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Murkiness on same-sex marriage clouds benefits issue

GLAD attorney offers guidance on federal, state laws

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Ever since Rhode Island's same-sex couples starting getting married in Massachusetts, the phones at the offices of Gay and Lesbian Advocates and Defenders have been ringing off the hook.

Karen L. Loewy, staff attorney with the region-wide gay and lesbian legal rights organization, says many attorneys who work with employers have consulted with GLAD as they decide what kinds of benefits to offer employees with same-sex spouses who are married outside of Rhode Island.

"We're happy to have these conversations as folks figure out their plans," says Loewy.

Recently, Attorney General Patrick C. Lynch issued a non-binding opinion advising the state's Board of Governors for Higher Education that same-sex employees married in Massachusetts should be considered married in Rhode Island.

Loewy says some employers are confused by the interplay of Lynch's opinion with the federal Defense of Marriage Act, which says that, for federal tax and benefit purposes, marriage can only be between a man and a woman. But the federal law does not bar private businesses from recognizing same-sex marriages, the GLAD attorney explains.

Loewy spoke with Lawyers Weekly's Noah Schaffer about how employers should proceed given the murky state of same-sex marriage — which is neither expressly prohibited nor allowed by Rhode Island law.

Q. *How did Lynch's opinion change the outlook for employers in terms of providing benefits?*

A. What is great about Attorney General Lynch's opinion is it is an articulation of established legal principles in Rhode Island. There hasn't been anything legislative or judicial [in Rhode Island] with regard to respecting marriages in Massachusetts, but there have been differences in marriage law [from state to state] for hundreds of years, and there are these existing principles that deal

with it. In Rhode Island, there is a clearly established comity law that makes very clear that if a marriage was valid where it was entered into, it is valid in Rhode Island.

What Attorney General Lynch has done is laid out that there are zero obstacles to respecting these marriages as valid marriages. So, while technically his opinion is non-binding, it's a really useful tool for having these conversations with private employers, so that folks have clarity about what the law does require.

Q. *Should employers start offering these benefits right away?*

A. Absolutely. As a general matter, employers are prohibited from discriminating on the basis of sexual orientation, and that includes employment. Certainly with insurance benefits there is a more complicated federal overlay, but all employers can provide benefits; there is nothing stopping them from doing so. And why would an employer want to discriminate against gay and lesbian employees?

Q. *But there's a difference between that and a legal obligation. Does one exist?*

A. I do think employers have a legal obligation to treat lesbian and gay employees equally. Where it gets more complicated is what kind of insurance plan an employer has where benefits are governed by ERISA. There is a knee-jerk reaction that, because of federal discrimination, employers think they are prohibited from treating employees fairly. DOMA does not prevent an employer from providing these benefits in any way, shape or form. When an employer has an insurance plan, general non-discrimination principles in the state law may require benefits for same-sex spouses.

But I think the other thing to keep in mind is certainly while insurance benefits are an important bread-and-butter benefit employers worry about, there are other benefits that are not governed by ERISA, and there is no question that employers are required to provide them on equal terms. ... They include things like travel vouchers for spouses that an airline might provide, access to facilities for university employee spouses, and subtle things like company directories of employees and spouses. That sounds minor, but all of these things tend to create a [welcoming] environment.

Q. *You're saying employers have an obligation. Would you be willing to back that up with a lawsuit that would result in a formal legal opinion from the courts?*

A. I feel like these issues should be resolved short of litigation. There are some legal tools to force employers to do the right thing. This is an evolving area of law, but there are some established principles. I don't think anyone is rushing into court right now.

Q. *What kinds of tax issues arise?*

A. As employers who provide domestic-partnership benefits know, the amount that the employer spends on the benefits of a partner is imputed to the employee as taxable income on the federal level, and that would be true for money paid for spousal benefits. But at the state level that is not considered taxable income, whether it is going to a spouse or a domestic partner.

There was a bill passed last year that added a section to R.I.G.L. Sect. 44-30-12 that makes clear that money spent to provide benefits to an employee's dependent, including a domestic partner or spouse, is not considered taxable income under Rhode Island tax law.

Q. *How might future legislative or judicial events concerning same-sex marriage affect employer issues?*

A. There has been affirmative marriage legislation introduced in the General Assembly for several years now. The advocates for marriage equality have hoped that's where the state is going to go.

The important thing to remember with regard to what is happening right now with married couples in Rhode Island is that any future changes shouldn't be used as a reason not to provide equal treatment immediately. Employers always know how to deal with someone who is married one day but not the next.

Also, in terms of judicial developments, there is a certified question that has been sent to the Rhode Island Supreme Court over the Family Court's obligation to enforce a [same-sex] divorce action. If they do answer it, what exactly will that answer look like?

The nice thing about Attorney General Lynch's opinion is that there are established principles to deal with this question, and until we know what the Supreme Court will do, there are established laws for employers to rely upon.

Q. *For employers that recognize domestic partners, what difference is there if the employees are married?*

A. Domestic partners are much harder for an employer. A marriage license is a marriage license — an employer has no excuse not to respect that. When you look at domestic-partnership plans, you need an affidavit, [rules about] a certain amount of time folks have lived together, proof of co-mingled finances.

Folks jump through hoops to get domestic-partnership benefits, but folks who are married, they just show the license and they get the benefit. I think it is much more straightforward to establish a legal marriage than a partnership. That's the nice thing about an employer like CVS, a major Rhode Island employer: You just show your marriage license and you get the benefits.

There can be big differences between benefits for domestic partners as opposed to spouses. There can be travel benefits, the availability of life insurance policies, who you can designate as the beneficiary for certain policies, different ways to structure health insurance post-retirement.

Q. *Speaking of post-retirement benefits, how are they impacted by this?*

A. That was a different opinion issued by Attorney General Lynch in October 2004, that same-sex spouses of retired teachers are entitled to benefits. His opinions are non-binding, but they come about because he's been asked by a state agency for his advice.

When someone goes to the trouble of asking their lawyer for advice, they'll follow that advice. I know that benefit was provided to the retired teachers' spouses, and to my knowledge the Board of Higher Education has done the same with the most recent opinion.

So, it is not like [Lynch] manufactured these out of thin air; he received a request and he provides legal advice, because as attorney general, he's their lawyer.