

Same Sex Spousal Benefits - Rights and Obligations

RAYLENE PALICHUK

The obligation of an employer to provide spousal benefits to employees in same sex spousal relationships has been the subject of both human rights and labour arbitration decisions. Although there is no obligation on an employer to provide benefits, once it decides to do so, such benefits must be provided in a non-discriminatory manner. The denial of coverage in cases of same sex couples has been alleged to violate collective agreements which include a nondiscrimination clause and human rights legislation which prohibits discrimination in relation to employment. It is typically argued as discrimination on the basis of "sexual orientation".

A similar issue was recently considered by the Supreme Court of Canada in a case where Old Age Security Spousal Benefits were denied to a same sex couple pursuant to the applicable federal legislation. It was argued that the legislation violated the equality section of the Charter of Rights and Freedoms in that it discriminated on the basis of sexual orientation. The majority of the Court held that the denial did constitute such discrimination, however, the case was dismissed in part on the basis that the discrimination was considered justifiable since the government must be accorded some flexibility in extending social benefits. It is clear from the decision that denial of benefits to same sex couples is on its face discriminatory. It is not clear though whether in the context of private benefit plans it can be successfully argued that the discrimination is justified as found by the Supreme Court of Canada or whether the decision is restricted to its facts.

Every employer is subject to the applicable human rights legislation. For those businesses covered by federal legislation, the Canadian Human Rights Code expressly includes sexual orientation as a ground of discrimination. As a result, federally regulated employers may be required to respond to a human rights complaint by an employee seeking same sex spousal coverage if the coverage is denied.

For provincially regulated employers the issue is currently unresolved. The Alberta Individual's Rights protection Act (IRPA) does not expressly prohibit discrimination on the basis of sexual orientation. However, a recent case from the Alberta Court of Queen's Bench (Vriend v. Alberta) held that sexual orientation must be "read-in" to the legislation. The effect of this decision is to include sexual orientation as a prohibited ground of discrimination. This decision is presently under consideration by the Alberta Court of Appeal and until the appeal is decided, the obligation for Alberta employers in this situation remains uncertain. If the Court of Appeal confirms the inclusion of sexual orientation, the denial of same sex spousal benefits is likely to result in a finding of discrimination in regard to employment or a term or condition of employment. However, it may be possible for an employer to defend such a claim on the basis that the discrimination is reasonable and justifiable in the circumstances. Not every denial of benefits will necessarily result in a finding of discrimination if there are other overriding objectives which may be relied upon to justify the employer's benefit scheme. Evidence as to the reason for excluding same sex couples as it relates to the purpose or effect of the benefits scheme would be relevant in that determination.

The Alberta Human Rights Commission is accepting complaints based upon "sexual orientation" although the complaints are not being processed until the status of the IRPA

2000, 10235 - 101 STREET
EDMONTON, AB T5J 3G1
PH: 780.423.3003

400 THE LOUGHEED BUILDING
604 1 STREET SW
CALGARY, AB T2P 1M7
PH: 403.260.8500

201, 5120 - 49TH STREET
YELLOWKNIFE, NT X1A 1P8
PH: 867.920.4542

www.fieldlaw.com

is settled by the Court of Appeal in the Vriend case. We will provide an update of the Alberta Court of Appeal decision in Vriend in future issues of WORKWISE.

In a unionized setting, an employer should examine the provisions of the collective agreement to determine whether there is a non-discrimination clause which specifically includes sexual orientation. If there is, an employer who denies this coverage will likely be in breach of the agreement. However, where a specific benefit plan has been incorporated into the collective agreement and the plan defines "spouse," "dependent" or "family coverage" to include only heterosexual relationships, it may be argued that the parties have implicitly agreed that there is no obligation to provide same sex benefits and the issue of coverage may not arise. The specific wording of the benefit plans is important in this assessment.

Accordingly, employers who are faced with requests by employees for benefits coverage of a same sex spousal partner should assess their legal obligations before denying coverage simply on the basis of existing company policy. That policy may now be inconsistent with human rights legislation or collective agreement obligations. The types of benefits to which this obligation may apply include everything from extended health care and dental coverage to pension benefits.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

The Labour and Employment Group
Edmonton 780-423-3003
Calgary 403-260-8500

REPRINTS

Our policy is that readers may reprint an article or articles on the condition that credit is given to the author and the firm. Please advise us, by telephone or e-mail, of your intention to do so.