the employee’s Form W-2. Note, however, that under *Goodridge* the value of same-sex coverage presumably will be excludible from the employee’s taxable income for Massachusetts personal income tax purposes. The Massachusetts Department of Revenue has not yet issued guidance regarding employers’ reporting and withholding responsibilities with respect to these amounts.

*Q. Will there be any additional complications if the employee pays for his or her medical coverage through a cafeteria plan?*

A. Yes. Under a cafeteria plan, an employee may (subject to certain requirements) pay for tax-free benefits, such as medical coverage for the employee and his or her spouse, using pre-tax dollars. However, because medical coverage for a same-sex spouse will not be tax-free to an employee under federal law (unless the same-sex spouse is a dependent of the employee for tax purposes), the employee will not be able to use pre-tax dollars (for federal purposes)

under a cafeteria plan to pay for that coverage. Again, this is similar to the rule that has applied with respect to employee contributions toward medical coverage for domestic partners. However, it would appear that the employee’s contributions toward same-sex coverage will be pre-tax for Massachusetts personal income tax purposes.

*Q. Will employees have the right to add same-sex spouses to their medical plan coverage during the year (i.e., outside the open enrollment period)?*

A. They generally will not have statutory rights to make such a coverage change, but the employer’s plan could permit the change subject to certain potential complications. Federal law generally requires medical plans to provide special enrollment periods during which an employee may (subject to certain conditions) change his or her medical plan election to add a new spouse. Under the DOMA, a same-sex spouse would not be a “spouse” for this purpose, and therefore an employee would not have a statutory right to add the same-sex spouse to coverage. However, the employer’s plan could be amended to permit employees to make such a change outside of the open enrollment period. If the plan is insured, the relevant insurance policy (or HMO contract) should be reviewed to confirm that such a change is authorized. Further, it may be necessary to review the specific circumstances to ensure that the change in election does not indirectly affect the amount paid by the employee on a pre-tax basis under the employer’s cafeteria plan. (Even though, as noted above, the coverage for the same-sex spouse would have to be paid for on an after-tax basis, in unusual cases adding a same-sex spouse might have an indirect impact on the portion of the employee’s contributions that are paid on a pre-tax basis.) In any event, the relevant plan documents and employee communications must be reviewed to ensure that they are consistent with the employer’s intent with respect to this issue.

*Q. Will same-sex spouses be entitled to continuation medical coverage under COBRA or otherwise?*

A. COBRA generally requires, among other things, that medical plans offer continuation coverage to covered spouses in certain events, including divorce and the employee's death or termination of employment. However, because COBRA is a federal statute, under the DOMA same-sex spouses will not be considered to be "spouses" entitled to statutory rights under COBRA. Nevertheless, under insured medical plans, same-sex spouses may be entitled to continuation coverage under certain Massachusetts insurance laws, such as the Massachusetts "mini-COBRA" statute (for insured plans covering fewer than 20 employees), and laws specifically providing for continuation coverage in the event of the employee's termination or divorce. (Note that the conditions applicable to continuation coverage and the length of the continuation coverage period under these state laws may not be the same as under COBRA.) Employers should consult with the relevant insurer (or HMO) with respect to this issue. Further, same-sex spouses could be entitled to COBRA-like rights under the terms of the employer's plan. The plan documents, insurance contracts, and employee communications should be reviewed, and revised as appropriate, to ensure clarity on this issue.

#### **Effects on Domestic Partner Benefits**

The following questions and answers address concerns of employers that have domestic partner policies; that is, policies that are designed to provide benefit plan participation opportunities for same-sex couples that are the same or similar to those available to opposite-sex couples.

*Q: How will the availability of same-sex marriage affect an employer's domestic partner benefits policy?*

A: That depends on the language of the policy. The availability of same-sex marriage in Massachusetts may have the surprising, unintended consequence of disqualifying previously eligible individuals from receiving

benefits under some existing domestic partner benefits policies.

Typically, domestic partner benefits policies require that for an employee's domestic partner to be covered, the employee must have a commitment to a long-term relationship with the domestic partner. Some employers that seek to avoid extending coverage to opposite-sex couples who have chosen not to marry have further required that, to be eligible for benefits, the employee and his or her domestic partner must not be able to marry legally.

Once same-sex couples can marry legally in Massachusetts, same-sex couples will be ineligible for benefits under those domestic partner benefits policies that are available only to those who are legally barred from marrying. Those domestic partner benefits policies that do not condition eligibility for domestic partner benefits on the ability to marry should be unaffected by the availability of same-sex marriage in Massachusetts. Therefore, employers should review carefully the eligibility criteria set forth in their domestic partner benefits policies.

*Q: What should an employer do if, in light of the effect of Goodridge on plan terms, many of its employees' domestic partners no longer are eligible for domestic partner benefits?*

A: Employers may want to consider adopting a rule that allows the domestic partners of employees who currently qualify for benefits to continue receiving such benefits either indefinitely or for a grace period despite the removal of the legal impediment to marriage. The rule should make clear that those domestic partners would remain subject to other qualifications (e.g., the continued existence of a long-term commitment).

*Q: Do employers with domestic partner benefits policies that are not conditioned on the unavailability of marriage still need to maintain a domestic partner benefits policy?*

A: Employers could decide that the availability of marriage for same-sex couples in Massachusetts makes it unnecessary to continue to maintain domestic partner benefits policies, at least for Massachusetts employees. However, employers with employees in multiple states might prefer to maintain a uniform company-wide domestic partner benefits policy. It may be impractical or impossible for same-sex couples who reside outside of Massachusetts to enter into a legally recognized marriage, even by coming to Massachusetts to marry. Therefore, maintaining a domestic partner benefits policy may be the only mechanism to enable same-sex couples outside Massachusetts to receive domestic partner benefits. By maintaining a uniform domestic partner benefits policy, employers avoid having to deal with any complications arising out of disputes over whether other states recognize same-sex marriages performed in Massachusetts. One option for multi-state employers would be to add a condition barring the application of such policies to employees who can legally marry in their state of residence, if such a provision is not already part of the policy.

### Effects on Statutory Employment Standards

*Q: Will same-sex marriage affect Massachusetts employers' obligations under the Family and Medical Leave Act?*

A: Probably not. The Family and Medical Leave Act ("FMLA") requires covered employers to allow eligible employees to take twelve weeks of leave during any twelve-month period for, among other reasons, the care of a spouse with a serious health condition. The FMLA defines the term "spouse" as a "husband or wife." DOMA provides that the word "spouse," when used in a federal statute, means only a legal union between one man and one woman. Therefore, an employer should not be required to provide FMLA leave to an employee because of the serious health condition of a same-sex spouse.

There is the potential for disputes about this subject. The Department of Labor's FMLA

regulations provide that spouse means a "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." However, DOMA should trump this regulatory definition.

While "spouse" under the FMLA will probably not include same-sex spouses even in Massachusetts, there may be a different result under FMLA policies. Many employers have leave of absence policies that track the FMLA requirements without expressly limiting their scope to that of the FMLA.

Unless the intended scope of such a policy is clarified, there could be uncertainty concerning whether such a policy is intended to extend leave of absence rights to employees with same-sex spouses. Moreover, extending such a policy regarding same-sex spouses could have its own unintended consequences. For example, an employee who takes leave to care for a same-sex spouse under his or her employer's policy for twelve weeks would remain entitled to take up to another twelve weeks of leave during the same year under the FMLA for another reason, such as to care for a parent with a serious health condition, since the leave for the same-sex spouse would not be treated as one of the employee's FMLA leave entitlements under federal law.

Therefore, employers should review their FMLA policies carefully. In conducting this review, employers must decide whether they will provide only the leave required by the FMLA or whether they wish to provide leave to same-sex spouses as well, even though such leave is not required by law.

*Q: What other statutory employment benefits must be provided to employees based on the fact that they have entered into a same-sex marriage?*

A: No federal employment laws other than the FMLA and the benefits statutes addressed above are affected by marital status. However, *Goodridge* does expand employers' obligations under the Massachusetts Small Necessities Leave Act

(the "SNLA"). The SNLA requires employers to provide limited leave to employees for, among other reasons, the purpose of accompanying an elderly relative to appointments for professional services. The statute defines "elderly relative" as an individual of at least sixty years of age who is related by blood or marriage to an employee. Thus, employers would be required to provide SNLA leave to employees who need to accompany elderly relatives of their same-sex spouse to appointments for professional services.

### Effects on Other Employment Policies and Benefits

*Q: What other non-ERISA employment benefits are implicated by Goodridge?*

*A:* Many employers have bereavement leave policies under which an employee may take a paid or unpaid leave of absence when his or her spouse dies. Employers will be obligated to provide such benefits when the same-sex spouse of an employee passes away. Employers may have other policies providing benefits based on spousal relationships. All such non-ERISA policies will now extend to Massachusetts employees with same-sex spouses. If a Massachusetts employer were to deny non-ERISA spousal benefits based on

whether the spouse was of the same sex, that distinction would constitute sexual orientation discrimination under Massachusetts law.

### Conclusion

*Goodridge* raises a host of complex issues for employers created in large measure by the direct conflict between federal and state law and the scope of the ERISA preemption doctrine. Employers should identify and address the effects of *Goodridge* in a proactive manner to ensure that their benefits plans and employment policies reflect the employer's intent. Many of these issues will require attention by employers before *Goodridge* takes effect on May 17, 2004. To assist employers in addressing these issues, Goodwin Procter's ERISA & Employee Benefits and Labor & Employment practices will jointly hold client [seminars](#) on the effect of *Goodridge* on employers, from 8 a.m. to 10 a.m. on each of April 27, 2004 and May 4, 2004. For further information about these seminars and to register, please contact Noreen Toomey at (617) 570-1678, or at [ntoomey@goodwinprocter.com](mailto:ntoomey@goodwinprocter.com)

If you are unable to attend either the April 27 or May 4 seminar and would like further information on the employee benefits and employment law implications of same-sex marriage for your company, please contact:

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