

Same-Sex Marriage—Implications for Employee Benefit Plans

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In Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court determined that denying same-sex couples the right to marry violated the state constitution. Many employers question whether, and how, the existence of same-sex spouses will affect their benefit obligations to their lesbian and gay employees and their partners. This article summarizes the Goodridge decision, reviews the state of the law regarding the provision of domestic partner benefits and discusses potential implications for employers.

In *Goodridge v. Department of Public Health*,¹ the Massachusetts Supreme Judicial Court determined that denying same-sex couples the right to marry violated the state constitution, but stayed entry of the ruling for six months, allowing the Massachusetts legislature to “take such action as it may deem appropriate in light of this opinion.”² Thereafter, the court rendered an advisory opinion to the legislature,

concluding that a bill prohibiting same-sex couples from entering into marriage, but allowing them to form civil unions, would not comply with the *Goodridge* decision and would violate the Massachusetts constitution.³ At this writing, as a result of these decisions, beginning May 17, 2004 same-sex couples will be able to marry in the state of Massachusetts.

Goodridge v. Department of Public Health

In *Goodridge*, the court considered the appeal of seven same-sex couples, each of whom had attested a desire to marry his or her partner. The couples had been involved in committed relationships ranging from four to 30 years, and each couple sought to marry in order to affirm their commitment, as well as to secure the legal benefits and protections afforded to married couples. The couples were all denied marriage licenses by the state of Massachusetts. After a lengthy discussion, the court concluded that because the Massachusetts constitution “affirms the dignity and equity of all individuals” and “forbids the creation of second-class citizens,” denying same-sex couples the ability to marry violated the Massachusetts constitution.⁴

In an epilogue to *Goodridge*, the court concluded on February 4, 2004, in response to a request by the legislature for an advisory opinion, that a proposed law permitting same-sex couples to enter only into civil unions would not satisfy the

court’s earlier ruling in *Goodridge*, even if couples in a civil union had all the rights of married couples. The court stated:

The bill’s absolute prohibition of the use of the word “marriage” by “spouses” who are the same sex is more than semantic. The dissimilitude between the terms “civil marriage” and “civil union” is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.⁵

In the wake of *Goodridge*, discussion in the employee benefits community has focused particularly on the decision’s implications for employer obligations under employee benefit plans. For example, with respect to employee benefits, the following questions are examples of the confusion surrounding the new landscape: Will a Connecticut employer be required under its benefit plans to extend spousal benefits for same-sex married employees living in Massachusetts? Will an employee living and working in New York, but “married” to a same-sex spouse in a Massachusetts marriage ceremony, be entitled to claim spousal benefits under a New York employer’s employee benefit plans?⁶

Spouses: Most-Favored Beneficiary Status in the Benefits World

The federal tax laws generally encourage employers to provide employee benefits by conferring significant income tax advantages on employers, employees and their beneficiaries. For example, the cost of providing, and the reimbursement for,

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an employee's accident and health care coverage is tax-deductible for employers⁷ and is excluded from an employee's income.⁸ Moreover, the tax-favored status of this benefit is extended to include the provision of such coverage to spouses and other dependents of employees.

In some circumstances, the law does not merely favor the provision of benefits to an employee, spouse or dependent, but requires an employer to provide certain benefits to these beneficiaries. As an example, if an employer chooses to provide an employee and the employee's spouse and dependents with health care coverage then, under COBRA, upon the occurrence of a qualifying event,⁹ employees' spouses and/or dependents must be offered the opportunity to continue their health coverage for a prescribed period upon their payment of the required premium. Similarly, the Family and Medical Leave Act (FMLA)¹⁰ requires an employer to provide up to 12 weeks of unpaid leave for the care of an employee's spouse, child or parent.

And even within the favored status of dependents, spouses occupy a most-favored status. For example, tax-qualified pension plans are *required* to provide spouses with certain death benefits upon the employee's death (i.e., qualified joint and survivor annuities (QJSAs) and qualified preretirement survivor annuities (QPSAs)).¹¹ In fact, pension law is so protective of spouses that it requires an employee to obtain a spouse's approval to waive a QJSA or a QPSA,¹² or to use his or her accrued benefit as security for a loan.¹³ Additionally, under a profit-sharing plan, unless waived by the employee's spouse, the spouse is the automatic beneficiary of the employee's benefit upon his or her death.¹⁴

Current Law Regarding Domestic Partner Benefits

To understand the significance of same-sex couples' marital status for benefit purposes, it is useful to review the current state of the law in connection with the provision of employee benefits to "domestic partners." A domestic partnership is not a spousal relationship, and no uniform criteria exist for identifying relationships that constitute domestic partnerships. Whether a couple qualifies as domestic partners depends on how a

state or local governmental entity or private sector employer defines a *domestic partnership*, if it does so at all.¹⁵

A domestic partner's ability to access the favored federal income tax benefits previously discussed depends upon the individual's ability to satisfy the statutory definition of either *spouse* or *dependent*. The Internal Revenue Service (IRS) has stated consistently that an individual is considered to be a "spouse" if the applicable state law recognizes the relationship as a spousal relationship.¹⁶ Consequently, for example, if a state law legalizes common-law marriage, an employer in such state will be required to recognize an employee's common-law marriage spouse as a "spouse." Currently no state defines *domestic partners* as spouses.

The status of being a "dependent" of an employee is somewhat broader than that of a spouse; however, it may nonetheless be difficult for a domestic partner to qualify as such. Section 152 of the Internal Revenue Code (the Code) provides that an individual qualifies as a dependent only if the individual: (a) receives over 50% of his or her support from the taxpayer (employee) for the calendar year; (b) has as his or her principal abode the taxpayer's home for the entire calendar year; and (c) the relationship between such individual and the taxpayer is not in violation of local law. Because, often, both partners in a same-sex domestic partnership work full time, it is particularly difficult for many domestic partners to satisfy the 50% "support" test and, thus, qualify as a dependent under the Code.

The fact that a same-sex domestic partner cannot qualify as a "spouse," and

in many instances will not qualify as a "dependent," does not, however, mean that an employer *cannot* extend employee benefits to such a domestic partner. An employer may *voluntarily* elect to extend health care coverage to domestic partners. However, the provision of such benefits will not generate the same federal income tax advantages as those accorded to spouses and dependents.

This is no small distinction. For example, as noted above, Treasury regulations provide that an employee's gross income does not include employer contributions to a health plan only for an employee, spouse or dependent.¹⁷ Similarly, a health flexible spending account (FSA) can be used only to reimburse medical expenses of an employee, spouse or dependent.¹⁸ Because a domestic partner cannot qualify as a spouse and will often fail to qualify as a dependent, where an employer provides health plan coverage to a domestic partner, such amounts will constitute income to the employee, subject to applicable income tax withholding and federal employment taxes, including Social Security, Medicare and federal unemployment taxes.¹⁹ The amount of the benefit included in an employee's gross income is the excess of the fair market value of the employer-provided group medical coverage over the amount paid (if any) by the employee for such coverage.²⁰

Many employers, in fact, have decided to make health care coverage available to the same-sex domestic partners of their employees. The income tax implications for such coverage can be addressed by the employer in several ways: (a) the employer pays for the coverage, and the value of

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such coverage is included in the employee's gross income; (b) the employee pays for such coverage with after-tax dollars; or (c) coverage is provided through a combination of employee and employer contributions, and the excess of the value of the coverage over employee contributions is included in the employee's income. An employee cannot pay for such coverage with pretax salary reductions under a cafeteria plan.²¹ Some employers provide the coverage by "grossing up" the value of the coverage to "reflect the payment of the employee's portion of the FICA attributable to the amount included" in the employee's income.²²

In addition to the income and employment tax implications to the employee, the extension of health benefits to domestic partners has important implications for benefit plans as well. IRS and the U.S. Department of Labor (DOL) have each issued rulings providing guidance to employers on how such benefits should be structured so that an employee benefit plan does not lose its tax-exempt status, and so that the benefits provided do not violate ERISA's trust and fiduciary provisions. In a 1998 Private Letter Ruling, IRS held that a tax-exempt trust fund that provided family health coverage for a same-sex domestic partner would not jeopardize its tax-exempt status under Section 501(c)(9) of the Code, so long as the benefits afforded to domestic partners do not exceed 3% of the total benefits paid by the health fund.²³

Moreover, DOL has ruled that a trust fund's payment of FUTA taxes and the employer portion of the FICA taxes on the taxable domestic partner amount would not violate ERISA Sections 403(c)(1) (plan assets must be held for the exclusive purpose of providing benefits to plan participants, and may not inure to the benefit of any employer); 404(a)(1) (a fiduciary shall discharge his duties for the purpose of providing benefits to participants and beneficiaries); or 406(a)(1)(D) (a fiduciary is prohibited from transferring any assets of the plan for the benefit of a party in interest), provided such payments were clearly identified as plan benefits in the plan document.²⁴ DOL also ruled in the same advisory opinion that a trust fund's payment of gross-up amounts would not violate ERISA Sections 403(c)(1),

404(a)(1) or 406(a)(1)(D), so long as such payments were clearly identified as plan benefits in the plan document.

Goodridge and the Federal Benefits Landscape²⁵

Goodridge's implications on employers' benefit plan obligations are complex and potentially far-reaching. While *Goodridge* stands as a landmark in the evolution of the recognition of gay and lesbian legal rights, the Defense of Marriage Act (DOMA), a federal law, is a "counteracting" force in the federal benefits arena. We begin by discussing *Goodridge's* effect on employer programs, policies and practices required, or permitted by, or subject to, federal law (collectively referred to hereafter as "federal benefits"). As a result of DOMA, an employer cannot be *required* to recognize a same-sex spouse for federal benefits purposes.

For employers providing federal benefits only, whether or not operating in a state that provides for same-sex marriage or civil union, *Goodridge's* implications are potentially the most straightforward. At the current time, the decision need not have a significant impact on employers because DOMA²⁶ provides that, in determining the meaning of any federal statute, ruling or regulation, the term *spouse* can only refer to a person of the *opposite sex* who is a husband or wife.²⁷ Thus, a plan will not be required to recognize a same-sex spouse or same-sex domestic partner²⁸ as a "spouse" for purposes of accessing spousal benefits afforded under federal benefits law, even if recognized as a spouse under state law. Moreover, ERISA Section 514(a) preempts any state law that "relates to" any employee benefit plan covered by ERISA.²⁹ The United States Supreme Court has broadly interpreted this section to preempt state laws of general application.³⁰ Consequently, regardless of DOMA, ERISA arguably would preempt any state law requiring the recognition under such plan of a same-sex marriage for federal benefits.³¹

DOMA notwithstanding, it appears that an employer could choose to treat a same-sex spouse as a "spouse" for federal benefits purposes, with certain limitations. First, an employer's expansive definition of *spouse* to include a same-sex

spouse will not make the same-sex spouse a "spouse" for federal tax purposes.³² As previously discussed, IRS has ruled that an employer can extend health care coverage to domestic partners. However, in such event the employee cannot receive the favorable tax benefits afforded to spouses under the employer's health plan.³³ Given this IRS position, it seems likely that IRS would allow an employer to extend health care benefits to an employee's same-sex spouse, but the employee would not receive the associated federal tax benefits with respect to his or her same-sex spouse.

An employer's ability to grant benefits to a same-sex spouse as a "spouse" would also be limited where the extension of such benefits would contravene the Code or ERISA. Specifically, where an expanded spousal definition restricts a participant's specifically guaranteed right under the Code or ERISA, such definition would violate these laws. For example, as previously discussed, tax-qualified pension plans are required to provide a QJSA as the normal form of benefit to a married participant, and provide a single life annuity as the normal form of benefit to an unmarried participant.³⁴ If a plan were to treat a same-sex spouse as a "spouse" for purposes of determining the applicable normal form of benefit, the plan would likely violate the Code because it would require a participant, whom federal law regards as unmarried (according to DOMA), to be treated as married, and thus subject the participant to the QJSA rules. DOMA would thus prohibit this action because the result would violate the Code's provision that an unmarried participant receive a single life annuity as the normal form of benefit.³⁵ In contrast, for example, because the Code does not restrict who is considered a "survivor," it appears that a plan could define a *same-sex spouse* as a "spouse" for purposes of a non-QJSA joint and survivor annuity and could require that a same-sex spouse's consent would be necessary to name anyone but the same-sex spouse as a recipient of a death benefit or contingent annuity. Because of this distinction, plans that use a definition of *spouse* that specifically references state law should give consideration to the impact and more clearly define the intended result in the plan's various provisions.

Goodridge and State-Regulated Benefits³⁶

With respect to employer-provided nonfederal benefits, *Goodridge*'s impact is particularly complicated because each state judiciary must individually determine whether such state, and entities operating within the state, are required to recognize Massachusetts same-sex marriages. Because the decision on this subject will be based on each state judiciary's understanding of its own state's public policy, it will be difficult for an employer to anticipate whether a same-sex marriage will be recognized in that state.³⁷

Goodridge has great significance for an employer that operates in a state that legalizes or recognizes same-sex marriage or civil unions when that employer provides nonfederal employee benefits. State law benefits such as unfunded vacation benefits and bereavement leave are not governed by ERISA.³⁸ Under such state law plans, a state's regulation of marriage occupies the entire field on the subject, and no opportunity exists for either DOMA or ERISA to intercede in such state's regulation. Thus, an employer will be required to extend these nonfederal benefits to same-sex spouses of employees.³⁹ This obligation will require an employer to determine which of its employees have same-sex spouses; under which circumstances benefits *must* be extended to these spouses; and under which circumstances the extension of such benefits is either prohibited by DOMA or preempted by ERISA. In short, the combination of *Goodridge* and DOMA will translate into greater administrative complexities for such employer.

An employer operating in a state that has not itself legalized same-sex marriage, and where the state's judiciary has not decided whether same-sex marriage is recognized, will have to make the difficult decision about whether it will recognize a same-sex marriage for purposes of nonfederal benefits. Generally, if a marriage is valid where it is solemnized, it is valid in other states as well. However, where the marriage violates a strong public policy of a state, that state need not recognize the marriage. For example, the common law definition of *marriage* in New York does not allow the legalization of a marriage between an aunt and nephew, but New York courts will recognize the

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validity of such marriage if such a union is solemnized in a state that does allow such marriages.⁴⁰

In contrast, New York State considers polygamy to violate a strong public policy of the state. Thus, if another state were to allow polygamy, a New York court would not recognize the polygamist's marriage.⁴¹ DOMA provides that a state, for federal purposes, cannot be required to recognize same-sex marriage solemnized in another state. However, in the context of same-sex marriage, DOMA's proscription is irrelevant since it is ultimately the role of a state's judiciary to determine whether comity will be extended to a marital union legalized in another state.⁴² Thus, in the context of same-sex marriages, until a state's judiciary announces whether it recognizes a same-sex marriage legalized in another state, or whether it considers such unions void as against public policy, an employer providing state-governed benefits to spouses faces a difficult question—whether to proactively extend these benefits to same-sex spouses, or to wait until the appropriate state court has ruled on the recognition of same-sex marriage.

However, even if a state determines not to recognize such a marriage, that does not thereby preclude an employer from voluntarily extending benefits to same-sex spouses, much like nothing prohibits employers from granting benefits to domestic partners, as previously discussed. Also, providing benefits in advance may insulate an employer from liability if the judiciary subsequently rules that the state does recognize same-sex marriages.

Goodridge presents a greater dilemma for a multistate employer that operates in

both a state that has legalized same-sex marriages and a state (or states) that has neither legalized same-sex marriage nor determined whether such marriages will be recognized. An employer might choose to avoid the administrative complexities associated with providing nonfederal, state law benefits to same-sex spouses (as previously discussed) by choosing not to recognize same-sex marriage until the state judiciary in the state in which it is operating has affirmatively announced that same-sex marriages must be recognized. Such decision could mean that a multistate employer could recognize the same-sex marriage of some, but not all of its employees, thus treating the same relationship inconsistently under its plan(s). Because such employer would be unable to support this inconsistent treatment by citing any judicial authority, its action could lead to employee relations issues. Again, there is nothing precluding an employer from recognizing a same-sex marriage where the state court has been silent.

Finally, *Goodridge*'s implications will become most complex if a significant divide develops between the state courts recognizing same-sex marriage and those declaring it void as against public policy. In this situation, an employer operating in several states, subject to conflicting decisions on the recognition of same-sex marriage, will be required to keep track of federal benefits that, because of DOMA and ERISA preemption, cannot be extended to same-sex spouses, and nonfederal benefits that can be extended to same-sex spouses, same-sex spouses that must be recognized as spouses and same-sex relationships that cannot be recognized as spousal.

Future Challenges to DOMA?

Although, with respect to federal benefits, DOMA has largely muted *Goodridge*, it is possible that *Goodridge* will be the vehicle to ultimately silence DOMA.⁴³ When originally enacted, many questioned DOMA's constitutionality. The questions surrounding DOMA came in many varieties, including whether the act's provisions limiting the full faith and credit that a state must accord to a marriage performed in another state violates the full faith and credit clause of Article IV of the U.S. Constitution and whether DOMA's limitation of marriage for federal purposes to a "legal union between one man and one woman" violates the federal equal protection clause or offends the constitutionally recognized right to marry. However, without the existence of a state law recognizing same-sex marriage, a plaintiff could not satisfy the "injury in fact" standing requirement to challenge the constitutionality of DOMA. As of May 17, 2004, the date on which same-sex marriage is legalized in Massachusetts, an individual wishing to challenge the constitutionality of DOMA will have standing to sue to determine whether DOMA offends the U.S. Constitution. Should DOMA be found unconstitutional, *Goodridge* will have even greater significance for employers.

Conclusion

The *Goodridge* decision is the most recent development in the continuing evolution of the recognition of gay and lesbian legal rights. It presents many difficult and unresolved challenges for employers. In the short term, DOMA and ERISA preemption certainly limit the impact of the decision for an employer offering benefits under plans governed by federal law—Same-sex spouses will only qualify for those federal benefits for which same-sex domestic partners are currently eligible. However, it is possible that future challenges to DOMA and other legal developments will result in *Goodridge* exerting renewed impact on federal benefits provided by employers.

Goodridge also poses many challenges for employers providing nonfederal employee benefits. For such purposes, employers face the difficult task of establishing procedures to recognize which

benefits require the recognition of same-sex marriage. Perhaps the most daunting challenge is that, without opinions from the state judiciaries, employers may have to decide whether to recognize same-sex marriage and adjust their benefit programs accordingly. ♦

Endnotes

1. As of the writing of this article, developments relating to same-sex marriage are occurring on a daily basis. Updated information can be found on the *New York Times* Web site, which contains a link to the Associated Press at www.nytimes.com/aponline/national/AP-Gay-Marriage-Developments.html.
2. *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 948 (Mass. 2003).
3. *Opinions of the Justices to the Senate*, 2004 Mass. LEXIS 35 (Mass. Feb. 3, 2004).
4. *Goodridge*, at 970.
5. *Opinions of the Justices to the Senate*, 2004 Mass. LEXIS at *12-13.
6. Of course, there are federal and state laws addressing these questions. However, there is little clarity or consistency under these laws. The Defense of Marriage Act (DOMA), which we discuss in this article, would prohibit an employer from recognizing a same-sex spouse as a "spouse" for purposes of accessing federal benefits. However, there are serious questions regarding DOMA's constitutionality. There are also conflicting state laws that impact these issues. Presently, 38 states have enacted laws defining *marriage* as a heterosexual institution, and 16 states are considering constitutional amendments that would ban same-sex marriages. For example, the Ohio legislature recently approved a strict ban on same-sex marriages, barring state agencies from giving benefits to both gay and heterosexual domestic partners. On the other hand, Vermont has enacted a law, as discussed in note 25 below, that affords same-sex couples entering into a civil union all the benefits and protections of marriage under state law. 15 V.S.A. §120. Some states, such as New Jersey and Arizona, recognize some (but not all) property and other rights for same-sex couples. Additionally, it should be noted that the provinces of Ontario and British Columbia, Canada, allow same-sex couples to marry. Also, as of the writing of this article, Multnomah County, Oregon (which includes Portland), the city of San Francisco and the municipalities of New Paltz and Ithaca, New York are issuing marriage licenses to gay and lesbian couples. Governor Schwarzenegger has stated that the issuances of such licenses are void under California state law, and the New York State Health Department characterized the issuance of these licenses as illegal. Moreover, New York State Attorney General Eliot Spitzer and New York City Corporation Counsel Michael Cardozo issued opinions advising that same-sex marriages violate New York State law, and New Mexico Attorney General Patricia Madrid ordered a county clerk to stop issuing marriage licenses to same-sex couples. No doubt, legal developments nationally will continue to arise on a regular basis.
7. IRC §162.
8. IRC §106(a), Treasury Reg., §1.61-21(a)(4).
9. ERISA §606(a)(4).
10. 29 U.S.C. §2612.
11. IRC §§401(a)(11), 401(a)(17).
12. IRC §417(a).
13. Treas. Reg. §1.401(a)-20, A-24.
14. IRC §401(a)(11)(B)(iii).
15. Currently California, the District of Columbia, Hawaii, Connecticut and New Jersey recognize domestic partnerships.
16. Private Letter Ruling (PLR) 9717018 (Jan. 22, 1997); PLR 9603011 (Oct. 18, 1995); Revenue Ruling 58-66 1958-1 CB 60, (Jan. 1, 1958) ("the marital status of individuals under state law is recognized in the administration of the federal income tax laws").
17. Treas. Reg. §1.106-1.
18. Prop. Treas. Reg. §1.125-2, Q/A-7(b)(4).
19. PLR 200108010 (Nov. 17, 2000), PLR 9109060 (Dec. 6, 1990).
20. PLR 9603011 (Oct. 18, 1995).
21. Prop. Treas. Reg. §1.125-2, Q/A-4(b), PLR 9603011 (Oct. 18, 1995).
22. PLR 200108010 (Nov. 17, 2000).
23. PLR 9850011 (Sept. 10, 1998).
24. DOL Advisory Opinion 2001-05A (June 1, 2001).
25. We note that the Vermont Supreme Court ruled in *Baker v. State of Vermont* that it was unconstitutional to deny marriage licenses to same-sex couples. 17 Vt. 194 (Vt. 1999). The Vermont legislature subsequently enacted a statute affording same-sex couples who enter into a civil union in Vermont all the benefits, rights and protections of marriage under state law. 15 V.S.A. §120.
26. This assumes, of course, that DOMA continues to be good law. As discussed in this article, serious questions surround DOMA's constitutionality. IRS clarified in a 1997 Private Letter Ruling the relationship between its earlier rulings—that the applicable state law governs in determining for federal purposes whether a marital relationship will be recognized as spousal—and DOMA. IRS ruled that the applicable state law continues to determine whether IRS will recognize a marital relationship, except where such relationship is a same-sex relationship. PLR 9717018 (Jan. 22, 1997). For example, whether IRS recognizes a couple's asserted common-law marriage will depend on whether the applicable state recognizes such common-law marriage. However, so long as DOMA continues to be good law, IRS will not recognize a same-sex marriage, regardless of whether the applicable state legalized such marriage.
27. 1 U.S.C. §7.
28. As noted above, increasingly, in the past decade, employers have voluntarily expanded the definition of *spouse* under their employee benefit plans to incorporate members of a same-sex domestic partnership. Heterosexual domestic partnerships are often excluded from this expansive approach because, heretofore, heterosexual domestic partners could "legalize" their relationship, unlike their same-sex counterparts. For that reason and others (e.g., cost implications), employers typically have limited the recognition of domestic partnerships as spousal relationships by confining their plans to include same-sex domestic partnerships only. Accordingly, in this article, we discuss the state of the law regarding domestic partner benefits with respect to same-sex couples only.
29. ERISA Section 514(a) provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ."
30. See, e.g., *Shaw v. Delta Air Lines, Inc.* (S.Ct. 1983).
31. However, an argument can be made that ERISA preemption would not apply to state laws recognizing same-sex marriage. As discussed previously, the federal recognition of a spousal relationship turns on whether the applicable state law recognizes the relationship (except insofar as DOMA

applies). Arguably then, if the federal definition of *spouse* looks to the state definition, and the state defines *spouse* expansively to include same-sex marriages, civil unions, common-law marriage, etc., such definition would be incorporated into the plan.

32. See PLR 9717018 (Jan. 22, 1997).

33. See note 19 above.

34. IRC §401(a)(11), Treas. Reg. §1.401(a)-20, Q&A-25.

35. Similarly, a plan's inclusion of a same-sex spouse in the definition of *spouse*, thus allowing the distribution of benefits through a qualified domestic relations order (QDRO), would probably violate the Code's antialienation provisions. IRC §401(a)(13). Although the Code allows payments to be made to an alternate payee pursuant to a QDRO without violating the antialienation rules, an *alternate payee* is defined as a spouse, former spouse, child or other dependent of a participant. IRC §414(p)(1). Accordingly, treating a same-sex spouse as "a spouse" in this instance would thus allow the alienation of a participant's benefits, in violation of the Code's antialienation provisions.

36. Certain members of the Massachusetts legislature are attempting to amend the Massachusetts constitution to prohibit same-sex marriage. Because such amendment would not be effective until November 2006, at the earliest, and under the *Goodridge* ruling the state will begin to legalize same-sex marriage on May 17, 2004, there will be a period of at least two years, if not an indefinite period, in which same-sex marriages can be legalized in Massachusetts. As such, and since the laws of any particular state could have consequences beyond that state's borders, it is critical to consider the im-

plications of same-sex marriage for employee benefit plans.

37. In this section we distinguish between the "legalization" of same-sex marriage and the "recognition" of same-sex marriage. When discussing legalization of same-sex marriage, we refer to states in which a same-sex couple may legally enter into a marriage. A state's recognition of same-sex marriage refers to the comity that a state will accord a same-sex marriage legalized in another state. The U.S. Constitution's Full Faith and Credit clause (Article IV) generally requires that states extend comity to another state's legislative, executive and judicial acts. As discussed more fully below, in very limited circumstances, a state need not extend comity, or recognition, to a marriage legalized in another state.

38. We note that participants and their beneficiaries and/or dependents covered under state-regulated benefit plans, such as pension or health benefits maintained by state or municipal employers, are nevertheless subject to federal tax law. In that event, DOMA will prevent a participant and/or a same-sex spouse who is covered under such a plan from enjoying the associated federal tax benefits.

39. However, some plans not subject to ERISA will still want to comply with the Code to receive favorable income tax treatment. For example, a pension plan governed by state law may not be subject to ERISA. However, it still will attempt to satisfy the requirements of the Code under Section 4019(a) to ensure favorable income tax treatment for the plan participants (e.g., deferral of taxation on vested accrued benefits and favorable taxation on benefit distributions). Thus, although the plan is not subject to ERISA, DOMA would still prevent the state plan from recognizing a same-sex marriage to

ensure that participants received favorable income tax treatment under the Code.

40. *In re Estate of May*, 305 N.Y. 486, 493 (N.Y. 1953).

41. *Id.* at 491, N.Y. Penal Law §225.25.

42. 28 U.S.C. §1738C.

43. The Massachusetts Supreme Judicial Court rejected the argument that, due to the existence of DOMA, it should not permit same-sex marriages and should only authorize civil unions. It stated:

We are well aware that current federal law prohibits recognition by the federal government of the validity of same-sex marriages legally entered into in any state and that it permits other states to refuse to recognize the validity of such marriages. . . . We do not abrogate the fullest measure of protection to which residents of the commonwealth are entitled under the Massachusetts Constitution. Indeed, we would do a grave disservice to every Massachusetts resident, and to our constitutional duty to interpret the law to conclude that the strong protection of individual rights guaranteed by the Massachusetts Constitution should not be available to their fullest extent in the commonwealth because those rights may not be acknowledged elsewhere. We do not resolve, nor do we attempt to, the consequences of our holding in other jurisdictions. But as the court held in *Goodridge*, under our federal system of dual sovereignty, and subject to the minimum requirement of the Fourteenth Amendment to the United States Constitution "each state is free to address difficult issues of individual liberty in the manner its own Constitution demands." *Opinions of the Justices to the Senate*, 2004 Mass. LEXIS at *15-16.

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