

BUFFALO Law Journal

VOL. 85 _ NO. 42 _ AUGUST 19, 2013 _ EST. 1929

Special Report: Insurance & Employee Benefits



THINKSTOCK

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When the U.S. Supreme court struck down a portion of the Defense of Marriage Act (DOMA) this summer, it was hailed as a major victory in the fight for equality for same-sex couples. But with the dust still settling, one thing is clear: Same-sex marriages may be legal in New York, and the DOMA decision may have added some federal teeth to the fight, but there is still much to be clarified. And that has business owners in limbo.

Retirement plans

"The Supreme Court ruling raises a number of questions when it comes to employers as to what they may have to do with their qualified retirement plans," said Thomas Hurley, a partner in the Buffalo office of Harter Secrest & Emery LLP. The firm specializes in employee benefits



Hurley

issues.

"Everybody is still waiting for IRS guidance as to how the IRS is going to roll out

the impact of the Supreme Court decision when it comes to those plans."

Up to this point, he said, a same-sex spouse hasn't been treated as a spouse under DOMA in terms of pension and 401(k) plan payouts. With that changing now, the question for employers is: How do they ensure compliance with the new rules, which remain murky?

Said Hurley: "Clients are wondering, 'What will this ruling mean, and will the IRS require retroactive adjustments? Will there be potential liability for benefit payments that were made to a survivor other than a same-sex spouse?'"

To the latter point, same-sex couples may have previously decided to leave retirement payouts to a child or other family member. However, with the DOMA ruling, a same-sex spouse is treated the same as a heterosexual spouse so the money cannot be given away without written consent of the spouse.

These questions and more have employers concerned, as well as the attorneys who represent them.

"Those questions remain unanswered, and I think people just need to be patient and wait for that IRS guidance to come out," Hurley said. "We had great hopes that the IRS would offer some direction quickly, but right now it is just a matter of wait-and-see for employers to see what they have to do."



Saracene

Kate Saracene, meanwhile, is employee benefits and labor & employment counsel at Nixon Peabody. She said her phone started ringing right after the DOMA ruling and business has been brisk ever since.

"Our clients wanted to go out to their employees with some sort of statement as to what they were going to be doing," she said. "That has been challenging since the decision itself didn't address the type of logistics that employers need to know. We have received almost no guidance since the decision to tell employees what they are supposed to do."

Saracene said Nixon Peabody has adopted a two-part strategy when it comes to advising clients on how to proceed with benefits programs.

"We tell them, 'Here is what you should be doing immediately based on what we know, and here is what we need to be waiting on until we have that guidance.'"

Interstate issues

Saracene said another gray area following DOMA is how to apply the rules in

cases where multiple states are involved. For example, if a company is based in New York where same-sex marriage is legal, but it has workers in states where it is not, which state's rules apply? Is the ruling state the one where the company is based? The one where the employee works? Or even the state in which the employee and spouse were married?

"We have seen two court cases address that issue, as well as one federal agency," she said. "But it is still early on, so there is no definitive answer on that question."

Saracene said the federal agency that has weighed in — the Department of Labor — has commented that it will continue to use the state of residence to determine if someone is married for purposes of Family Medical Leave Act (FMLA) rights.

"That is the first agency comment on that so far, and that is because their regulations require that," she said.

Both decisions came from lower courts and thus the matters are still far from being clarified, according to Saracene.

Arthur Marrapese, a partner at Hodgson Russ LLP, leads the firm's employee benefits practice group.

"Larger employees have concerns here and we need that guidance as to how they should proceed," he said. "One of the things that the Supreme Court did not do was to declare Section 2 of DOMA unconstitutional. That is the section that permits a state to refuse to recognize a same-sex marriage performed in another state."

While New York has traditionally recognized same-sex marriages performed in other states, Marrapese said there are plenty of states that refuse to do so. That muddyies the water even more in light of the latest rulings.

"You have this patchwork of states, 13 of which recognize same-sex marriage and a vast majority that don't, so it is critical to know which state law will govern," he said.

Marrapese also raised the issue of retroactive application to the rules, noting that DOMA was enacted in 1996, opening the door for a pos-

sible lengthy rollback in the rules.

"Do I think we are going all the way back to 1996? I highly doubt that," he said. "But that doesn't mean we don't need more answers to give to our clients so that they can take action."

For large employers, the state ruling could have a financial impact, as well, if employers are made to correct benefit issues stretching back nearly 20 years.

"I still think it is going to be hard to quantify that and come up with cost parameters at this point," Marrapese said. "That is going to depend on how employers respond to the guidance that hasn't been issued yet. But it is clearly going to create administrative and plan design challenges for these companies."

PR concerns

Many businesses in this state opted to provide benefits to same-sex spouses even before any legal rulings, saying it was the right thing to do. Indeed, Hurley said he has clients who have taken that generosity one step further.

"A number of our larger clients have been providing benefits to same-sex spouses even before any court decision, and I don't think there has been any great financial cost," he said. "In fact, some have gone as far as to — when there is an employee who suffers adverse federal tax consequences from covering a same-sex spouse — actually pay the employee to make them whole for what, up to now, has been the different federal tax treatment when it comes to medical coverage provided to a same-sex spouse."

In some cases, Saracene said, it's a matter of giving the work force a good impression.

"They don't want it to appear that they (the employer) aren't getting onboard and doing what they are supposed to do," she said.

However, there are some pitfalls to such decisions and an employer, in certain cases, may find themselves paying for that down the road.

"The challenge is that if you extend the benefit, you could be violating another law," she said. "For example, with health benefits, the question is: Do I tax them on the benefit? If you decide to be generous and treat them like they are married, then the IRS could come after you for not withholding taxes."

The same is true on the pension side, according to Saracene.

"If you treat them like a spouse, then maybe another beneficiary comes after you because you gave the money to the wrong person," she said. "Even on the family-leave scenario, if you want to be generous and give them family-leave time, the downside is that you can't count it against their 12- or 26-week allotment for family leave."

The Family Medical Leave Act appears to be one of the more significant areas where employers must be concerned about changes.

Kathie Frier is an HR consultant at Benefit Brokers of WNY.

"When they struck down DOMA, the definition of spouse under federal law changed. So FMLA, which is a federal law, now had to be offered to people in those states where spouse was defined as same-sex and opposite-sex couples," Frier said. "So in New York, spouses are now eligible for more benefits or, in



Frier

some cases, just having the benefit to be able to take time off to care for their same-sex spouse. That was not the case before in the law."

Amy Christieson, president of Benefit Brokers of WNY, said FMLA has generated the most buzz among clients. In the end, she said, she expects that once there is greater clarification, the ruling will work for both employers and employees.

"Our clients are patient and they want to wait to see how this all comes down and make sure we have the right information to give them," she said. "I also think that in time it will all become clear, because it has to."

If the government is requiring companies to comply, they have to define what compliancy is."



Christieson



Marrapese