

Impact of New Hampshire's Civil Union Law on the Workplace



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On May 31, 2007, Governor Lynch signed

into law the bill permitting civil unions. Effective January 1, 2008, this new law permits same gender couples to enter civil unions and affords them the same rights, responsibilities and obligations as traditional married couples. It stops short, however, of declaring the unions to be "marriages." It also creates a process for establishing a civil union, defines who may enter a civil union, clarifies how civil unions are dissolved and states that New Hampshire will recognize as a civil union in this state same gender civil unions or marriages entered into in other states.

What impact will the new civil union law have in the workplace? Here are a few issues New Hampshire employers should consider.

Insurance Benefits. Private employers who offer group insurance through a contract with an insurance company probably will be required by the

new civil union law to offer the same benefits to the partners of employees who are in same gender civil unions as are offered to spouses of employees in opposite sex marriages. This could occur if the New Hampshire Insurance Department, which regulates insurance companies doing business within the state, interprets the civil union law as requiring insurers providing group plans to offer the same coverage to civil union partners as to spouses in traditional marriages. It is likely the Insurance Department will offer guidance on this issue.

In contrast, an employer who provides insurance through a self-insured plan probably will not be affected by the civil union law. Self-insured plans are governed by the federal Employee Retirement Income Security Act ("ERISA"), and are not regulated by the state. ERISA, in which "spouse" refers solely to a person of the opposite sex who is a husband or a wife, preempts state law and thus self-insured plans would not be required to grant the same benefits to civil union partners as they do the spouses of married employees. Employers with plans governed by ERISA may voluntarily provide benefits to civil union partners on the same basis as opposite sex marriage simply by drafting their plans accordingly.

Pension Benefits. The civil union law will not impact retirement plans, whether traditional defined benefit, cash balance or defined

contribution (such as 401(k) and 403(b)) plans, as these plans are governed by ERISA and thus free from any state-imposed requirements.

Public Employers. Civil union partners of public employees will have the same rights to benefits as spouses since ERISA does not apply to benefit plans sponsored by federal, state or local governments.

Workers' Compensation Benefits. Civil union partners will be entitled to survivor's benefits and payment of back wages.

Family and Medical Leave. The new law will not change the federal Family and Medical Leave Act, which does not require employers to extend family and medical leave to same gender partners. Many New Hampshire employers, however, already have voluntarily expanded their family and medical leave policies to include same sex domestic partners and their children, and it is likely this trend will continue.

Employment Discrimination. Although the new law does not expressly prohibit employment discrimination based on civil union status, New Hampshire has prohibited workplace discrimination on account of sexual orientation since 1997. It also is illegal in New Hampshire to discriminate in employment based on marital status. Thus the existing laws afford civil union partners significant protection from workplace discrimination based on being in a civil union.

COBRA, Flexible Spending Accounts. The new law will not affect the federal COBRA law and hence civil union partners will not be "qualified dependents" eligible for continued coverage. Civil union partners will be afforded continuation rights under New Hampshire law, which pertains to employers who are not covered by COBRA (COBRA applies to employers with 20 or more employees). Employees also will not be able to use Flexible Spending Accounts for a civil union partner unless the partner qualifies as a "dependent" under federal tax law.

Other Employment Benefits. The civil union law requires employers to treat civil union partners the same as traditionally married spouses (e.g., bereavement leave for a civil union partner must be the same as for a spouse). Accordingly, employers should review their policies, handbooks and practices to insure civil union partners are afforded the same benefits as opposite sex married couples.

In summary, employers should review their existing policies, continue to monitor developments as this new law unfolds and, if necessary, consult with legal counsel to insure they are in compliance before the civil union law becomes effective next January.

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