

Client Alert

A report
for clients
and friends
of the Firm **March 2007**

Update - New Guidance Issued Regarding Benefit Plans under New Jersey's Civil Union Act and New Jersey's Recognition of Same-Sex Relationships Established Elsewhere

Department of Banking and Insurance States that Identical Coverage is Required for Spouses and Civil Union Partners under Group Benefit Plan Policies

As discussed in our Client Alert on February 13, 2007, the New Jersey Civil Union Act ("CUA") is not clear as to whether insurance policies issued by New Jersey insurers are required to provide equal benefit coverage for civil union partners, if spousal coverage is provided in an employer group insurance plan. Recently, the State of New Jersey Department of Banking and Insurance (the "Department") issued guidance noting that, unlike the New Jersey Domestic Partnership Act, which expressly afforded employers an *option* to provide coverage for domestic partners, the CUA contains no such proviso. Bulletin 07-04. Thus, the Bulletin advises that all benefit "plans" that include dependent coverage "should be amended or administered to provide coverage to civil union couples."

Despite this broad pronouncement, the Bulletin should have no effect on the issue of whether or not

an employer's *self-insured plan* must provide equal coverage. As discussed in our initial Client Alert, it appears that the state law likely would be preempted by ERISA, to the extent it attempts to mandate such coverage for a self-insured ERISA plan.

As to group plans insured with a carrier, however, the Department's Bulletin apparently interprets the CUA as requiring equal coverage in all policies issued in New Jersey. Indeed, it appears that the Department will automatically deem all insurance policies to provide such coverage, whether or not expressly stated therein. The Bulletin states that "[a] contract that covers spouses will, as of February 19, 2007 [the effective date of the CUA], cover civil union partners. For example, a group life contract that allows a covered employee to elect to buy life insurance for their spouse must be read as allowing an employee with a civil union partner to purchase coverage for the partner." Thus, it appears that the Department likewise will require a group health insurance policy that provides spousal coverage to also provide coverage to civil union partners. The Bulletin further explains that "carriers should provide an opportunity to employees to make an election to cover a dependent acquired through a civil union on or after February 19, 2007 in the same manner as the opportunity would be provided to cover a dependent acquired through a marriage."

As discussed in our initial Client Alert, though, it is not clear whether the CUA's general reference to insurance laws actually requires insured plans to provide equal coverage and, if so, whether that would be an "insurance law" exempt from ERISA preemption. While the Bulletin provides interpretive guidance as to the Department's position, it is not a law or regulation. The courts typically accord some deference to a regulatory agency's reasonable interpretation of an ambiguous law. The issue will not be definitively resolved, however, until such time as the courts rule on the issue of whether ERISA preempts any requirement in the CUA that insured plans provide equal coverage, such that it would not be enforceable.

Significantly, the Department has also issued an Advisory Bulletin confirming that, as discussed in our initial Client Alert, the CUA “does not alter federal law, which only confers marriage rights and privileges to opposite-sex married couples.” Advisory Bulletin 07-SHE-01. Thus, as further noted in the Advisory Bulletin and in our initial Client Alert, the CUA will have no effect on COBRA rights, since civil union partners do not qualify as “qualified beneficiaries” under federal law. The Advisory Bulletin also confirms that New Jersey’s “mini-COBRA” law applicable to health insurance policies issued to “small” employers (defined as from 2 to 50 employees) *will* apply to civil union partners in like manner as spouses.

Given the Department’s position in its Bulletin, insurance carriers in New Jersey may decide that they will not issue policies or renewals that do not provide equal coverage to civil union partners. If so, as a practical matter, an employer sponsoring an insured benefit plan would have three options: (1) provide equal coverage to civil union partners; (2) change to self-insured benefit plans, which likely would not have to provide equal coverage because of ERISA’s preemption provisions; or (3) litigate the issue of whether ERISA also preempts the CUA as to insured plans.

New Jersey Will Recognize Same-Sex Relationships Legally Established In Other States and Nations, Depending on Their Nature

On February 16, 2007, the Attorney General of New Jersey, Stuart Rabner, issued Formal Opinion No. 3-2007, in which he advised that New Jersey will recognize valid same-sex relationships formed under the laws of other states and foreign nations, as either civil unions or domestic partnerships for purposes of New Jersey law, depending on the nature of those relationships. Specifically, to determine how such couples will be treated under New Jersey law, the Opinion compares the legal rights conferred upon the unions of same-sex couples in the other state or nation to the level of rights afforded to couples in New Jersey under its civil union and domestic partnership laws. “The name of the relationship selected by other jurisdictions, however, will not control its treatment under New Jersey law.”

Under this analysis, the Opinion explains, same-sex couples married in Massachusetts, Canada, the Netherlands, Belgium, South Africa or Spain will be recognized as civil union partners in New Jersey, as will couples who have entered into civil unions in Vermont or Connecticut, or government-sanctioned same-sex relationships in Great Britain, New Zealand, Iceland or Sweden. In addition, same-sex couples who have entered into domestic partnerships in California will be treated as civil union

partners in New Jersey, since the domestic partnership established under California law provides rights that are similar to the CUA. Those who have entered into such unions in other jurisdictions need not register in New Jersey, but may reaffirm their relationships under the CUA, if desired.

Same-sex couples in legally recognized relationships that afford lesser rights and obligations than marriage, however, such as those in Maine, Washington, D.C., Hawaii and a variety of other nations, will be treated as domestic partnerships in New Jersey. Couples in such relationships, of course, have the option of entering into a civil union in New Jersey, if they wish to secure all of the rights and obligations of such a relationship in this state.

The effect of this Opinion essentially is to extend all the protections of the CUA (discussed in detail in our initial Client Alert) to employees who have entered into civil unions *recognized* by New Jersey, not only those civil unions actually entered into in New Jersey under the CUA. Thus, the Opinion provides guidance to employers who provide benefits to civil union partners and/or domestic partners, as to how to treat employees working in New Jersey who have entered into a government-sanctioned same-sex relationship in another jurisdiction.

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