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A Trend Toward State Recognition of Same-Sex Civil Unions

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On July 2, 2011, Rhode Island Governor Lincoln Chafee signed legislation that allows same-sex couples to form civil unions effective as of July 1, 2011. The law comes just days after New York passed legislation legalizing same-sex marriage. (For information on New York's same-sex marriage law, please see our client alert, June 30, 2011: Same-Sex Couples May Now Marry In New York.)

The law makes Rhode Island the fifth state to permit same-sex partners to enter into civil unions. Delaware, Hawaii and Illinois each enacted civil union laws earlier this year, and New Jersey has permitted civil union formation since 2007.[1] (For information on New Jersey's civil union law, please see our client alerts of February 13, 2007: Impact of New Jersey's Civil Union Act on the Workplace and March 27, 2007: Update - New Guidance Issued Regarding Benefit Plans under New Jersey's Civil Union Act.) Currently, six other states (and the District of Columbia) permit same-sex marriage, and several other states have laws that create various types of domestic partnership.[2]

Application of the Civil Union Laws

Each of the four new state civil union laws generally grant to civil union parties all the legal rights, benefits, protections and responsibilities afforded to married persons under the state's laws (including statutory, administrative, decisional and common law), while refraining from defining such unions as "marriages." In addition, each law expressly provides that civil union partners are included in their state law definitions or uses of terms that denote a spousal or family relationship. Thus, not only will these laws have an impact on employee benefits and other employment-related rights that arise out of, or are governed by, state law, but they will also affect various statutory and other legal rights provided to spouses in these states, such as those relating to inheritance and death benefits, property division, hospital visitation and parental rights.

With respect to same-sex unions formed under the laws of other states or jurisdictions, the state laws differ. Rhode Island recognizes civil unions or registered domestic partnerships formed outside the state as civil unions, provided that the parties satisfy Rhode Island's eligibility requirements.[3] In Delaware and Hawaii, same-sex marriages, civil unions, and domestic partnerships formed out-of-state are all recognized as civil unions if the relationships otherwise meet Delaware's and Hawaii's eligibility requirements. In Illinois, a same-sex marriage, civil union or "substantially similar legal relationship" (other than a common law marriage) that is legally formed outside of Illinois is recognized as a civil union in Illinois, without regard to whether the relationship would meet Illinois' eligibility requirements.

Impact on Employee Benefits and Other Employment-Related Rights

The federal Defense of Marriage Act ("DOMA") defines the term "marriage" to refer exclusively to a marriage between a man and a woman, and the term "spouse" to refer exclusively to an opposite-sex spouse, for purposes of federal acts of Congress. Thus, any employer-sponsored benefits that are governed by federal law will not be affected by the civil union laws. These include certain retirement plans and health and welfare benefits governed by the Employee Retirement Income Security Act of 1974 and/or the Internal Revenue Code of 1986. However, insofar as state law governs a particular benefit (for example, insured health benefits), employers operating in a civil union state must generally treat an employee's civil union partner as a spouse for purposes of those state-regulated benefits. Attention should also be paid to whether any of the states have discrimination or other laws that would require equal treatment for civil union partners with regard to various employment-related rights.

Tax Implications

As a result of DOMA, state civil union laws do not have any federal tax implications. At the state level, however, the impact of the four new civil union laws is not entirely clear. [4] The language of each of these state laws appears to require civil union parties to be treated as spouses for all state law purposes; however, each of the states' tax laws refer to the federal tax law in at least some circumstances, and DOMA applies to federal tax law. As a result, it is possible that a state's taxing authority may take the view that the civil union law does not affect the definitions of "marriage" and "spouse" for state tax purposes. For example, the Illinois Department of Revenue has stated that Illinois' civil union law did not change Illinois tax laws and that, because state tax law follows federal tax law with regard to filing of state tax returns, civil union partners are therefore required to file separate state tax returns. Same-sex partners residing in Illinois may, however, be able to qualify for dependent status under the Illinois Revenue Code.

What Employers Should Do

Civil union laws generally have significant implications for employers in many respects, including benefits, human resources policies, and tax withholding. An employer operating in any of these states should review its benefit plans and policies to ensure they are in compliance with applicable law. In addition, even an employer that does not operate in any of these states should undertake a review to determine whether applicable state reciprocity (or other) principles would require recognition of civil unions (or domestic partnerships or same-sex marriages) formed in another state for purposes of the employer's benefit plans and policies.

For a more detailed description of the potential legal and other issues confronting employers with regard to same-sex marriages, civil unions and domestic partnerships, please see our recent Client Alert discussing New York's Marriage Equality Act, June 30, 2011: Same-Sex Couples May Now Marry in New York, and our prior client alerts on these subjects. August 11, 2004: Same-Sex Marriage and Domestic Partnerships, February 13, 2007: Update - New Guidance Issued Regarding Benefit Plans under New Jersey's Civil Union Act, December 3, 2008:Fully-Insured Benefit Plans in New York Must Recognize Out-of-State Same-Sex Marriages, July 15, 2010: U.S. District Court in Massachusetts Rules Federal Defense of Marriage Act Unconstitutional and March 8, 2011: Departing from Prior Practice, DOJ Declines to Defend Section 3 of the Defense of Marriage Act. As always, please contact an employee benefits attorney at Proskauer if you would like more detailed advice that meets your specific needs.

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[1] The Illinois civil union law took effect on June 1, 2011, while the Delaware and Hawaii laws will both become effective on January 1, 2012.

[2] Same-sex marriage is permitted in Connecticut, Iowa, Massachusetts, New Hampshire, New York and Vermont. The following states have domestic partnership laws: California, Maine, Maryland, Nevada, New Jersey, New York, Oregon, Rhode Island, Washington and Wisconsin.

[3] It is unclear whether Rhode Island recognizes same-sex marriages performed in other states.

[4] However, New Jersey law is clear that civil union partners are to be treated as spouses for purposes of state tax issues.

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