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Client Alert

A report for clients and friends of the Firm

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Impact of New Jersey's Civil Union Act on the Workplace

New Jersey's Governor Corzine recently signed the Civil Union Act ("CUA") authorizing civil unions between individuals of the same sex. P. L. 2006, Ch. 103. The CUA takes effect on February 19, 2007 and is intended to provide civil union couples with "all of the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." *Id.* §4. It amends a variety of New Jersey laws, including those regarding marriage, divorce and child custody, to accomplish that end. The CUA will also affect the workplace, as it prohibits discrimination based on civil union status and extends the state leave law to permit employees to take family leave to care for seriously ill civil union partners. The full impact of the CUA on employee benefit plans is not entirely clear, but it will depend on the type of employee benefit plan at issue and the degree to which ERISA[1] may preempt the CUA's application to the plan. The potential ramifications of the new law are discussed below.

Law Against Discrimination

The CUA amends the New Jersey Law Against Discrimination ("LAD") to prohibit employers from discriminating against applicants or employees because of their "civil union status." Employers may not refuse to hire, discharge or otherwise take adverse action against an employee because the employee is a partner in a civil union. Further, an employer may not discriminate as to terms, conditions or privileges of employment, based on civil union status.

While no guidance has been issued by the New Jersey Division on Civil Rights concerning the impact of the CUA, it apparently would require that employees with civil union partners be treated the same as married couples with respect to policies, practices and non-ERISA benefits. For instance, bereavement policies should provide time off in the event of the death of a civil union partner, on the same basis as for a spouse. Examples of other policies and practices which may need to be reviewed to assure equal treatment include relocation benefits, attendance at functions where spouses are invited and tuition assistance programs. The effect of the CUA on benefits provided under ERISA-covered benefit plans is more complicated and is discussed below.

We also note that the LAD's prohibitions on discrimination in government contracts, public accommodations, housing, lending and business transactions are likewise extended by the CUA to protect against discrimination based on civil union status.

Employee Benefits

The CUA generally provides that parties to a civil union shall have all of the same benefits under law (whether derived from statute, administrative or court rule, public policy, common law or any other source of civil law) as are granted to spouses in a marriage, and further provides that "laws relating to insurance, health and pension benefits" shall apply in like manner to the parties to a civil union. Whether civil union partners of employees in the *private* sector will have to be treated the same as spouses with respect to ERISA-covered benefit plans depends on the breadth of the CUA (which is not entirely clear) and the extent to which ERISA may preempt the purported effect of the CUA on such plans. For *public* employees, it appears that civil

[1] Employee Retirement Income Security Act of 1974, as amended ("ERISA").

union partners will have the same rights as spouses with respect to benefits (since ERISA preemption does not apply to benefit plans sponsored by the federal, state or local government).[2]

Generally, ERISA preempts state laws that "relate to" a private sector ERISA plan. As discussed above, the LAD has been amended to prohibit discrimination in terms and conditions of employment based on civil union status. If the LAD amendment is intended to require an extension of benefits to civil union partners under an ERISA plan, however, it appears likely that the amendment would be preempted in that regard (although, as discussed below, insurance laws generally are not preempted by ERISA and for that reason, the CUA may nevertheless impact insured plans). *See Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (state laws prohibiting employment practices that are lawful under federal law are subject to ERISA pre-emption, to the extent that such laws effectively would require the employer to establish a particular ERISA-governed benefit).

Although ERISA's preemptive reach is broad, it contains an exception for state laws relating to insurance, which are not preempted. Thus, the courts generally have upheld state insurance laws that require insurers to include certain benefits in group policies issued within the state, including policies for ERISA-governed benefit plans. This issue and the CUA's potential impact on various types of employee benefit plans are discussed below.

It should be noted, though, that employers who voluntarily wish to provide benefits to civil union partners on the same basis as spouses, regardless of whether such would be required under the CUA, may do so, as there is no federal prohibition against offering such coverage in an ERISA plan.

Insured Group Plans

To the extent that New Jersey insurance laws contain any provisions governing benefit rights for spouses, the CUA appears to require that those provisions must apply equally to civil union partners. ERISA would not preempt such changes to the insurance laws. Thus, if a private employer provides insured health or life insurance benefits under a policy issued under the New Jersey insurance laws, any spousal benefits mandated by the insurance laws must also be provided to an employee's partner in a civil union. For example, New Jersey has a "mini-COBRA" law that requires continued health coverage to be offered to the spouses of employees of "small employers" under certain circumstances (*see further discussion below*). It appears that this law, as well as any life (or other) insurance benefits that New Jersey insurance law mandates for spouses, would apply in the same manner to partners in a civil union.

It is not yet clear, however, whether the CUA's changes to New Jersey's insurance laws go so far as to require equal coverage for civil union partners where spousal coverage is voluntarily provided by an employer (as opposed to *required by* an insurance law such as the mini-COBRA statute for small employers). Although the CUA states that laws "relating to insurance" and "health benefits" "shall apply in like manner to civil union couples," the state insurance laws do not require spouses to be covered under group insurance policies. Further, the CUA does not contain any new insurance statute or amendment to an existing insurance law expressly requiring that private group health or life policies must provide equal coverage, if spouses are covered.

Even if the CUA's general reference to "insurance" laws were to be construed to require equal coverage in policies issued in the state, it is unclear whether that interpretation would withstand a challenge on ERISA preemption grounds. Generally, ERISA does not preempt state insurance laws requiring carriers to provide particular benefits in policies issued within the state. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (Massachusetts statute requiring certain insurance policies, including group employee health care plans, to provide minimum mental health care benefits was not preempted by ERISA because the law regulated insurers, not employers). However, it may be that the CUA's reference to insurance laws would not constitute an "insurance law" that is excepted from preemption. Resolution of these questions, unfortunately, may not occur for some time.

Self-Insured Plans

The CUA would not appear to have any impact on employers that sponsor *self-insured* health or life benefit plans, because ERISA generally preempts the application of state laws relating to employee benefit plans (and an insurance law would not apply to a self-insured plan). Thus, in accordance with ERISA, the terms of the plan (rather than the state law) will govern. If an employer with a self-insured plan does not wish to cover civil union partners, the employer should carefully craft the definition of eligible persons in the plan to make that clear.

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[2] The CUA was passed in response to the New Jersey Supreme Court's decision in *Lewis v. Harris*, 188 N.J. 415 (2006), which held that the equal protection clause of the state constitution requires that same-sex couples be afforded the same rights and benefits as married couples. The Court, however, left it to the Legislature to determine whether to comply by allowing same-sex couples to marry or by enacting a "parallel statutory structure by another name," in which same-sex couples would enjoy the full rights and benefits, as well as the same burdens and obligations, as married heterosexual couples. The Legislature chose the latter avenue, creating civil union status. Thus, it appears that under the holding in *Lewis*, it would be unconstitutional for a public employer to afford anything other than equal benefits for civil union partners and married couples.

Withholding Taxes on the Value of Benefits

Civil union partners will not qualify as a "spouse" under the Internal Revenue Code ("Code"). Although the CUA's intent is to endow civil unions with the same rights and benefits as married couples, the federal Defense of Marriage Act ("DOMA") prohibits recognition of a union of same-sex partners as a "marriage" under federal law, for any purpose, even if state law would treat it as such. Thus, the employer-paid portion of health insurance coverage for civil union partners ordinarily will be taxable income to the employee under federal law, unlike the value of health benefits provided to "spouses." The only exception would be if the civil union partner qualifies as a "dependent" of the employee under the Code. Under New Jersey state law, however, the value of coverage for civil union partners, like that of spouses, will *not* be taxable income. Accordingly, the amount that the employer pays for such coverage would be included as income to the employee for federal withholding taxes, but not for New Jersey withholding taxes.

Pension Benefits

With regard to employer-provided pension benefits (including 401(k) plans), to the extent that New Jersey state law includes any provisions that require pension benefits for spouses, the CUA's mandate (to provide the same benefits to parties to a civil union) would not appear to have any impact on an ERISA-covered pension plan, in light of ERISA's preemption provisions and DOMA. Thus, employers should not need to make any changes with respect to pension plans, unless they voluntarily choose to do so.

COBRA

The CUA will have no effect on COBRA rights, as COBRA is a federal law. Because of DOMA, civil union partners will not be "qualified beneficiaries" under federal law and, therefore, will not be eligible for continued health coverage under COBRA. As noted above, however, New Jersey's "mini-COBRA" law applicable to health insurance policies issued to "small" employers (defined as from 2 to 50 employees) would appear to apply to civil union partners in like manner as spouses.[3] Self insured health plans and group health plans sponsored by employers with more than 50 employees, however, would not be subject to this law and, thus, would not be required to (but could voluntarily) provide continued coverage for civil union partners. Such employers who voluntarily wish to make continuation coverage available to civil union partners should consult with their insurers (if applicable), benefits consultants and legal counsel.

FSA Accounts

Flexible Spending Accounts ("FSAs") are established pursuant to federal tax law, which, as noted, does not recognize civil union partners as "spouses." Accordingly, employees will not be able to use FSAs for medical expenses for a civil union partner, unless the partner qualifies as a "dependent" under the Code.

Family Leave

The CUA also amends the New Jersey Family Leave Act ("NJFLA"), to include a civil union partner in the definition of a "family member." Thus, employees in a civil union who satisfy other NJFLA eligibility requirements will be entitled to unpaid NJFLA leave to care for their seriously ill civil union partner, just as an employee may take such leave to care for a seriously ill spouse by marriage. The state NJFLA provides up to twelve (12) weeks of family leave in a twenty-four (24) month period, while the federal Family and Medical Leave act ("FMLA") provides a maximum of twelve (12) weeks of family and medical leave in a twelve 12 month period.

This amendment of the state leave law raises an issue as to the total amount of family leave that may be available for employees with civil union partners. Generally, where leave is taken for a purpose that qualifies under both the state NJFLA and the federal FMLA, the leave time runs concurrently and the employee is using up his or her leave entitlement simultaneously under both statutes. If, however, the leave is for a purpose that is recognized by one law, but not the other, an employer may only count the leave time against the entitlement provided by the statute that recognizes that particular basis for leave. For example, the state NJFLA permits an employee to take family leave to care for a parent-in-law, while the federal FMLA does not. If NJFLA leave is used to care for a parent-in-law, the employee would still be entitled to a full twelve weeks of federal FMLA leave for other purposes, because the reason for the leave – to care for a parent-in-law – was not covered by the FMLA. *See* 29 C.F.R. §825.701.

The NJFLA will now require employers to give family leave to eligible employees to care for a seriously ill civil union partner, but the federal FMLA has no such provision. Federal FMLA leave to care for an ill spouse is limited to an individual to whom the employee is "married" under state law. 29 C.F.R. § 825.113(a). Although the CUA states that it is intended to afford civil union partners the same rights and benefits as married couples, the law does not permit same-sex individuals to enter into a legal "marriage." Further, as noted above, DOMA states that the

[3] *See* N.J.S.A. 17B:27A-17, 27. The state "mini-COBRA" law does not apply to anyone who is a qualified beneficiary entitled to continued coverage under the federal COBRA law. Because a civil union partner will not be eligible for COBRA continuation coverage (unless the partner is also a "dependent" under the Code), employers with up to 50 employees should be aware that the New Jersey "mini-COBRA" law will apply to a civil union partner covered under the plan.

federal government may not recognize same-sex marriages for any purpose, even if recognized by a state.

Accordingly, it appears that leave time granted an employee under the state NJFLA to care for a seriously ill civil union partner cannot be counted against the employee's leave entitlement under the federal FMLA. Such an employee could take up to twelve (12) weeks of state NJFLA leave to care for a civil union partner and would still have a full twelve (12) weeks of federal FMLA leave left. This creates an anomalous situation in which New Jersey employees with civil union partners could be entitled to more family leave in total, than would married employees. Nevertheless, until such time as the FMLA or its regulations are changed, it appears to be the end result of this amendment to the state NJFLA.

Workers Compensation

The CUA also amends the Workers Compensation Law, to allow for payment of survivor's benefits and back wages to civil union partners.

Establishing Civil Unions and the Effect on Domestic Partnerships

Same-sex couples who wish to enter into a civil union must obtain a civil union license, subject to the same requirements and restrictions which currently apply to marriage licenses. Likewise, anyone authorized to solemnize a marriage may also perform a civil union. The New Jersey Domestic Partnership Law will no longer be available to same-sex couples, except that couples who are each over the age of 62 – whether of the same or opposite sex – may continue to register domestic partnerships under that law. Existing same-sex domestic partnerships, however, will be unaffected, although individuals in such a partnership may enter into a civil union, which would operate to terminate the domestic partnership.

EDITORS' COMMENT: Although some of the implications of the CUA appear clear, employers should bear in mind that the law is new and, therefore, the full impact of the law may not be apparent until guidance is provided by the courts or administrative agencies. New Jersey employers should change their EEO policies to include "civil union status" as a category protected from discriminatory treatment and similarly modify EEO training materials. Non-ERISA benefits and policies that relate to spouses should be revised to reflect equal treatment of civil union partners. Employers should also modify their New Jersey family leave policies and forms to indicate that civil union partners are family members for purposes of leave under the state law. Procedures should be in place to assure that family leave taken to care for a seriously ill civil union partner is charged only against the employee's state leave allotment and *not* deducted from the federal FMLA entitlement. Further, the New Jersey Division on Civil Rights has issued revised versions of its anti-discrimination posters for employment, public accommodations and housing, as well as its Family Leave Act poster. Businesses and other organizations should post the new versions, which may be downloaded at www.state.nj.us/lps/dcr/posters.html#posters.

With respect to ERISA plans, employers should first consider whether they want to provide benefits to civil union partners, regardless of whether the CUA would, or could, require that. Some employers may wish to provide such benefits as a matter of employee relations or to avoid the potential for legal disputes and expense. If so, appropriate changes should be made to plan language and, as to insured plans, arrangements should be made with the carrier to provide the coverage. Summary Plan Descriptions should be modified, as well as benefit forms and any pertinent handbook provisions or other written benefit descriptions. Procedures for appropriate tax withholding on the value of health benefits should be implemented.

New Jersey employers that do not wish to extend benefit coverage to civil union partners should consult with legal counsel and their insurance carrier (if applicable) to assess the options and legal risks involved before making a final decision.

Employers should continue to monitor developments, including any regulations, bulletins or other guidance that may be issued in the future by any state agencies on this subject.

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