

January 12, 2009

MEMORANDUM TO CLIENTS

**Re: Recent Developments in Four States
Regarding Same-Sex Marriage and Civil Unions**

There have been several recent developments regarding same-sex marriage. Some, such as Proposition 8 in California, have garnered considerable national media attention, and others, such as the decision by the University System of New Hampshire to offer benefits only to same-sex partners that are civil union spouses, have occurred with less fanfare.

Following the changing developments in same-sex marriage and civil union laws is important for employers, plan sponsors, and insurers to ensure that benefit plans comply with state and local laws that are not preempted by ERISA.¹ Generally, insured benefit plans will be required to cover same-sex spouses, and self-insured plans, because of ERISA preemption, may elect whether to cover same-sex spouses. Employers may also be interested, for plan design purposes, in what benefits other employers are offering to same-sex spouses and partners.

Below we briefly summarize recent developments in California, Connecticut, New Hampshire, and New York regarding same-sex marriage and civil unions.

I. California

Proposition 8, the California state ballot measure banning same-sex marriage, was passed by California voters on November 4, 2008. The ballot measure changes the California state constitution to eliminate the right of same-sex couples to marry in California and provides that only marriage between a man and a woman is valid or recognized in California. Same-sex marriage, which had only been legal in California since June 2008, was ended, at least for now, by the passage of Proposition 8. The legality of the same-sex marriages that occurred during the period that same-sex marriage was legal in California is now also called into question by the passage of Proposition 8.

On November 19, 2008, the California Supreme Court agreed to review Proposition 8. The court's order granting review asked the parties to brief several issues including what effect, if any, Proposition 8 has on the legality of the same-sex marriages performed before the adoption

¹ It is important for employers, plan sponsors, and insurers also to follow the developments in domestic partner state and local laws because frequently such laws require that insurers treat domestic partners the same as spouses for purposes of insurance benefits and coverage. Examples of states with such requirements include, but are not limited to, California, Maryland, and Oregon.

of Proposition 8. Legal briefs are due to the court in December and January, and oral arguments are expected to be heard in March 2009.

It is important, however, for employers, plan sponsors, and insurers to remember that California still has a domestic partner registration law that extends the same rights, protections, and benefits granted to spouses to registered domestic partners; Proposition 8 does not change this law.

II. Connecticut

Following a decision issued on October 10, 2008, by the Connecticut Supreme Court holding that under the Connecticut state constitution same-sex couples cannot be denied the right to marry, same-sex marriage is now legal in Connecticut.

The Connecticut Insurance Department issued Bulletin IC-21 on November 18, 2008, notifying insurers that same-sex spouses are to be treated the same as spouses in opposite-sex marriages, for all purposes, including insurance. For employers with insured benefit plans, this now means that same-sex spouses will be entitled to coverage under those plans to the same extent that opposite-sex spouses are entitled to coverage.

Connecticut also still has a civil union law that permits same-sex couples to enter into civil unions. Couples who have been joined in a civil union are not same-sex spouses unless and until they are married. However, under Connecticut's existing civil union law, insurers also are required to treat partners in a civil union the same as spouses in a marriage.

III. New Hampshire

The University System of New Hampshire recently announced two significant changes to its benefit options for same-sex partners due to the New Hampshire civil union law which took effect on January 1, 2008. (Under the New Hampshire civil union law, partners to a civil union are afforded the same legal rights provided by state law that apply to individuals who are married.)

The first change is effective January 1, 2009, and provides that the University System of New Hampshire will provide compensation to employees in civil unions to help alleviate the impact of the federal tax requirement that income be imputed for benefits provided to same-sex partners. The second change is effective July 1, 2009, and provides that the University System of New Hampshire will provide spousal benefits only to employees in legal marriages or legal civil unions and not to domestic partners. Individuals may be able to apply for an exception to this rule. A domestic partner of an employee with current domestic partner coverage who is not joined in a civil union with the employee before July 1, 2009, will be offered continuation coverage on July 1, 2009.

IV. New York

Same-sex marriage is not legal in New York, but New York does recognize same-sex marriages legally performed outside of New York including marriages performed outside of the United States, e.g., in Canada.

On November 21, 2008, the New York Insurance Department, based on a legal opinion from the Insurance Department's Office of General Counsel, issued a bulletin (Circular Letter No. 27) notifying insurers that same-sex spouses in marriages legally performed outside of New York must be treated as spouses for purposes of the New York Insurance Law, including all provisions governing health insurance and all other kinds of insurance. Accordingly, to the extent that opposite-sex spouses are entitled to health insurance or other insured coverage, same-sex spouses also must be entitled to the coverage to the same extent as opposite-sex spouses.

V. Conclusion

There are a number of tax consequences attendant to providing benefits to same-sex spouses and civil union partners as well as domestic partners. Same-sex marriage, civil union, and domestic partner laws affect the benefits offered under health, welfare, and pension plans in different ways, and it is important for employers, plan sponsors, and insurers to consider each type of law to determine what effect it may have on benefit arrangements. We encourage you to contact your regular Groom contact or any of the attorneys listed below with questions about specific types of plans and benefits.

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