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Illinois Civil Union Act's Implications for Employers

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On June 1, 2011, Illinois began recognizing civil unions in accordance with the Illinois Religious Freedom Protection and Civil Union Act (the "Act"). The Act's purpose is to allow same-sex and heterosexual couples to enter into civil unions and provide them with the same legal obligations, responsibilities, benefits and protections as are afforded or recognized under Illinois law to married spouses (*e.g.*, the ability to make emergency medical decisions for partners, adoption and parental rights, spousal testimonial privilege and state spousal benefits, including workers' compensation and spousal pension coverage). A notable caveat (and continuing sore point for some who seek full federal recognition of same-sex unions) is that the Act does not label these civil unions as a "marriage." Nonetheless, all rules governing annulment, divorce and property division that currently apply to couples in marriages will apply to couples in civil unions.

Under the Act, the phrase "party to a civil union" shall be incorporated into any definition under Illinois law in which the terms "spouse," "family," "immediate family," dependant," "next of kin," and any other term that denotes spousal relationship are currently used. The Act also will recognize marriages, unions and other legal relationships—other than common law marriages that were performed in other jurisdictions and that meet the qualifications of the Act. In addition to Illinois, five other states (California, Nevada, New Jersey, Oregon and Washington) recognize civil unions or domestic partnerships where marriage is not available. Marriage between same sex couples is legal in Connecticut, Iowa, Massachusetts, New Hampshire, Vermont and the District of Columbia.

While a civil union is not a marriage, it does pose several interesting considerations for employers, depending upon how literally the Act will be interpreted. For example, an employer may be required to provide unpaid leave to a partner of a civil union consistent with the Illinois Family Military Leave Act, which requires the provision of unpaid leave if certain members of the family, including a spouse, are called away on military duty. Similarly, other statutory leaves, such as leave for victims of domestic abuse, sexual assault and related crimes, could be impacted.

However, the new law may not affect rights under federal laws. For example, because the new Illinois law does not change the definition of "marriage" or "spouse" under Illinois law, and because federal laws are still governed by the Defense of Marriage Act (DOMA), which excludes same-sex unions from the definition of "marriage" and "spouse" under federal law, couples in a civil union may not be entitled to leave to care for one another under the Family and Medical Leave Act. Therefore, if you allow an employee who is party to a civil union to take leave to care for his or her partner, that employee may still have a full 12 weeks of FMLA leave available for another FMLA-qualifying reason.

Accordingly, it is crucial for employers to consider and review how the Act might affect terms and conditions of employment in handbooks, contracts or collective bargaining agreements.

Employee Group Health Plans

Employers with employees in Illinois must now consider how the Act will affect, among other things, their employee benefit plans and programs. While the Civil Union Act does not amend the Illinois Insurance Code or any other employee benefits law directly, the Illinois Department of Insurance has opined that the Act does have implications for sponsors of fully-insured employee benefit plans. In recent guidance, the Department of Insurance has taken the position that "health insurance policies and HMO contracts issued in Illinois must offer coverage to civil union couples and their families that is identical to the coverage offered to married couples and their families." In addition, the Department wrote a letter to all Illinois-licensed insurance companies indicating that compliance with the Act was mandatory. Therefore, given this express instruction from the Department (and the likelihood that all Illinois insurance companies will follow it), employers with fully-insured group health plans will be required to offer coverage to partners to a civil union effective June 1, 2011. Partners to a civil union will be permitted to enroll in coverage during the plan's open enrollment period or during a 30-day "special enrollment period" after the civil union becomes effective.

The Department of Insurance has not issued any guidance indicating that self-insured plans must also offer coverage to partners to a civil union. While the Department may issue further guidance on this issue, the plain language of the Civil Union Act would not appear to create any requirement for self-insured plans to offer coverage to partners in a civil union. Further, self-insured ERISA plans are exempt from such state regulations. Therefore, it appears that self-insured plans may (but are not required to) offer coverage to partners to a civil union. We expect that self-insured plans which already offer coverage to domestic partners will also choose to extend coverage to partners to a civil union.

Finally, federal tax law under the Internal Revenue Code was not changed by the Civil Union Act. Therefore, flexible spending accounts, health savings accounts and other tax-favored medical savings plans for employers are not required (or permitted) to offer benefits to partners in a civil union (unless the partner meets the plan and Code definition of "qualified dependent"). Further, for group health plans that cover partners to a civil union, the employee must have imputed taxable income equal to the excess of the fair market value of the coverage provided to the civil union spouse over the amount paid by the employee for such coverage (if the civil union spouse is not a qualified dependent of the employee).

More Information

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