

***First Wednesday — A Monthly Discussion of Employment Law
Issues and Other Hot Topics for Management***

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New California Law Regulates Spousal Benefits

This May, the California Supreme Court effectively legalized gay marriage by ruling that a statute that defined marriage as a union only between a man and a woman was unconstitutional. How this ruling will affect California employers and the benefits they offer is the subject of some debate. Employers should examine their policies now to ensure they are treating employees according to the law. Even if the Court's ruling is undone in the future by a potential ballot initiative seeking a change in the state Constitution to limit marriage to unions between spouses of the opposite sex, same-sex couples who are getting married now may forever be legally married under state law.

The California Court's decision went into effect on June 14, 2008, and employers need to be prepared to address their employees' requests for benefits for a same-sex spouse. For employers that already recognize registered domestic partners as having the same rights as opposite-sex spouses, the ruling may not have much of an effect. But given the complex interplay between federal and state law, every employer should review current benefits and policies to ensure equal treatment of their California employees, regardless of their marital status, gender, or sexual orientation.

California State Law

Benefits provided under state law or the employer's existing policy should be provided equally to opposite-sex spouses, same-sex spouses, and registered domestic partners because it is illegal to discriminate against an employee on the basis of sexual

orientation, gender, or marital status. Some couples who were already registered domestic partners may now choose to get married, and some may choose not to. Regardless, if the benefit at issue is based on state law, or a policy the employer has elected to offer, it should be provided equally or the employer risks a claim of discrimination. For example, a same-sex spouse or registered domestic partner employee should be granted leave to care for a sick partner, is entitled to Paid Family Leave, and is entitled to California based "COBRA" health benefit continuation rights. There are other benefits governed by state law, and for these, the rule of thumb is to apply them equally.

Federal Law

Federal Law states the opposite. The Defense of Marriage Act (DOMA), effective on September 21, 1996, states that marriage is a union between a man and a woman, and defines the word "spouse" as a person of the opposite sex who is a husband or wife. The DOMA precludes same-sex spouses or registered domestic partners from qualifying for federal benefits that opposite-sex spouses get. California employers can choose to offer the benefits, but they are not guaranteed under federal law.

The federal law impacts several benefits employers may offer. Retirement plans governed by federal law do not apply to a same-sex spouse legally married in California. Some benefits, such as pre-tax reimbursement of medical expenses, raise complicated Internal Revenue Code and payroll issues – in some instances, unless the same-sex spouse qualifies as the employee's dependent, the employee cannot use pre-federal tax dollars the same way an employee and their opposite-sex spouse are able to. Finally, COBRA continuing health coverage provided under federal law does not apply to same-sex spouses. Because some federal laws pre-empt some state laws, employers must carefully examine each provided benefit on a case-by-case basis to ensure they are in compliance with state and federal law.

Practical Tips for California Employers:

- Employers should review their benefit plans and corresponding policies to ensure that the written definition of "spouse" is in accordance with current California law.

- If an employee requests benefits that involve tax advantages, the employer should make sure the benefit is being provided properly and that the employer's payroll service understands and can apply the tax rules correctly.
- Employers cannot discriminate on the basis of marital status, gender, or sexual orientation, and should review benefits and policies to ensure they are being provided equally to all California employees.
- Whatever the definition of marriage is, spouses are not entitled to work together in the same division or department, and employers can still refuse to place spouses in a position within the organization where one spouse will supervise the other.

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