

Proposal 2 Will Affect Public and Private Employers Differently

Law Firm Presents Seminar on Proposition 2

January 6, 2005

In the November 2004 general election, Michigan voters passed Proposal 2 amending the Michigan Constitution to define marriage as "the union of one man and one woman." For public and private employers, the adoption of a constitutional definition of marriage has implications on union contract negotiations, domestic partner benefits, national origin discrimination and ERISA, to name a few.

"It is clear that the Amendment is intended to invalidate same-sex marriage," says John Willems, attorney at Miller, Canfield, Paddock and Stone, P.L.C. and a 25-year veteran in labor and employment law. "What is unclear is the effect of the last six words, 'or similar union for any purpose.'"

In 1996, the Michigan Legislature enacted P.A. No. 324, which revised the statutory definition of marriage to "a unique relationship between a man and a woman." It also provides that "a marriage contracted between individuals of the same sex is invalid in this state." State courts could find this legislation unconstitutional, resulting in the statute having no legal effect. Proposal 2 was designed to foreclose this possibility.

"While it would appear that the intended effect of Proposal 2 is to deny marital benefits to any kind of arrangement between members of the same sex with a "marital" type union, the actual application of this Amendment in the employment context is yet to be determined," says Willems, whose firm is currently advising clients on this topic. "What can be said at this point is that the Amendment will likely affect public and private employers differently."

Many Michigan public and private employers have chosen or bargained to provide domestic partner benefits to employees who cohabit with and share a long-term sexual relationship with another. Miller Canfield attorneys caution that the language of Proposal 2 may rule out domestic partner benefits if courts interpret an employee's relationship "as a marriage or similar union," a result that may extend to heterosexual domestic partner benefits as well.

Public employers face the possibility that the judiciary may invalidate their same-sex benefit plans. The fact that, in many circumstances, these benefits are bargained-for under a collective bargaining agreement further complicates the Amendment's effects.

"The potential impact of Proposal 2 was recently illustrated in Governor Granholm's decision to remove benefit provisions for partners of gay and lesbian employees from the state's new union contracts," adds Felicia Duncan, also a Miller Canfield labor attorney.

As a State Constitutional Amendment, Proposal 2 may not bind private employers, nor should judicial interpretation of the Amendment in the public sector necessarily directly affect private employers. As long as an employer's benefit plan conforms to ERISA requirements, it should continue to be valid, advises Duncan.

There remains a question as to the effect of the Amendment on private employers who contract with the state government. "It has yet to be decided whether private state contractors must adhere to the same interpretation of the Amendment as state entities," says Chuck Oxender, another member of Miller Canfield's Labor and Employment Law Group. "It is likely that the Amendment would only bind a private state contractor in the event that the contractor is

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found to be a state actor. There would have to be a legally sufficient connection between the contractors providing of domestic partner benefits and the constitutional Amendment that prohibits such benefits.”

On January 11 at 8:00 a.m., Miller Canfield employment attorneys will discuss the impact of Proposition 2 on employers at its office in Troy (840 West Long Lake Road, Suite 200, Troy, Michigan). Attorneys, including Duncan and Oxender, will present the ramifications of Proposal 2 and its possible effect on domestic partner benefits under policies or collective bargaining agreements, and the best way to protect against possible exposure under this brand new development in employment law.

For more information and to register for the seminar, please contact Virginia Herrick at (313) 496-7548 or herrick@millercanfield.com. Cost is \$20 per person and includes handouts, parking, and a continental breakfast starting at 7:30 a.m. Special pricing for members of the Detroit Regional Chamber is available. For details call the Detroit Regional Chamber at 1-866-MBRLINE.

The 330-attorney law firm of Miller, Canfield, Paddock and Stone, P.L.C. was established in Detroit in 1852 and has offices in Ann Arbor, Detroit, Grand Rapids, Howell, Kalamazoo, Lansing, Monroe, and Troy, Michigan. Other offices are located in New York City; Pensacola, Florida; Washington, D.C.; Windsor, Ontario; and in Gdynia, Katowice, and Warsaw, Poland.