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Supreme Court ruling changes little for employers

By DOUG SHERWIN

While the state Supreme Court's ruling Thursday to legalize same-sex marriage in California represented a huge victory for the lesbian and gay community, its legal implications for area businesses is minimal, according to local legal analysts.

"It's not adding an additional layer of protection," said Jeremy Roth, an employment attorney and the managing shareholder of Littler Mendelson's San Diego office, adding, "There are sensitive issues employers have to be aware of. They have to treat married same-sex couples the same as opposite-sex couples."

Despite the Thursday's ruling, the federal law remains unchanged. In 1996, Congress passed the Defense of Marriage Act (DOMA). As a result, inside and outside of California, same-sex couples do not qualify for "spousal" benefits under federal laws, including retirement plans and self-insured health and dental plans.

Since DOMA permits only opposite-sex spouses for federal purposes, the legalization of same-sex marriages in California will not grant spousal rights and benefits to same sex-spouses under ERISA retirement or welfare plans, or COBRA coverage stemming from ERISA welfare plans.

It also precludes federal benefits involving the Family Medical Leave Act, immigration and Social Security.

California, however, has a comprehensive Domestic Partnership Act, which grants same-sex couples many of the same benefits afforded heterosexual married couples.

Although insurance plans are considered welfare plans under ERISA, the "insurance savings clause" exception to ERISA preemption allows California to regulate group insurance plans issued within the state.

As a result, employers participating in group health and dental insurance plans are legally required to extend spousal coverage to same-sex spouses of employees participating in such plans within California.

"Everything available to registered domestic partners doesn't change," Roth said.

San Diego attorney Lonny Zilberman, a partner in **Wilson Petty Kosmo & Turner's** employment practice group, agreed.

"Essentially what this decision did is it changed the definition of what marriage is under California law," he said. "And so essentially gay couples can now get married. That's a huge change, but as a practical matter, it didn't necessarily give them any additional civil rights that they didn't have under the domestic partnership act."

Zilberman said it could become an issue for same-sex couples who legally marry in California but then move to a state that doesn't recognize the marriage certificate.

Also, because of non-conformity in state law, California companies who have offices throughout the country may have to consider what to do about their internal policies. They may have to write up two sets of rules -- one for California and one for the other states.

Employers also must be careful to treat same-sex married couples the same way they treat opposite-sex married couples.

In the past company officials had the option of asking an employee to show proof he or she was in a registered domestic partnership.

Rarely, however, do businesses ask heterosexual married employees to present their marriage certificate.

"Now with this case, I would suspect no employer is going to ask someone in a same-sex marriage to supply a copy of their marriage certificate because they wouldn't do that in the ordinary course," Wilson Petty's Zilberman said.