Connecticut's Civil Union Statute: Effect on Employers

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Effective October 1, 2005, same sex couples in Connecticut will be able to obtain legal recognition as members of a civil union. Under the new law, "[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage . . . ." This means that, generally, someone in a civil union will be considered a "spouse" for purposes of Connecticut law.[1]

The passage of the civil union statute creates some tension between the state and federal laws that regulate employers and the benefits they offer their employees. The states have traditionally regulated local health and welfare matters such as marriage and family relations. In 1996, however, the federal government ventured into this area by enacting the Defense of Marriage Act (DOMA). Under DOMA the definition of "spouse" and "marriage" are confined to opposite sex partners for purposes of federal law, including ERISA and the federal tax code. So in analyzing the impact of Connecticut's civil union statute, employers should keep in mind which type of law, federal or state, governs a particular question.

The politics and controversy sparked by this new law aside, it stands to have a substantial impact on Connecticut's employers. The legal landscape is far from certain, as only a handful of states have enacted similar laws. The civil union statute will likely prompt litigation testing its constitutionality, its limits, and its interplay with federal law and the laws of other states. But meanwhile, employers need to address the impact of the new law on their existing workforce.

Outlined below are some of the considerations employers should keep in mind when deciding whether and how to incorporate civil unions into their personnel policies and benefits structures.

Health Benefits

Any discussion of the application of state law to employee health benefit plans requires an understanding of the basic principle of ERISA preemption. Both self-insured health plans and fully insured health plans are governed by ERISA. ERISA preempts most state laws that "relate to" employee benefit plans, but it does not preempt state insurance laws. Consequently, fully insured health plans are indirectly subject to state insurance laws, such as mandated benefits laws, whereas self-insured health plans[2] are not.

ERISA does not apply to governmental plans, such as those sponsored by the state or municipalities. The new statute mandates such plans to cover civil union spouses, so even self-insured plans sponsored by municipalities will be required to do so effective October 1, 2005.

Self-Insured Plans

Private employers that self-insure their health plans and that previously have not offered health benefits to same-sex partners will almost certainly not be required to do so under the new statute. As explained above, self-insured plans

generally are not regulated by state laws. Thus, to the extent the civil union law affects self-insured health plans, it would likely be preempted by federal law. Moreover, DOMA provides an extra "backstop" for self-insured plans that do not want to provide same-sex partner coverage. For self-insured health benefit plans that do not expressly define "spouse" and/or "marriage" to specifically *include* same-sex partners, DOMA will supply default definitions which *exclude* civil union spouses from coverage, even if the plan document itself does not specifically exclude them. This same rationale would allow self-insured plans that choose to do so to exclude from coverage same-sex married spouses from other jurisdictions (such as Massachusetts or Canada).

For employers that offered coverage to "domestic partners" or other same-sex couples on a self-insured basis prior to the new law, the analysis is a bit more complicated. Although it may be a difficult transition, employers should consider requiring civil union status for same-sex partner coverage for at least two reasons.[3] First, many plans currently covering same-sex partners require couples seeking coverage to meet certain thresholds for duration of the relationship, shared domicile or proof of financial commitment. These criteria are in some respects stricter than those required for a civil union. Keeping the same standard for granting coverage to "domestic partners," rather than moving to a civil union standard, could prompt challenges from employees who have entered into civil unions but do not meet all the requirements for domestic partner status (although, most likely, any such legal challenges would be found preempted by ERISA).

A second reason for requiring civil unions for eligibility is to minimize the risk of lawsuits claiming that the grant of coverage to same-sex partners, but not to unmarried, opposite-sex partners, is unlawful discrimination under federal law. Some courts have held that an employer's extension of benefits to same-sex partners of unmarried employees does not illegally discriminate against unmarried employees with opposite-sex partners on the basis of sex, because the employees are not similarly situated with regard to the ability to marry. In Connecticut, however, as of October 1st, same sex-partners will have a mechanism for gaining state recognition of their relationship (with the attendant rights and obligations under state law). Thus, the key distinction between same-sex partners and unmarried opposite-sex partners will have been dulled, if not eliminated. For that reason, the opportunity to have a civil union might change the analysis in a federal discrimination case.

Fully Insured Plans

It is not entirely clear at this time how the new law will affect employers that offer fully insured health plans such as HMOs. At this point, it appears that the requirement of the new law that civil union spouses be treated the same as married spouses under Connecticut law will result in insurance carriers being required to make civil union spouse coverage available to the same extent they currently make married spouse coverage available. This is likely to result in a situation where the only products available in the market do not allow for distinctions between married spouses and civil union spouses. If so, employers who wish to cover married spouses would also have to cover civil union spouses. Until further guidance is issued by the Connecticut Insurance Department on the effect of the new law on group health insurance policies, employers who sponsor fully insured plans should contact their insurance carriers to determine how the carrier will implement the new law's requirements.

For employers that offered coverage to "domestic partners" or other same-sex couples on a fully insured basis prior to the new law, they will likely find that transition options are limited by their insurance carrier. The option to continue same-sex partner coverage for employees who do not enter into civil unions might become unavailable. Likewise, the length of time of the grace period during which employees with existing same-sex partner coverage may enter into a civil union and retain coverage may be dictated by the insurer. These employers should contact their carriers to determine the applicable requirements.

COBRA Continuation Coverage

COBRA is a federal law, part of ERISA, that requires private employers to offer continuation coverage under a health plan to certain employees or dependents who otherwise would lose coverage. Because of DOMA, civil union spouses will not be "qualified beneficiaries" for COBRA. This means that employers are not required to offer continuation coverage to civil union spouses if the employee-spouse terminates or experiences another event that otherwise would be a "qualifying event" under COBRA. As a corollary, employers are not required to send civil union spouses the initial COBRA notice or an election notice. Some employers who provide health benefits to same-sex domestic partners choose to make some form of continuation coverage available upon dissolution of the relationship, death of the covered employee, or termination/reduction in hours of the covered employee. The current practice for such self-insured plans should not be affected by the civil union statute going forward. Employers who sponsor fully

insured plans, however, should contact their insurance carriers to determine whether the insurer will permit voluntary extensions of continuation coverage to civil union spouses. Either way, employers should review their plan documents, summary plan descriptions, and policies - everything that is distributed to employees describing coverage and continuation coverage - to make sure it is clear that the civil union statute does not change who is eligible for continuation coverage.

Even though civil union spouses are not eligible to elect COBRA continuation coverage, qualified beneficiaries who have elected COBRA have the same rights to add dependents at open enrollment that employees currently covered under the plan have. Accordingly, if civil union spouses are eligible for coverage under the plan, they can be added as dependents at open enrollment by a COBRA qualified beneficiary. However, dependents added in this way do not themselves become qualified beneficiaries (i.e., they have no independent COBRA rights), and can be dropped from coverage by the COBRA beneficiary who added them without triggering any additional COBRA requirements.

Cafeteria Plans and Special Enrollment Rights

Most employers who provide health benefits allow employees to pay their portion of the premium on a pre-tax basis through a cafeteria plan. Employers who choose (or are required) to cover civil union spouses in their health plans should be aware of the differential tax treatment that will apply. Because a civil union spouse is not a "spouse" for purposes of federal law under DOMA, premium contributions by the employee for such a spouse cannot be made on a pre-tax basis for federal income tax purposes, except in those rare instances where a civil union spouse will qualify as a "dependent" under federal tax law. Any employer contributions for such premiums would be considered taxable income. For state income tax purposes, however, employee premium contributions can be made pre-tax, and employer contributions can be excluded from income.

Likewise, because of DOMA, employees and same-sex partners who enter into civil unions will not be eligible for special enrollment rights or certificates of creditable coverage under HIPAA. However, sponsors of self-insured plans may extend similar rights on a voluntary basis to civil union spouses. Sponsors of fully insured plans will be subject to the terms of their insurance contract on this, as on other issues.

Qualified Retirement Plans

Survivor Annuities and Death Benefits

ERISA and the Internal Revenue Code provide spouses with certain rights with respect to tax-qualified retirement plans. Defined benefit pension plans must provide a married participant with a qualified pre-retirement survivor annuity (QPSA) form of benefit in the event the participant dies before retirement while still employed, and a qualified joint and survivor annuity (QJSA) form of benefit when he or she retires. A married participant must obtain his or her spouse's written approval to waive a QJSA or a QPSA. Defined contribution plans, such as §401(k) plans, pay the account balance to the participant's designated beneficiary if the participant dies prematurely, and are generally not required to provide QPSAs and QJSAs. This exception does not apply to money purchase pension plans. However, the employee's spouse is the automatic beneficiary of the employee's account upon his or her death unless the spouse has consented in writing to the designation of another beneficiary. Under DOMA, a civil union spouse is not a "spouse" for purposes of federal law, and so both defined benefit and defined contribution plans need not provide any of these rights to the civil union spouses of retirement plan participants. However, an employer that chooses to do so may be able to amend its plan to provide similar benefits to civil union spouses.

QDROs

One spousal benefit that a plan may not provide to civil union spouses is the ability to obtain a portion of a participant's benefit under a qualified domestic relations order (QDRO) in the event a civil union is legally dissolved. The federal tax code states that benefits payable under a tax-qualified retirement plan may not be assigned except by a QDRO, and a QDRO must relate to child support, alimony or marital property rights of a spouse, former spouse, child or other dependent of the participant. DOMA has the effect here of permitting QDROs only for opposite-sex spouses. Allowing the assignment of a participant's plan benefit to a civil union spouse, even where the civil union dissolution decree expressly addresses retirement plan benefits, will jeopardize the tax-qualified status of the retirement plan.

Family and Medical Leave and other Policy Issues

Under the new statute, civil union spouses should be entitled to leave under the Connecticut Family and Medical Leave Act (state FMLA) to care for their partner with a serious health condition. Although DOMA precludes recognizing civil union spouses as "spouses" under the federal FMLA, the federal FMLA also provides that it does not supersede state laws granting greater family or medical leave rights. Because the state FMLA provides *greater* rights, state law will control in this

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instance. Accordingly, employers covered under the Connecticut FMLA (those with seventy-five or more employees) should review their FMLA policies and forms to ensure that civil union spouses are included, and communicate these changes to supervisors. Employers also should review any policies that may reference spouses or family members, such as bereavement leave policies, and ensure that civil union spouses are included.

Discrimination

If you choose (or are required) to provide any form of benefits to civil union spouses, be attentive to the potential for unintended consequences. Employees now may be more willing to "come out" at work in order to enroll their civil union spouse for benefits or to get FMLA leave. Once an employer knows that a particular employee is lesbian or gay, state statutes prohibiting discrimination based on sexual orientation are implicated. In addition, co-workers may not view the employee in the same way, leading to the possibility of harassment claims. Depending on your workforce, consider whether diversity training or nondiscrimination policies may be an appropriate step.

Conclusion

This Advisory is intended to highlight some of the most important questions that employers should consider with respect to the new law. There are numerous other benefit and taxation issues that may be affected by the new civil union statute, the ramifications of which are far from certain and may be unknown for sometime. Meanwhile, employers should review their plans and policies to determine where the new law may have an impact and consider what changes, if any, should be made.

Please feel free to contact a Wiggin and Dana attorney if you have questions about the new civil union law or would like assistance in reviewing your plans and policies or are considering amending your plan documents.

ENDNOTES

1. On September 20, 2005, Connecticut Attorney General Richard Blumenthal issued a legal opinion stating that Connecticut would recognize Vermont civil unions and California same-sex domestic partnerships as civil unions under Connecticut law. Connecticut will also recognize civil unions entered into in other states. Attorney General Blumenthal concluded that Connecticut courts may recognize domestic partnerships entered into in states other than California if the specific provisions of the state's domestic partnership law are substantially as broad as those of the Connecticut civil union law. The opinion also provided that Connecticut would not recognize same-sex marriages entered into in any state as valid civil unions (or marriages). As you review and administer your benefit plans, keep in mind that a civil union or domestic partnership need not have been entered into in Connecticut to be accorded civil union status under Connecticut law, and that a same-sex marriage is not a valid civil union.
2. Generally, procuring stop-loss coverage will not cause your otherwise self-insured plan to be considered fully insured for ERISA preemption purposes.
3. For employees who already have enrolled their same-sex partners in a health plan, an employer might consider allowing a grace period of as long as 6 months to one year for such employees to enter into civil unions before coverage is terminated. All such policy decisions, of course, should be communicated to employees as early as possible.

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