Some people planning to marry want to enter into a premarital agreement. A business owner may have particular concerns that may cause him or her to consider a premarital agreement. There are a variety of issues the lawyer for the business owner needs to pay special attention to.

Why a business owner may seek a premarital agreement. A business owner may want a premarital agreement to protect his or her exclusive rights to the business if the marriage fails, and to control the disposition of the business after his or her death. At divorce, whether appreciation in the value of a premarital business is marital property can become the subject of an expensive court fight. Similarly, the value of the good will of a business can be disputed, with competing expert witnesses and substantial risk for the owner. A premarital agreement can take the business out of the pool of assets that may be divided at divorce. It can also allow the owner to pass the business on to a child from a prior marriage at his or her death free of a spousal claim.

Criteria for validity. The standards for validity of a premarital agreement are the same for a business owner as for anyone else. The agreement must be executed voluntarily, not as a result of duress. Parties should make a fair financial disclosure. However, they can waive disclosure so long as the waiver is voluntary.

Best practices. When there is a disparity in resources at the outset, and even when parties are in comparable circumstances, it is in the interest of the business owner to follow best practices in the negotiations leading to the signing of a premarital agreement. These include:

- Timing. The proponent should present the proposed agreement to his or her fiancé(e) well before the wedding. How long depends on many factors. Better still is presenting the proposed agreement before setting a date for the wedding.
- Actual negotiation. Courts have recognized that an actual negotiation is a transaction between equals which equates to a voluntary agreement. The stronger party should be open to considering proposed changes and should agree to some.
- Access to counsel. When both parties are represented by counsel, it is almost impossible to get a court to throw out a premarital agreement. When there is a significant disparity in resources, the stronger party should consider paying the weaker party’s legal fees. Doing so furthers the stronger party’s interest in validity.
- Financial disclosure. A good financial disclosure, so that a weaker party knows what he or she is giving up claims to, is an...
EMPLOYER ALERT: Misclassification of Employees as Exempt from Overtime Pay and Minimum Wage

By Roger A. Hayden, II

Employees are required to pay their employees for overtime (generally, 1 ½ times the employee's hourly pay for time in excess of 40 hours in a work week) and minimum wage. (The federal hourly minimum wage is $7.25; the hourly minimum wage in the Washington, D.C. metropolitan area is: DC $8.25, MD $7.25, VA $7.25). Some employees are “exempt” from these requirements. Employers have an economic incentive to classify an employee as “exempt” vs. “nonexempt.” However, misclassification can expose the employer to governmental oversight and action as well as an employee lawsuit, including a class action claim in which employees collectively challenge an employer’s classification of a group of employees as exempt. At a minimum, an employer faced with such an initiative will incur substantial legal fees and suffer loss of productivity in the workplace. If a violation of wage and hour law is found, then the employer can be subject to ongoing governmental oversight, fines and penalties, the obligation to retroactively compensate misclassified employees for unpaid overtime and minimum wages, court-ordered damages up to three times the amount of unpaid wages, and a court judgment for the employees’ attorneys’ fees and expenses. Misclassification can also adversely affect employee benefit plans, including health insurance and retirement programs.

The Fair Labor Standards Act (FLSA), administered by the Department of Labor (DOL), is the federal law with most common application to wage and hour rights of employees. State laws tend to piggy-back and amplify the federal law. DOL has announced its intention to increase its focus on the misclassification of employees and has reached agreements with other federal and state agencies, including the Internal Revenue Service, to report suspected violations. Employers need to reassess their classification of exempt employees to avoid scrutiny.

Exemptions are, perhaps, the most complex area of wage and hour law. In some instances, they apply to both minimum wage and overtime, and in other instances to overtime only. Initial compliance with the applicable laws and regulations can be inadvertently lost with changes in an employee’s duties or failure to meet certain compensation goals. Many exceptions to the standard requirements for exemption are found throughout the regulations. Changes in how labor is provided, such as through telecommuting, have strained the current regulations and demonstrated them to be anachronistic.

This article provides an overview of the types of employees who may be properly classified as exempt. It does not attempt to cover every employee who may be properly classified as exempt or each circumstance, nuance or exception that may apply. The determination is often fact specific and requires careful analysis. Thus, employers are wise to proceed with caution and with a thorough understanding of the federal and state laws and regulations that apply.

The FLSA recognizes five broad categories of exempt employees: executive, administrative, professional, computer personnel, and outside salespersons. Executive, administrative and professional employees are exempt from both the minimum wage and overtime requirements – the so-called “white collar” exemptions. Common to all three categories is that the employee must receive at least $455 per week or its equivalent. Exemption as an executive requires that the employee: (a) has, as a primary duty, management of the enterprise in which the employee is employed or of a customarily recognized department or division thereof; (b) customarily and regularly directs two or more other employees; and (c) has the authority to hire or fire other employees or whose suggestions and recommendations as to hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.

Each of these requirements is amplified by extensive regulations. For example, two or more employees means two or more full time employees, or their equivalent in part time employees, e.g., four half time employees. While the percentage of time spent on management responsibilities is relevant, the primary duty test does not require that more than 50 per cent of the employee’s time be spent on such endeavors. Thus, for example, an
Common Law Marriage Equality

By Anne W. Coventry

A common law marriage is a marriage that is entered into informally, without a license. Informal marriages have been abolished in most states, but they are still available in a handful of states and the District of Columbia.

The required elements of common law marriage in DC are: (1) cohabitation; following (2) an express mutual agreement to be married, which must be in words of the present tense. In DC, unlike some other jurisdictions, there is no minimum duration of cohabitation required before the marriage is in effect. One misconception about common law marriage is that a cohabiting couple could inadvertently find themselves married after a given period of time, without ever having intended to enter into a marriage. This is not true; creating a common law marriage requires both cohabitation and an unambiguous statement of a present intent to be married. Living together, even for a long time, is not enough.

Marriage equality in DC has now extended the concept of common law marriage to same-sex couples. The cases establishing DC common law marriage are riddled with references to “husband and wife” and “man and woman,” but the Religious Freedom & Civil Marriage Equality Amendment Act of 2009 (the Marriage Equality Act) rendered neutral all the gender-specific language of the law relating to marriage.

There are no known statistics about how many marriages in force today were entered into informally. By their very nature, such marriages defy record-keeping. We usually become aware of an informal marriage only when:

- the relationship sours and one party seeks spousal support and division of assets;
- one party seeks to marry someone else (or does marry someone else, and is accused of bigamy); or
- one party has died and the survivor and/or their children seek to inherit or receive other benefits dependent upon the marriage, such as Social Security, or the decedent’s estate claims the estate tax marital deduction for amounts left to the surviving “spouse.”

Imagine a same-sex couple, Robert and Jacob, who lived together in DC for decades. For most of that time, the law prevented them from marrying, but each considered the other to be his husband, and they agreed that they were married. They wrote sweetheart wills, leaving all of their assets to one another, and otherwise conducted their lives as though married. Eventually, DC law changed, making it possible for them to get married formally, but they never got around to it. Then Robert died, leaving his entire estate, worth $3 million, to Jacob.

In DC, there is a $1 million estate tax threshold. Assets of a DC-domiciled decedent that exceed this threshold are subject to DC estate tax unless they have been left to a surviving spouse, registered domestic partner, or charity. In this case, Jacob may be able to prove that he was Robert’s surviving common law spouse. If Jacob is successful, then Robert’s estate will not owe any DC estate tax.

If a legal impediment to marriage exists (e.g., one member of a couple is married to someone else), then the couple cannot become married at common law. When the impediment is removed (e.g., the prior marriage is dissolved), the common law marriage will become valid if the other requirements are met. For Robert and Jacob, when the Marriage Equality Act extended marriage to same-sex couples, the impediment to their informal marriage was removed.

Courts closely scrutinize claims of common law marriage, especially where one party is deceased and the survivor stands to gain financially. So Jacob will have to produce evidence of cohabitation (which should be easy enough) and their agreement to be married (which may be harder to prove). The best evidence of an express agreement to be married is the testimony of the parties. However, the validity of an informal marriage is usually tested only when one party is deceased (as in Jacob’s case) or is repudiating the marriage. Other evidence may allow a court to infer the existence of an agreement, such as the character and duration of cohabitation, witness testimony to the parties’ general reputation in the community as married, deeds to property, statements from jointly titled bank accounts, and jointly filed tax returns. In Jacob’s case, that he and Robert wrote sweetheart wills will be a helpful fact.

What if Robert’s estate had been $6 million? There is a federal estate tax imposed on estates that exceed the federal estate tax exemption (currently, $5.12 million, but scheduled to decline to $1 million on January 1 unless Congress acts). An unlimited federal marital deduction is available for assets left to a decedent’s surviving spouse. For opposite-sex couples, the IRS will recognize a marriage for tax purposes if valid under the laws of the state where the marriage was entered into (including valid common law marriages). However, the Defense of Marriage Act (DOMA) precludes the IRS from recognizing a same-sex marriage for federal tax purposes. Even if Jacob proves that he and Robert had a valid common law marriage under DC law, if DOMA stands, he will not receive the benefit of the federal estate tax marital deduction. The constitutionality of DOMA has been hotly contested. On May 31, 2012, in Massachusetts v. U.S. Dept. of Health and Human Services, the 1st Circuit U.S. Court of Appeals in Boston held that DOMA is unconstitutional insofar as it denies federal benefits to same-sex couples legally married in a jurisdiction that permits same-sex marriage.

Common law marriage is not available in Virginia or Maryland. Maryland will recognize a common law marriage if validly entered into in a jurisdiction, such as DC, that permits such marriages. The law of Maryland regarding recognition of same-sex marriage is still developing. In May, 2012, in Port v. Cowan, the Maryland Court of Appeals held that Maryland law recognizes a same-sex marriage valid where celebrated for purposes of allowing a same-sex couple to get divorced in Maryland.
Premarital Agreements and the Business Owner

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important key to validity.
• Substantive fairness. The laws of Virginia, Maryland and the District of Columbia (and the majority of other states) permit premarital agreements that are very unfair to an economically weaker party so long as the process of getting the agreement was fair. However, when there is a big disparity in resources, the stronger party is usually better served by an agreement that makes adequate provisions for the financial security of his or her future spouse.

Disclosure issues of special concern to the business owner. Disclosure of the value of an interest in a closely held business or professional services practice presents a special challenge. The value may not be readily ascertainable, the owner may be reluctant to disclose information that could be of interest to competitors, or the owner’s partners may not wish to have such information shared.

It is a mistake for the owner to assume that the other party’s knowledge of the existence of the business is tantamount to an understanding of its value.

The gold standard for a disclosure in connection with a premarital agreement is a written statement appended to the agreement identifying all significant assets and providing a reasonable statement of values. However, a business owner may want to consider other options, such as:

• A statement of net worth without a breakdown.
• A detailed statement of nonbusiness assets and their values coupled with a different sort of disclosure for the business.

The problem of stating the value of a closely held business. There are several challenges in creating a financial disclosure for a business owner that will stand up against attack. The value may not be readily ascertainable. Yet a statement that understates value or is misleading or incomplete puts the validity of the agreement at risk. There is no obligation to engage an expert appraiser to appraise a business for purposes of a premarital agreement. In the absence of a formal appraisal, the owner, and his or her lawyer, should take precautions in the disclosure of value. There are various standards of value, including book value and fair market value. The owner may use book value, but should qualify the statement if he or she does so. For example, in a 1984 Maryland case, Head v. Head, the husband stated the value of his business, the company that made the Prince tennis racket, at book value, but qualified the statement by saying actual value could be much higher. The appeals court held the agreement was valid even after the husband sold the company for 17 times book.

Another approach to disclosing the value of a business is for the owner to provide known data—e.g., gross revenues for a three-period; the amount the owner took out in compensation over the same three-year period; a balance sheet; a profit and loss statement; the business tax return or the Schedule C for a sole proprietorship; a narrative statement of the history of the business, what it sells, who founded it, how long it has been in operation, and other background facts that can help the weaker party understand what he or she is giving up a claim to. Courts have upheld premarital agreements that have taken this approach to disclosure.

The lawyer for the business owner should make some inquiries to make sure that there are no problems relating to disclosure lurking in the background, including:

• Does the business have key person insurance and, if so, what is the amount of the death benefit? The owner’s statement of value should not contradict any statement of value made to the insurance company, or should be explained.
• Has the owner made a statement of his/her opinion of value, e.g., in an application for life insurance, a loan application, or in another place where criminal penalties may apply? A disclosure for a premarital agreement should not contradict such a statement, or should explain the discrepancy.
• Has the business been valued recently for the client’s divorce, or for a divorce of one of the other owners of the business, or in connection with a probate of the estate of a deceased owner? If the valuation is fairly recent, the lawyer should get a copy of the valuation report. If the disclosure for the premarital agreement contradicts that opinion, the disclosure statement may need to include an explanation of the difference.

Terms to protect the owner. There are several terms that a premarital agreement drafted on behalf of the business owner should generally include:

• The interest in the business should be defined as the owner’s separate property, meaning he or she will have exclusive rights to it at death or divorce. The agreement may include some compensating provisions for the other spouse, discussed below.
• The agreement should include explicit text that defines all appreciation, whether the result of active efforts of either spouse or passive market forces, as part of the owner’s separate property in the event of separation/divorce.
• If a non-owner spouse will work for the owner, the owner should have a separate employment agreement with the spouse-employee.

Terms to provide for a weaker party. A business owner who wishes to include provisions in a premarital agreement for his or her spouse has a variety of options available, limited only by the creativity of the parties and their willingness to compromise. Parties may wish to consider terms that would take effect at divorce or after a death as well as obligations during the marriage, or a combination. Some options include:

• An owner could agree to transfer an existing home into joint names, or to acquire a jointly titled home.
• The business owner spouse may agree to make cash gifts to the other spouse upon marriage or over time during the marriage to allow him or her to create a nest egg.
• The business owner may agree to pay all living expenses, educate the spouse’s children, or assume other obligations that may allow that party to save and invest his or her own resources. This could also include an obligation to maintain long-term care insurance for a spouse to provide for his/her future healthcare needs.
• The owner may agree to a cash payment as a property settlement or the transfer of specified assets, such as real estate or securities, in the event of divorce. The amount can be tied to the length of the marriage.
• The agreement can reserve the weaker party’s right to seek an alimony award, or can provide for a specified amount and duration of alimony at divorce.
• The agreement can provide for a surviving spouse at death through a trust, life insurance, a cash bequest, survivor benefits under a retirement plan, or the right to certain assets that will be held in a survivorship form (such as a jointly owned home).

Confidentiality issues. A business owner may be particularly sensitive to disclosures made in connection with the execution of a premarital agreement being disseminated to others, such as family members of the spouse, as well as private information and

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Employers – Beware of How You Use Criminal Background Checks

By Jeremy D. Rachlin

Recent guidance issued by the Equal Employment Opportunity Commission (EEOC) limits how employers should apply the findings of a criminal background check in determining whether or not to hire a particular job applicant.

The EEOC found that up to 92 percent of employers subject job applicants to criminal background checks to combat theft, fraud, and workplace violence, and to reduce potential civil liability for negligent hiring. An applicant’s prior criminal conduct may be a factor considered by an employer in deciding whether to hire a particular applicant.

Finding that an employer’s use of an applicant’s criminal history in making employment decisions may have a disparate impact on certain classes of employees based upon race, national origin, or other unlawful reasons, in April 2012, the EEOC issued a lengthy document entitled Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (the “Criminal Records Guidance”).

The Criminal Records Guidance states that an employer may consider an applicant’s criminal history discovered through a criminal background check only if the employer ‘demonstrate[s] that the policy or practice is job related for the positions in question and consistent with business necessity’. If the aggrieved job applicant is able to establish that he or she was adversely affected by the use of a criminal background check, the burden shifts to the employer to prove that its use of the criminal background check in reaching its decision was proper.

In determining whether the policy of excluding an applicant on the basis of prior criminal history is “job-related for the position in question and consistent with business necessity”, the Criminal Records Guidance suggests that employers examine three relevant factors: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and, (3) the nature of the job. The Criminal Records Guidance also suggests that, after the employer analyzes these three factors, it should then perform an individualized assessment for applicants who have been screened out on the basis of criminal history to determine whether the screening policy, as applied to that particular applicant, is job-related and consistent with business necessity.

Employers should note the critical difference between an arrest and a conviction. An arrest record alone does not establish that an applicant engaged in criminal activity; therefore excluding an applicant only on the basis of a prior arrest is presumptively improper. On the other hand, a conviction is usually sufficient evidence of criminal conduct and can be considered by an employer.

All employers should familiarize themselves with EEOC guidance, evaluate whether their employment practices comply with federal law, and, if necessary, retain counsel to assist them to develop practices that do comply.

For a third consecutive year, Business, Real Estate and Litigation associate Jeremy Rachlin served as a volunteer judge in the Maryland State Bar Association High School Mock Trial Competition. Jeremy says he is always impressed by the fearlessness, commitment and talent demonstrated by the students who participate.

Premarital Agreements and the Business Owner

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documents becoming public in the event of a future dispute. As part of the process leading to execution, the owner must strike the right balance between providing sufficient data, and doing so in a way that can be readily provable in the event of a challenge, especially one that occurs after the client’s death, and the owner’s interest in keeping business information private. One option is for the owner to make a variety of documents available for review by the fiancé(e) and his/her lawyer, but not to allow these documents to be copied. The agreement should identify with specificity which documents were made available. There are a variety of other ways this process can be conducted, depending upon the particular circumstances.

The agreement can include a confidentiality provision that requires the parties to maintain the financial disclosures in confidence. This would preclude a party from giving copies of the other party’s disclosure to his or her adult children or friends, but would allow him or her to show it to his/her own lawyer, accountant, or financial advisor.

The confidentiality clause could also include terms governing future litigation, such as a requirement that business documents be submitted to a court under seal.

Another way to limit dissemination of sensitive business information in the future is through a form of alternative dispute resolution that keeps the parties out of court and their financial records out of the public record.

Dispute resolution. Even when there is no dispute about validity of a premarital agreement, parties may disagree about the meaning of some of the terms, or there may be matters deliberately left for future resolution, such as the specifics of a division of property at divorce. Parties may wish to provide for alternative dispute resolution to keep the dispute out of court and out of the public record.

The agreement could provide that a CPA or other trusted advisor would assist the parties to divide up any property that the agreement provides is to be shared at divorce, and to advise about the tax consequences of the division.

• Appraisal. It is common for a premarital agreement to provide for appraisal of property subject to the agreement where the value is in dispute.

• The agreement could provide for binding arbitration of any dispute about the meaning of the agreement or the parties’ rights and obligations under it. Such a provision can be very useful also to resolve a claim of breach or an issue deliberately left open, such as an alimony claim. However, an agreement should not provide for binding arbitration of a dispute about validity. Decisions of an arbitrator are virtually unappealable. A party who may be disadvantaged by a wrong decision on validity should retain the right to appeal that decision.
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assistant manager of a store may serve customers and stock shelves, but remains exempt if his or her primary duty is management. However, a working supervisor in a manufacturing plant or on a construction site is not exempt, simply because he or she directs the work of other employees. The employee must satisfy all of the requirements to be exempt.

An exempt administrative employee is one whose primary duty: (a) is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (b) includes the exercise of discretion and independent judgment with respect to matters of significance. Examples include tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, human resources, employee benefits, labor relations, public relations, government relations, computer network, internet and database administration, and legal and regulatory compliance. The most difficult part of the test is the second requirement for discretion and independent judgment with respect to matters of significance. The regulations distinguish discretion and independent judgment from skill. Clerical work, although requiring great skill, is not exempt.

Special requirements for exemption apply to educational administrative employees. There is no test for discretion and independent judgment. Instead, the regulations provide that the employee’s primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof. Administrative functions related to business operations do not qualify. Thus, superintendents, principals and vice principals, department heads of universities and academic counselors can be classified as exempt. Building management and maintenance, student health, academic staff, such as social workers and psychologists, and food service managers, on the other hand, are not exempt.

There are four sets of professional exemptions. The learned professional is one whose primary duty is the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. Professors, certain registered or certified medical technologists, registered nurses, dental hygienists (with four years of study), physician assistants (with four years of study), accountants, chefs (with four years of study), athletic trainers (with four years of study), and funeral directors and embalmers (with four years of study) are all exempt. Paralegals and cooks are expressly excluded from the list.

Exempt creative professionals are those employees whose primary duty is the performance of work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. This category applies to music, writing, acting and graphic arts. It applies to actors, musicians, composers, conductors, soloists, painters, cartoonists (as opposed to illustrators), essayists, novelists, short story and screenplay writers, and persons who hold more responsible writing positions in advertising agencies. It does not apply to copyists, animators or photo retouchers. Journalists can qualify for this exemption if their work requires invention, imagination, originality or talent, as opposed to work which depends on intelligence, diligence and accuracy.

Teachers, including pre-school and trade school teachers, athletic coaches and advisors for school activities such as drama and science clubs are also covered by the professional exemption. The salary requirement does not apply to this classification.

Doctors and lawyers who hold licenses or certifications are subject to the professional exemption. The salary requirement does not apply.

The FSLA also contains an exemption for highly compensated employees who receive a total annual compensation of at least $100,000 and customarily and regularly perform any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee. If the employee fails to earn the minimum compensation, the exemption can be lost.

These white collar exemptions require that the employee be paid on a salary basis. That is, the employee must receive a predetermined amount of pay, each week, regardless of the number of hours worked or the work performed. With important exceptions (such as full day absences for personal reasons, jury duty, etc.), no deductions can be taken for time not worked.

The FSLA expressly excludes from the white collar exemptions manual laborers, such as factory and construction workers, and longshoremen, no matter how highly compensated. Likewise police officers, detectives, deputy sheriffs, state troopers, probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees are never exempt regardless of position or amount of compensation. However, if the primary duty of high level fire and police officials is primarily managerial and they otherwise meet the applicable requirements, they can be classified as exempt.

The FSLA contains a special exemption from overtime for certain computer employees. A minimum salary of $445 per week, or $27.63 per hour is required. The employee’s primary duty must be: (a) the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications; (b) the design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications; (c) the design, documentation, testing, creation or modification of computer programs related to machine operating systems; or (d) a combination of the aforementioned duties, the performance of which requires the same level of skills.

An exempt outside salesperson is one: (a) whose primary duty is making sales or obtaining orders or contracts for services or use of facilities for which consideration will be paid; and (b) who is customarily and regularly employed away from the employer’s place of business. There is no minimum salary requirement to meet this exemption. There are many intricate requirements and exceptions which must also be complied with for an outside salesperson to be exempt. Whether an outside salesperson is exempt can generally only be determined on a case-by-case basis.

The foregoing are the broad categories of exemptions from both minimum wage and overtime pay requirements that most employers deal with under the FSLA and other wage and hour laws. There is a long list of specific jobs in which employees may be subject to exemption, such as certain agricultural workers, motor carrier employees, seamen, salesmen, partsmen, and mechanics employed by automobile and truck dealers, local deliverymen paid by the trip, household domestics residing in the household, employees at motion picture theaters, employees of amusement and recreational establishments having seasonal peaks, fishing industry employees, casual baby-sitters, etc.

The determination whether an employee can be classified as exempt is as much an art as a science. With the increased scrutiny of government regulators and the heightened awareness of employees regarding their rights, prudent employers will audit the classification of their employees. Because of the complexity, wise employers will undertake this review with the assistance of experienced counsel or other human resource professional.
Maryland’s Highest Court Recognizes Out-of-State Same-Sex Marriages

By Anne (Jan) W. White

On May 18, 2012, in Port v. Cowan, the Maryland Court of Appeals unanimously held that Maryland courts will recognize a same-sex marriage validly entered into in another state for purposes of granting a divorce. Maryland’s highest court said that its holding is in line with Maryland’s history of according deference to marriages validly performed in other states, even if those states’ laws differ from Maryland’s. Moreover, Maryland statutes which accord rights to same-sex couples as domestic partners and prohibit discrimination based on sexual orientation in areas such as employment indicate that the Court’s decision is in line with Maryland’s public policy.

In March 2012 Governor O’Malley approved a law that will legalize same-sex marriages performed in Maryland effective January 2013, or later, if the law is challenged, as expected, in the November 2012 election and the challenge has not been resolved in favor of the law by such date. The Court of Appeals in the Port case was quick to point out that its holding will be unaffected by any such challenge. In other words, even if Maryland voters reject the law that would allow same-sex couples to marry in Maryland, Maryland courts will still give recognition to valid out-of-state same-sex marriages for purposes of granting a divorce.