CARLTON FIELDS

In Florida, Recognition of Same-Sex Marriage Will Impact Employers

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On January 6, Florida became the 36th state to recognize same-sex marriage. This development came as the result of several recent state and federal court decisions finding Florida's ban on same-sex marriage an unconstitutional violation of the due process and equal protection clauses of the U.S. Constitution. Although the state of Florida has appealed these decisions, federal and state court stays on the rulings are now lifted. Currently, Florida's constitutional and statutory provisions defining marriage as between a male and female only and precluding the recognition of same-sex marriages performed in other states have been struck down. Florida clerks of court are now permitted to issue marriage licenses to same-sex couples in Florida, and same-sex marriage ceremonies are taking place around the state. For example, prior to the recent Florida rulings, same-sex couples who were validly married in other states but worked and resided in Florida were not deemed "spouses" under the Family and Medical Leave Act (FMLA) because the FMLA defines "spouse" according to the state where the employee resides. Even following the Supreme Court's decision in *United States v. Windsor*, which struck down a portion of the Defense of Marriage Act defining a marriage as only between a man and a woman for federal law purposes, the Department of Labor (DOL) made it clear that expanded rights post-*Windsor* only applied to same-sex married employees who resided in a state that recognized same-sex marriage (DOL Fact Sheet No. 28F). Now that Florida's statute precluding the recognition of same-sex marriages from other states has been found unconstitutional, Florida employers must grant FMLA leave not only to same-sex couples who marry in Florida, but also to those who have legally married in other states. Regardless of where same-sex couples marry, however, Florida's employers should have already been treating married same-sex partners as "spouses" for certain Internal Revenue Service (IRS) and private retirement plan purposes given a series of IRS Notices and DOL Technical Releases issued in 2014 following the *Windsor* decision. These federal agency pronouncements made it clear that in certain contexts, an individual's status as a "spouse" was to be determined based on the recognition of the marriage where celebrated, regardless of the married couple's state of domicile. In Florida, there is no longer a

distinction between the two. Given the complex interplay between state insurance regulations, ERISA's exemption of self-funded plans from state regulation, and federal tax code provisions relating to benefit plans, same-sex spouse access to private employer benefits is a less clear issue. For example, in *Roe v. Empire Blue Cross Blue Shield*, the Second Circuit Court of Appeals recently ruled that it was not improper under ERISA to expressly exclude same-sex spouses from spousal coverage under a New York-based employer-sponsored medical plan, despite the Supreme Court's *Windsor* decision and the fact that New York recognized same sex marriages. Constitutional and equal protection arguments do not reach private conduct, and employers are free under ERISA, within certain parameters, to set the terms of employer-sponsored plans. Whether the outcome will be the same in Florida is unclear. One consideration is the protection afforded Florida employees under the Florida Civil Rights Act (FCRA) against marital status discrimination. With same-sex marriage now recognized in Florida, a married gay or lesbian employee's marital status will be covered by the Act. And while some local governments in Florida prohibit discrimination on the basis of sexual orientation, the FCRA does not. Therefore, the legality of a medical plan's exclusion of same-sex spouses could depend in part on whether the exclusion is deemed a form of marital status discrimination or discrimination based on sexual orientation and where the employee works. Of course, ERISA may very well preempt application of the FCRA to employer-sponsored benefits plans, and the aftermath of the Florida same-sex marriage decisions on state insurance regulation still remains to be seen. These are all issues that will require fleshing out in the months to come. In the meantime, Florida employers are well advised to place same-sex spouses on equal footing with opposite-sex spouses. Now is a good time to review your benefit plans and policies to ensure they comply with current Florida law.

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