

SAME-SEX MARRIAGE: THE EVOLVING LANDSCAPE FOR EMPLOYEE BENEFITS[†]

Neal S. Schelberg^{*} and *Carrie L. Mitnick*^{**}

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, and ordered the Massachusetts Legislature to “take

[†] “Same-Sex Marriage: The Evolving Landscape for Employee Benefit Plans” by Neal S. Schelberg and Carrie L. Mitnick reprinted in part from “Same-Sex Marriage – Its Implications for Benefit Plans,” *Employee Benefits Journal*, Volume 29 Number 2, June 2004, published by the International Foundation of Employee Benefit Plans (www.ifebp.org), Brookfield, WI.

^{*} Neal S. Schelberg is a partner in the Employee Benefits and Executive Compensation Law Group of Proskauer Rose LLP. He practices exclusively in the employee benefits law area and has had extensive experience in providing legal counsel to both sponsors and plan fiduciaries of single employer and multi-employer pension and welfare funds. Mr. Schelberg previously served as an attorney in the Office of the General Counsel of the Pension Benefit Guaranty Corporation.

Mr. Schelberg is the co-author of ERISA Fiduciary Answer Book (Panel Publications) and a contributing author to the Trustee Handbook, Fifth Edition (International Foundation of Employee Benefit Plans), in which he wrote the chapter entitled “Real Estate Investments Under ERISA.” He regularly writes for various other journals on employee benefit law topics. Mr. Schelberg also speaks frequently for various organizations on employee benefit issues.

Mr. Schelberg received a J.D. degree from Hofstra University School of Law, where he was a Notes and Comments Editor of the Hofstra Law Review, and a LL.M. degree from the Georgetown University Law Center. He is a member of the New York and District of Columbia bars.

^{**} Carrie L. Mitnick is an associate in Proskauer Rose LLP’s Employee Benefits and Executive Compensation Group. She practices exclusively in the employee benefits law area and routinely counsels corporate entities and multiemployer trust funds in all areas of employee benefits law — including tax qualification issues, general ERISA compliance, executive compensation, fiduciary duties, prohibited transactions, participant communications, and a host of plan asset investment issues. Ms. Mitnick has written several articles on the issues associated with providing employee benefits to domestic partners and same-sex spouses (including the implications for employer-sponsored health reimbursement arrangements and health savings accounts).

Ms. Mitnick is a Phi Beta Kappa graduate of the University of Michigan. She received her Juris Doctor degree from Columbia University School of Law, where she was a James Kent Scholar. Ms. Mitnick is a member of the New York and New Jersey bars.

The authors gratefully acknowledge the invaluable assistance of their colleagues

Peter J.W. Sherwin, Esq. and Michael S. Sirkin, Esq. in the preparation of this article.

1. 798 N.E.2d 941, 948 (Mass. 2003). As of the writing of this article, developments relating to same-sex marriage are occurring on a regular basis. Updated information can be found at: <http://www.gaymarriagenews.com>.

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 Consequently, as of May 17, 2004, same-sex couples have been able to marry in the State of Massachusetts. This significant change has led many employers to consider the impact of same-sex marriages on their benefit obligations to their lesbian and gay employees and their partners.⁴ In this article, we briefly summarize the *Goodridge* decision, review the state of the law regarding the provision of domestic partner benefits, and discuss *Goodridge*'s potential implications for employers.

GOODRIDGE V. DEPARTMENT OF PUBLIC HEALTH

In *Goodridge*, the court considered the appeal of seven same-sex couples, each of which had attested a desire to marry his or her partner. The couples had been involved in committed relationships ranging from four to thirty 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.⁵ Massachusetts denied all of the couples' marriage licenses. After a lengthy discussion, the court in *Goodridge* concluded that because the Massachusetts Constitution “affirms the dignity and equality of all individuals” and “forbids the creation of second-class citizens,” denying same-sex couples the ability to marry, violated the Massachusetts Constitution.⁶

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 dissimili-

2. *Goodridge*, 798 N.E.2d at 970.

3. See Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

4. See, e.g., Cosmo Macero, Jr., *Lawyers Should Celebrate the New Matri-money*, BOSTON HERALD, May 17, 2004, at 29.

5. *Goodridge*, 798 N.E.2d at 949.

6. *Id.* at 948.

tude 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.⁷

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?⁸

7. Opinions of the Justices to the Senate, 802 N.E.2d at 570.

8. 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. *See, e.g.,* Langan v. St. Vincent’s Hosp. of N.Y., 765 N.Y.S.2d 411, 415 (Sup. Ct., Nassau County 2003) (questioning Congress’ authority to disregard the Full Faith and Credit Clause in Article IV of the U.S. Constitution by enacting DOMA).

There are also conflicting state laws that impact these issues. Presently, forty states have laws or state constitutional amendments that arguably prohibit same-sex marriage. *See Marriage/Relationship Laws: State by State*, Human Rights Campaign, at <http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=20716&TEMPLATE=/TaggedPage/TaggedPageDisplay.cfm&TPLID=66> (last visited Nov. 4, 2004). 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. *See id.*

On the other hand, Vermont has enacted a law that affords same-sex couples entering into a civil union all of the benefits and protections of marriage under state law. VT. STAT. ANN. tit. 15, §1204(a) (2002). Some states, such as New Jersey and California, recognize some, but not all, property and other rights for same-sex couples. Additionally, the Canadian Provinces of British Columbia, Manitoba, Nova Scotia, Ontario, Quebec and Yukon Territory allow same-sex couples to marry. The Canadian Supreme Court is presently deciding whether a bill which would legalize same-sex marriage is within the Canadian Parliament’s authority. *See* Associated Press,

Government Lawyers Present Case to Canadian Supreme Court for Same-Sex Marriage Law, N. COUNTY TIMES (Oct. 6, 2004), at http://www.nctimes.com/articles/2004/10/07/news/nation/21_33_1810_6_04.txt.

Also, for a period of time during 2004, marriage licenses were issued in the municipalities of New Paltz and Ithaca, New York; Multnomah County, Oregon (which includes Portland), the City of San Francisco, California; and Sandoval County, New Mexico. *See* Sheryl McCarthy, *Where’s Bloomberg on Same-Sex Issue?*, NEWSDAY, Mar. 4, 2004, at A46. However, the California Supreme Court voided all same-sex marriages sanctioned by local officials. *Lockyer v. City & County of San Francisco*, 33 Cal. 4th 1055, 1069 (Cal. 2004). According to the court, because California law provides that a marriage license can only be issued to a couple comprised of a man and woman, the local officials lacked the authority to issue marriage licenses to same-sex couples and these

LEGAL 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 an employee's accident and health care coverage is tax deductible for employers,⁹ and generally the amount and the coverage received by an employee under an accident and health plan is excluded from an employee's gross income.¹⁰ Moreover, the favored tax status of this benefit is extended to include the provision of such coverage to spouses and other dependents of employees.¹¹

In some circumstances, federal law does not merely favor the provision of benefits to an employee, spouse, or dependent, but rather *requires* an employer to provide certain benefits to these beneficiaries. For instance, if an employer chooses to provide an employee and the employee's spouse and dependents with health care coverage, then, under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"), upon the occurrence of a qualifying event, an employee's spouse and/or dependents must be offered the opportunity to continue their health coverage for a prescribed period, provided they pay the applicable premium.¹² Similarly, the Family and Medical Leave Act ("FMLA")¹³ requires an employer to provide up to twelve weeks of unpaid leave for the care of an employee's spouse, child, or parent.¹⁴

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 (QJSA) and

"marriages" have no legal effect. *Id.* In contrast, while issuing an injunction prohibiting the issuance of any additional licenses to same-sex couples, a Multnomah County, Oregon judge directed the state to register the same-sex marriages that had already occurred. *Li v. State*, No. 0403-03057, 2004 EXTRA LEXIS 80, *29 (Multnomah County, April 20, 2004). In another development, New York State Attorney General Elliott Spitzer issued an advisory opinion on March 3, 2004 in which he indicated that current New York State law does *not* provide for the legalization of same-sex marriage. See McCarthy, *supra*. These are only examples of some of the developments relating to this issue. There is no doubt that other developments nationally will continue to arise on a regular basis.

9. See I.R.C. § 162(a) (2000 & West Supp. 2004).

10. *Id.* § 105(a) and 106(a); see also Treas. Reg. § 1.106-1 (2004).

11. I.R.C. § 105(b) (2000).

12. Employee Retirement and Income Security Act of 1974, as amended ("ERISA") § 606(a), 29 U.S.C. § 1166(a) (2000 & West Supp. 2004).

13. 29 U.S.C. § 2612 (2000 & West Supp. 2004).

14. *Id.* § 2612(a)(1)(C).

Qualified Pre-retirement Survivor Annuities (QPSA)).¹⁵ Other dependents are not accorded such survivor protection. 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,¹⁶ or to use his or her accrued pension benefit as security for a loan.¹⁷ 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.¹⁸ Again, unique among dependents, only spouses are given these rights under federal law.

STATE OF LAW REGARDING DOMESTIC PARTNER BENEFITS¹⁹

To fully appreciate the significance of same-sex couples' marital status for benefit purposes, it is useful to review the current state of the law concerning the provision of employee benefits to same-sex "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, local governmental entity, or private sector employer defines a domestic partnership—if it does so at all.²⁰

A domestic partner's ability to access the "tax favored" federal income tax treatment of employee benefits discussed above, depends upon the individual's ability to satisfy the federal statutory definition of either "spouse" or "dependent." The Internal Revenue Service ("IRS") has consistently stated that an individual is considered to be a "spouse" if the applicable state law recognizes the relationship as a spousal relation-

15. I.R.C. § 401(a)(11) (2000 & West Supp. 2002-2004).

16. *Id.* § 417(a)(2).

17. *Id.* § 417(a)(4); Treas. Reg. § 1.401(a)-20, A-24 (2004).

18. I.R.C. § 401(a)(11)(B)(iii) (2000 & West Supp. 2002-2004).

19. As noted in footnote 29 and accompanying text, 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 have typically 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.

20. Currently California, the District of Columbia, Hawaii, Maine and New Jersey recognize domestic partnerships. *See* CAL. FAM. CODE §§ 297-297.5 (West Supp. 2004); D.C. CODE ANN. §§ 32-701 – 32-702 (Lexis 2001); HAW. REV. STAT. § 572-1.6 (Supp. 2003); 2003 Me. Laws 672; N.J. STAT. ANN. §§ 26:8A-1-26:8A-4 (West Supp. 2004).

ship.²¹ For example, if a state law legalizes common law marriage, an employer in that state will be required to recognize an employee's common law marriage spouse as his/her legal "spouse," and such couple will be accorded all spousal rights provided or permitted by law. Currently no state defines domestic partners as spouses.

The status of being a "dependent" of an employee is somewhat broader than being a spouse. While possible, practically speaking, it may be difficult for a domestic partner to qualify as a dependent. As of January 1, 2005, an individual, other than a qualifying child, can only qualify as a dependent under the Internal Revenue Code ("Code") if the individual: (a) bears a specific, familial-like relationship to the taxpayer; (b) is not a qualifying child of any other taxpayer for the taxable year; and (c) receives over 50% of his or her support from the taxpayer (employee) for the taxpayer's taxable year. Under the Code, a domestic partner could only satisfy criteria (a) if the individual has as his/her principal abode the same principal abode as the taxpayer for the taxable year and is a member of the taxpayer's household.²² Where both partners in a domestic partnership work full time, satisfying the above criteria in order to qualify as a dependent under the Code would be difficult, if not impossible.²³

The fact that a same-sex domestic partner cannot qualify as a "spouse," and in many instances will not qualify as a "dependent" either, does not 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, U.S. Treasury regulations provide that employer contributions to a health plan on behalf of an employee, and the employee's spouse or dependent, is not included in the employee's gross income.²⁴ Similarly, a health flexible spending account ("FSA") can be used only to reimburse medical expenses of an employee, spouse or dependent.²⁵ Because a domestic partner cannot qual-

21. Priv. Ltr. Rul. 97-17-018 (Jan. 22, 1997); Priv. Ltr. Rul. 96-03-011 (Oct. 18, 1995); Rev. Rul. 58-66, 1958-1 C.B. 60 (stating that "[t]he marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws.").

22. See I.R.C. §§152(a)(9), (b)(5) (2000 & West Supp. 2002-2004).

23. See Gary Gates, *Domestic Partner Benefits Won't Break the Bank*, URBAN INSTITUTE FORUM (Apr. 1, 2001), at <http://www.urban.org/urlprint.cfm?ID=7358>.

24. Treas. Reg. §1.106-1 (2004).

25. Prop. Treas. Reg. §1.125-2, Q/A-7(b)(4), 54 Fed. Reg. 9460 (Mar. 7, 1989).

ify 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.²⁶ 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.²⁷

Nevertheless, many employers have decided to make health care coverage available to the same-sex domestic partners of their employees.²⁸ 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 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 value of the coverage over employee contributions is included in the employee's income. An employee cannot pay for this coverage with pre-tax salary reductions under a cafeteria plan.²⁹ Some employers provide the health care 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."³⁰

In addition to the income and employment tax implications for the employee, the extension of health benefits to domestic partners has important implications for benefits plans as well. The 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, the IRS determined 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 part-

26. Priv. Ltr. Rul. 200-10-8010 (Nov. 17, 2000); Priv. Ltr. Rul. 91-09-060 (Dec. 6, 1990).

27. Priv. Ltr. Rul. 96-03-011 (Oct. 18, 1995).

28. See Jonathan A. Hein, *Caring for the Evolving American Family: Cohabiting Partners and Employer Sponsored Health Care*, 30 N.M. L. REV. 19, 28 (2000) (discussing the growing prevalence of same-sex partner benefits on the East and West coasts, particularly in the field of academia, the entertainment and technology industries, and municipal governments).

29. Prop. Treas. Reg. §1.125-2, Q/A-4(b), 54 Fed. Reg. 9460 (Mar. 7, 1989); Priv. Ltr. Rul. 96-03-011 (Oct. 18 1995).

30. Priv. Ltr. Rul. 200-10-8010 (Nov. 17, 2000).

ners did not exceed three percent of the total benefits paid by the health fund.³¹

Moreover, the DOL has ruled that a trust fund's payment of Federal Unemployment Tax Act ("FUTA") taxes and the employer portion of the Federal Insurance Contribution Act ("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.³² The 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.³³

GOODRIDGE AND THE FEDERAL BENEFITS LANDSCAPE³⁴

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")³⁵, a federal law, is a "counter-acting" force in the federal benefits arena. We begin by discussing *Goodridge's* effect on employer programs, policies and practices required, permitted by, or subject to federal law (collectively referred to hereafter as "federal benefits"). It appears that, as a result of DOMA, an

31. Priv. Ltr. Rul. 98-50-011 (Sept. 10, 1998).

32. U.S. Dep't of Labor, Advisory Opinion 2001-05A (June 1, 2001), available at <http://www.dol.gov/ebsa/regs/aos/ao2001-05a.html>.

33. *Id.*

34. We note that the Vermont Supreme Court ruled in *Baker v. Vermont* that it was unconstitutional to deny marriage licenses to same-sex couples. 744 A.2d 864, 889 (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. VT. STAT. ANN. tit. 15, § 1204(a) (LexisNexis 2002).

35. 1 U.S.C. § 7 (2000 & West Supp. 2002). As discussed in more detail below, DOMA contains the following two significant provisions on the recognition of same-sex marriage: (a) a state cannot be required to recognize a same-sex marriage legalized in another state; and (b) for purposes of federal law, the word "marriage" is limited to a "legal union between one man and one woman", and the word "spouse" refers only to a person of the opposite sex.

employer cannot be *required* to recognize a same-sex spouse for federal benefits purposes.

Goodridge's implications are potentially the most straightforward for employers who only provide federal benefits, regardless of whether or not they employ individuals living in a state that provides for same-sex marriage or civil unions. Currently, the *Goodridge* decision need not have a significant impact on employers because DOMA 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.³⁶ Thus, a benefits plan will *not* be required to recognize a same-sex spouse or same-sex domestic partner as a "spouse" for purposes of accessing spousal benefits afforded under federal benefits law, even if recognized as a "spouse" under state law. Moreover, under ERISA Section 514(a), any state law that "relates to" any employee benefit plan covered by ERISA is preempted.³⁷ The U.S. Supreme Court has interpreted this section of ERISA broadly, holding that state laws of general application are preempted by ERISA.³⁸ Consequently, regardless of DOMA, ERISA would arguably preempt any state law requiring recognition of a same-sex marriage for federal benefits.³⁹

Nevertheless, if an employer extends health care coverage to its employees' opposite-sex spouses, such employer may be required to extend health care coverage to same-sex spouses as well, if such coverage is provided through an insured health plan. ERISA preemption does not

36. 1 U.S.C. § 7. This assumes, of course, that DOMA continues to be good law. As discussed in footnote 9, serious questions surround DOMA's constitutionality.

In a 1997 Private Letter Ruling, the IRS clarified the relationship between its earlier rulings—holding that the applicable state law governs in determining, for federal purposes, whether a marital relationship will be recognized as spousal—and DOMA. The IRS ruled that the applicable state law continues to determine whether the IRS will recognize a marital relationship, except where such relationship is a same-sex relationship. *See* Priv. Ltr. Rul. 97-170-18 (Jan. 22, 1997) (noting that whether the IRS recognizes a couple's asserted common law marriage will depend on whether the applicable state recognizes such common law marriage). Therefore, so long as DOMA continues to be good law, the IRS will not recognize a same-sex marriage, regardless of whether the applicable state legalized such marriage.

37. *See* 29 U.S.C. § 1144(a) (2000) ("Except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . .").

38. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983).

39. 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). Therefore, 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.

apply to a state law that “relates to” a plan regulating insurance.⁴⁰ If a state were to legalize or recognize⁴¹ same-sex marriage, the state’s insurance law would implicitly be amended to include a same-sex spouse within its definition of “spouse,” and would arguably be a state law saved from ERISA preemption by virtue of the fact that the law regulates insurance. Thus, where an employer delivers health care coverage through an insured health plan, and includes health care coverage for spouses among its plan of benefits, such employer would arguably be *required* to extend health care coverage to an employee’s same-sex spouse. However, because DOMA prohibits the recognition of same-sex spouses for purposes of determining an employee’s spouse, such employee would still be taxed on the health care coverage provided to his/her same-sex spouse.

DOMA and ERISA notwithstanding, it appears that an employer could *choose* to treat a same-sex spouse as a “spouse” for federal benefits purposes under its benefits plan, with certain limitations. One limitation is that an employer’s expansive definition of “spouse” which includes a same-sex spouse, will not make the same-sex spouse a “spouse” for federal tax purposes.⁴² And while the IRS has ruled that an employer can extend health care coverage to domestic partners, the employee still cannot receive the favorable tax benefits afforded to spouses under the employer’s health plan.⁴³ Given this position, it seems likely that the IRS would allow an employer to extend health care benefits to an employee’s same-sex spouse, but, as with domestic partner coverage, 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 partner 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 right that the Code or ERISA explicitly guarantee, such a definition would violate these laws. For example, 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.⁴⁴ If a

40. 29 U.S.C. § 1144(b)(2)(A) (2000).

41. See *infra* footnote 47 (discussing the difference between “legalization” and “recognition” of same-sex marriage).

42. See Priv. Ltr. Rul. 97-17-018 (Jan. 22, 1997) (citing DOMA for the proposition that a spouse can only refer “to a person of the opposite sex who is a husband or a wife”).

43. *Id.*

44. I.R.C. § 401(a)(11) (2000 & West Supp. 2002-2004); Treas. Reg. § 1.401(a)-20, Q/A-25

plan were to treat a same-sex partner 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 thereby subject the participant to the QJSA rules.⁴⁵

On the other hand, the employer could *permit* the pension plan to provide survivor annuity or death benefits as an *optional* form of benefit to same-sex couples. For example, because the Code does not restrict the definition of a “survivor,” it appears that a plan could define a same-sex spouse as a “spouse” for purposes of a non-qualified joint and survivor annuity. It is possible that this optional form of benefit, if *selected* by the participant, could allow a domestic partner or same-sex spouse to be treated as the participant’s spouse (for purposes of this optional benefit) and designated beneficiary. Accordingly, plan sponsors of those plans that contain a definition of “spouse” specifically referencing state law, should give consideration to the impact of this definition and more clearly define the intended result under the plan’s various provisions.

GOODRIDGE AND STATE-REGULATED BENEFITS⁴⁶

With respect to employer-provided *non-federal* benefits (for example, non-ERISA benefits include payroll practices, such as unfunded vacation benefits, sick leave and bereavement leave and state statutory benefits such as unemployment benefits and short term disability benefits), an employer’s benefit obligations with respect to an employee’s same-sex spouse are governed by a state’s definition of “marriage” or “spouse,” and neither DOMA nor ERISA are implicated. In this arena,

(2004).

45. Similarly, a plan’s inclusion of a same-sex partner in the definition of “spouse,” which allows the distribution of benefits through a Qualified Domestic Relations Order (“QDRO”), would probably violate the Code’s anti-alienation provisions. I.R.C. § 401(a)(13)(A) (2000). Although the Code allows payments to be made to an Alternate Payee pursuant to a QDRO without violating the anti-alienation rules, an “Alternate Payee” is defined as a spouse, former spouse, child or other dependent of a participant. I.R.C. § 414(p)(1)(B)(i) (2000 & West Supp. 2002). Accordingly, treating a same-sex partner as a “spouse” in this instance would allow the alienation of a participant’s benefits, in violation of the Code’s anti-alienation provisions.

46. Certain members of the Massachusetts Legislature are attempting to amend the Massachusetts Constitution to prohibit same-sex marriage. Because such an amendment would not be effective until November 2006, at the earliest, and the state began recognizing same-sex marriage as of May 17, 2004, there will be a period of at least two years, if not more, in which same-sex marriage is legal in Massachusetts. See generally Religious Tolerance.org, *Same-Sex Marriage (SSM) in Massachusetts: Initial Attempts to Create a Constitutional Amendment*, at http://www.religioustolerance.org/hom_marm2.htm (last visited Sept. 29, 2004).

Goodridge's impact on an employer is complicated by questions of whether (and which) states will recognize a same-sex marriage legalized in Massachusetts, even if such marriage could not be legalized in the states themselves.⁴⁷

Under the Full Faith and Credit Clause of Article IV of the U.S. Constitution,⁴⁸ a state is generally required to recognize a marriage legalized in another state, even if the marriage would not be legal in its own state. However, comity need not be extended where such marriage violates the strong public policy of the state. For example, New York's common law definition of marriage does not allow the legalization of a marriage between an aunt and nephew, but New York courts will recognize the validity of such marriage if such a union is legalized in a state that does allow such marriages.⁴⁹ In contrast, New York State considers polygamy a violation of a strong public policy of the state. Thus, if another state were to allow polygamy, a New York court would not recognize the polygamists' marriage.⁵⁰ DOMA provides that a state, for federal purposes, cannot be *required* to recognize same-sex marriage legalized in another state.⁵¹ However, in the context of same-sex marriage, DOMA's proscription is somewhat irrelevant, since it is ultimately the role of a state's judiciary to determine whether the state's public policy requires that comity be extended to a marital union legalized in another state.

Therefore, in the context of same-sex marriage, 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 non-federal benefits to spouses faces a difficult question—whether to proactively extend these benefits to same-

47. 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. Thus far, only the Commonwealth of Massachusetts has legalized same-sex marriages. 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. U.S. CONST. art. IV, § 1. As discussed in more detail below, there are very limited circumstances where a state need not extend comity, or recognition, to a marriage legalized in another state. See *infra* footnotes 52-54 and accompanying text.

48. U.S. CONST. art. IV, § 1.

49. *In re Estate of May*, 114 N.E.2d 4, 6 (N.Y. 1953).

50. *Id.*

51. 28 U.S.C. § 1738C (2000 & West Supp. 2004).

sex spouses, or to wait until the appropriate state court has ruled on the recognition of same-sex marriage.⁵²

An employer who employs individuals living in a state that ultimately decides not to legalize or recognize same-sex marriages or civil unions, need not extend non-federal employee benefits to the same-sex spouses of employees. Nevertheless, even if a state decides not to recognize a same-sex marriage, *absent a state prohibition*,⁵³ the decision does not preclude an employer from voluntarily extending benefits to same-sex spouses, just as nothing prohibits employers from granting benefits to domestic partners.

On the other hand, *Goodridge* has great significance for an employer who employs individuals living in a state that does decide to legalize or recognize same-sex marriages or civil unions, and provides non-federal employee benefits. Such an employer will be required by state law to extend these non-federal benefits to same-sex spouses of employees.⁵⁴ To discharge this obligation, an employer will be required to determine which of its employees have same-sex spouses, where non-federal benefits *must* be extended to those spouses, and under which circumstances the extension of federal benefits is either prohibited by DOMA or preempted by ERISA. In short, the combination of *Good-*

52. Many states legislatures are considering adopting "mini-DOMA" legislation, which would provide that the state would not recognize a same-sex marriage legalized in another state. *See e.g.*, 2003 OH HB 272. In addition, on November 2, 2004, voters in 11 states approved state constitutional amendments that would similarly prohibit the recognition of a same-sex marriage legalized in another state. However, the constitutionality of many of these amendments is now being challenged. *See, e.g.*, <http://www.kentucky.com/mld/kentucky/news/state/10205562.htm>.. Where a state legislature has adopted legislation on same-sex marriage, or a state constitutional amendment is adopted, an employer would be well-advised to comply with such legislation until the state's judiciary addresses the issue.

53. For example, Virginia's Marriage Affirmation Act, which took effect July 1, 2004, prohibits an employer from extending spousal benefits to same-sex members of a civil union, partnership contract or other arrangement. VA. CODE ANN. § 20-45.3 (2004).

54. We note that participants and their beneficiaries and/or dependents covered under state-regulated benefit plans, such as pension or health benefit plans maintained by state or municipal employers, are nevertheless subject to federal income taxation. Consequently, DOMA will prevent a participant and/or a same-sex partner who is covered under such a plan from enjoying the associated federal tax benefits. Moreover, even sponsors of 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, but it will still attempt to satisfy the requirements of Sections 401(a) and 501(a) of the Code to insure 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, thereby preventing such participants from accessing favorable income tax treatment under the Code for survivor and other benefits under the pension plan.

ridge and DOMA will translate into greater administrative complexities for such an employer, and expose the employer, as the plan administrator, to greater potential liabilities.

Goodridge presents even greater dilemmas for a multi-state employer who employs individuals living in 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 non-federal benefits to same-sex spouses by choosing not to recognize same-sex marriage until the state judiciary in the state where the employees live has affirmatively announced that same-sex marriages must be recognized. Such a decision could mean that a multi-state employer would recognize the same-sex marriages of some, but not all, of its employees, thus treating the same relationship inconsistently under its plan(s). Because such an 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 and there is no state mandate prohibiting such recognition.

Finally, *Goodridge's* implications, particularly for multi-state employers, will become most complex if a significant divide develops between the states 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 and laws on the recognition of same-sex marriage, will be required to keep track of federal benefits that, because of DOMA and ERISA preemption, do not extend to same-sex spouses. It must also track non-federal benefits that the employer may extend 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 DOMA has largely muted *Goodridge* with respect to federal benefits, it is possible that *Goodridge* will be the vehicle to ultimately silence DOMA.⁵⁵ Since DOMA's enactment, its constitutionality

55. 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:

has been questioned.⁵⁶ Such inquiries included whether the Act 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.⁵⁷ 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.⁵⁸ Since *Goodridge* took effect on May 17, 2004, an individual in Massachusetts wishing to challenge the constitutionality of DOMA will now have standing to sue on the grounds that DOMA unconstitutionally limits the right to marry and offends the Equal Protection Clause. If DOMA is 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

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 requirements 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, 802 N.E.2d 565, 571 (Mass. 2004) (internal citations omitted).

56. See, e.g., *Langan v. St. Vincent's Hosp. of N.Y.*, 765 N.Y.S.2d 411, 415 (Sup. Ct., Nassau County 2003).

57. See *Loving v. Virginia*, 338 U.S. 1, 12 (1967) (stating that marriage is a "fundamental right" that cannot be limited). If the United States Constitution recognizes marriage as a fundamental right, then there are Constitutional issues raised by any Federal statute, such as DOMA, that limit the full faith and credit that a state needs to accord to another state's marriage. But see *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (arguing that even though *Loving* was based on an arbitrary deprivation of the right to marry, it could also have rested on its violation of the Equal Protection Clause of the Fourteenth Amendment).

58. See *Sierra Club v. Morton*, 405 U.S. 727, 734-35 (1972).

short term, DOMA and ERISA preemption certainly limit the impact of an employer's decision to offer benefits under plans governed by federal law—same-sex spouses will only qualify (and will be subject to the same federal tax treatment) 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, particularly those who operate in multiple states and cover employees under the same non-federal employee benefit plan(s). Because of *Goodridge*, employers face the difficult task of establishing procedures to determine which benefits require the recognition of same-sex marriage. However, perhaps the most daunting challenge confronting employers is that, without the benefit of opinions from the state judiciaries, employers may have to decide for themselves whether to recognize same-sex marriage and adjust their benefit programs accordingly.