



Same Sex Marriage: What Do Employers Need to Know?

January 1, 2014

On December 19, 2013, the New Mexico Supreme Court issued its decision in [Griego v. Oliver](#), ___NMSC___. New Mexico followed the growing number of states allowing same sex marriages and held “the State of New Mexico is constitutionally required to allow same-gender couples to marry and must extend to them the rights, protections, and responsibilities that derive from civil marriage under New Mexico law.” In response to this ruling, employers may need to review their handbooks and policies to make sure that their internal procedures comply with this law. At a minimum, below are three things every employer should know with regard to the potential effects of the Supreme Court’s decision:

1. IRS

On September 23, 2013, the United States Department of Treasury and the Internal Revenue Service ruled that “For Federal tax purpose, the terms ‘spouse,’ ‘husband and wife,’ ‘husband,’ and ‘wife’ include an individual married to a person of the same sex if the individuals are lawfully married under state law, and the term ‘marriage’ includes such a marriage between individuals of the same sex.” Revenue Ruling 2013-17. This means, for example, that for tax year 2013 and going forward, same-sex spouses must file using a married filing separately or joint filing status. In light of New Mexico’s Supreme Court recognition of same sex marriages, employers in New Mexico (or any state recognizing same-sex marriages) need to make sure their employee benefits such as healthcare cafeteria plans apply to same-sex spouses.

2. FMLA

The FMLA allows an eligible employee to take up to 12 workweeks of FMLA leave in a 12-month period to care for the employee’s spouse who has a serious health condition. Department of Labor issued guidance in Fact Sheet #28F, which says that under the FMLA “Spouse means a husband or wife *as defined or recognized under state law for purposes of marriage in the State where the employee resides*, including common law marriage and same-sex marriage.” Now that New Mexico recognizes same sex marriages, employers will be required to offer FMLA leave to same sex spouses.

3. NMHRA

The New Mexico Human Rights Act, which makes it unlawful for an employer with 15 or more employees to discriminate in conditions or privileges of employment against any person on the basis of sexual orientation. NMSA 1978, § 28-1-7 states that it is an unlawful discriminatory practice for:



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A. an employer, unless based on a bona fide occupational qualification or other statutory prohibition, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition, or, if the employer has fifty or more employees, spousal affiliation; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age; or, if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity;

There is some risk of a Human Rights claim under New Mexico law whenever an employer declines to treat a same-sex couple with a marriage certificate equally with other married couples. One way in which such discrimination could occur is if an employer asks same-sex couples to produce documentation or proof of marriage but does not ask the same of heterosexual couples. For example, if an employee claims to have a same-sex spouse and an employer requires that he or she produce a marriage license to prove it, but an employer does not make the same request of an employee claiming an opposite-sex spouse, the employer could be found to have discriminated on the basis of sexual orientation. Consistent policies and procedures should be applied to same sex and heterosexual couples.

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