

APRIL 2, 2013



1918 Massachusetts adopted the Mayflower, *Epigaea regens*, also commonly known as the ground laurel or trailing arbutus, as its official state flower. The flower was named by the Pilgrims who, arriving on their ship the Mayflower at Plymouth Rock, saw in the abundant, blooming spring flower a similarity to how they overcame their adversity.

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WHAT'S HAPPENING . . .

On April 23, Justine and Nina will be panel members at the Boston Bar Association's Continuing Legal Education Program, **Employment Law Basics 2013**. This popular annual fundamentals program will equip attendees with a multitude of tips, skills, and forms essential to any employment law attorney's toolbox. A panel of experienced employment law practitioners will provide an overview of relevant federal and state employment laws by highlighting the application of those laws for the participants through the life-cycle of the employment relationship – from hiring, to managing the employment relationship, and finally to terminating the employment relationship, and post-employment considerations.

CATCHING UP WITH OUR CLIENTS . . .

SAME-SEX MARRIAGE, DOMA AND YOUR BUSINESS

Last week's extensive coverage of the two marriage equality cases at the Supreme Court may lead you to wonder, could the Court's ruling affect you or your business. Yes, it could. The Court's ruling in United States v. Windsor, the case challenging DOMA, the Defense of Marriage Act, could affect businesses here in Massachusetts and in other states where same-sex marriage is recognized. The reason is that DOMA, by defining "marriage" as the union of one man and one woman for purposes of over 1,100 federal laws, as Justice Ginsberg noted, "touch[es] every aspect of life," including laws that affect employment.

During oral argument, Justice Ginsberg aptly described how DOMA creates two classes of married couples, opposite-sex couples, who enjoy all the benefits of federal laws applying to married couples, and same-sex couples, who are deprived of those benefits. As she said,

"I mean, they touch every aspect of life. Your partner is sick. Social Security. I mean, it's pervasive. It's not as though, well, there's this little Federal sphere and it's only a tax question. It's -- it's -- as Justice Kennedy said, 1100 statutes, and it affects every area of life. And so he [the attorney supporting DOMA] was really diminishing what the State has said is marriage. You're saying, no, State said two kinds of marriage; the full marriage, and then this sort of skim milk marriage."

Here are just some of the federal laws that apply in the employment setting and which employers now have to apply differently to their married employees depending on whether the employee's spouse is of the same gender or the opposite gender, which creates all kinds of administrative and compliance burdens on employers:

- **Health insurance:** insurance companies are not required to recognize a same-sex spouse for coverage where the employer and insurance company is based out of state.
- **Tax treatment of health insurance:** if a same-sex spouse can only get health insurance coverage as a domestic partner, then the employer must treat the value of the benefits as taxable income on the W-2 form for purposes of taxes and social security income.
- **COBRA:** continuing health care coverage under COBRA, which is an important benefit when an employee loses a job, does not apply to same-sex spouses.
- **The Family and Medical Leave Act (FMLA):** an employee cannot take protected FMLA leave to care for his or her same-sex spouse, and military caregiver leave would not apply to a same-sex spouse in the military.
- **Employee pension plans:** the federal Employee Retirement Income Security Act (ERISA), which governs pensions and retirement plans, provides substantive rights to spouses, but not to same-sex spouses.

An illustration of the burden on employers, according to the amicus brief filed on behalf of 278 employers, is what happened to an employer as sophisticated as Yale University. In 2010, the university failed to withhold taxes for the value of health insurance for same-sex spouses, and thus had to deduct that amount from paychecks in 2012.

A ruling by the Supreme Court to strike down DOMA as unconstitutional – and there appeared to be five votes to do so – would put an end to this "skim milk" marriage thereby allowing employers to treat all their employees alike for purposes of federal employment benefits.