

New Jersey's Civil Union Law and Its Effect on Health Benefits

New Jersey recently passed legislation that provides the rights and responsibilities of marriage to same-sex couples that enter into civil unions, joining California, Vermont and a few other states that have adopted similar spousal parity requirements. The scope and applicability of spousal parity requirements vary from state to state, but all of these laws have at least two things in common: they are not always easy to interpret and they may collide in various ways with federal laws. Here we review the New Jersey law and the legal issues that benefits professionals will likely encounter in connection with it.

A Health Benefits Mandate – or Not?

The first question to consider when determining the impact of state spousal parity laws on employee health benefits is basic enough: do these laws regulate the health benefits that employers provide to their employees? The New Jersey civil union law does not address the issue directly. There is no doubt, however, that the New Jersey legislature intended that same-sex partners in a civil union be treated as spouses. The legislation stated as much, and it amended the New Jersey laws that regulate marriage so that those marriage laws now apply to civil unions.

The statute provides a non-exclusive list of "legal benefits, protections and responsibilities of spouses [that] shall apply to the parties of a civil union." That list includes "laws relating to insurance, health and pension benefits." Read literally, this provision would only require health coverage for civil union partners if

New Jersey had a law requiring health insurance to cover spouses. The New Jersey Department of Banking and Insurance had no doubts about whether the new law regulated health benefits, however. It has issued a bulletin confirming that, under the new law, all health plans *that include dependent coverage* must provide coverage to civil union partners.

Collision with Federal Laws

Two federal statutes – the Employee Retirement Income Security Act of 1974 (ERISA) and the Defense of Marriage Act of 1996 (DOMA) – may affect state requirements to treat domestic partners as spouses. ERISA may preempt the state law requirement, making it inapplicable to most employers' health plans, while DOMA may create tax issues for employees who enroll their civil union partners in employer-sponsored health plans.



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ERISA Preemption

In addition to regulating employee benefit plans, ERISA generally preempts state laws that “relate to” employee benefit plans. If a state law is preempted by ERISA, it cannot be enforced against an employee benefit plan that is subject to ERISA. Courts generally hold that state laws requiring employer-sponsored plans to cover particular items or individuals are preempted by ERISA. Therefore, it is likely that a court would find that ERISA preempts the spousal parity provisions in the New Jersey law. Of course, there is no guarantee that a given court will find that ERISA preempts a given law, but a court challenge along these lines is likely to prevail.

Exceptions to ERISA Preemption

ERISA does *not* preempt state laws insofar as they relate to plans that are not subject to ERISA. These plans include government and church plans. ERISA preemption also does not apply to many state laws that regulate multiple employer welfare arrangements (MEWAs). These plans remain subject to state spousal parity requirements.

In another and perhaps more important exception, ERISA does not preempt state laws that regulate insurance – even if the insurance provides coverage under an employee benefit plan that is subject to ERISA. State insurance laws do not regulate employers, of course, but these laws affect employers that provide benefits by purchasing insurance policies because insurers cannot sell policies that do not comply. As interpreted by the New Jersey Department of Banking and Insurance, the new civil union law requires every health insurance policy issued in New Jersey to include coverage for civil union partners, even if the employer purchasing the policy does not want to cover civil union partners. Therefore, employers that provide health benefits through insurance that is subject to New Jersey law will end up complying with spousal parity mandates.

Self-funded benefits, which generally are paid directly from the employer’s general assets instead of through an insurance policy, are not affected by insurance regulations. ERISA preemption would hold sway with respect to self-funded benefits and an employer would not be required to extend those self-funded benefits to civil union partners. Of course, self-funded government and church plans, as well as MEWAs, would be subject to the New Jersey civil union law because ERISA generally does not preempt state laws with respect to these plans.

Adding DOMA to the Mix: Federal Tax Implications

DOMA by itself does not affect state-law spousal parity requirements, but it does affect taxation of the health benefits a civil union partner receives. This is because the DOMA definition of spouse – a person of the opposite sex who is legally married to the employee under state law – applies to all federal laws, including federal tax laws. Parties to a same-sex civil union, therefore, do not qualify as spouses when applying federal law. The federal tax exclusion that applies to a spouse’s coverage under an employer-sponsored group health plan is not available for a civil union partner’s coverage, even if that coverage is required by state or local law. If, however, a civil union partner can qualify as an employee’s dependent, then the federal tax exclusion for health coverage provided to an employee’s dependents is available.

New Jersey Department of Health and Senior Services APPLICATION FOR LICENSE			
<input type="checkbox"/> MARRIAGE		<input type="checkbox"/> REMARRIAGE	
<input type="checkbox"/> CIVIL UNION		<input type="checkbox"/> REAFFIRMATION OF CIVIL UNION	
(PLEASE PRINT OR TYPE)			
DECLARATION OF APPLICANT A (Giving false information constitutes perjury.)		DECLARATION OF APPLICANT B (Giving false information constitutes perjury.)	
1. Name (First, Middle, Last) (List name given at birth or on birth certificate)		1. Name (First, Middle, Last) (List name given at birth or on birth certificate)	
Street Address (Current Legal Residence) (City, Borough, Twp.) (See Note 1)		Street Address (Current Legal Residence) (City, Borough, Twp.) (See Note 1)	
County (See Note 4)	State	Zip Code	County (See Note 4) State Zip Code
1a. Current Name (if different)	2. Date of Birth	1a. Current Name (if different)	2. Date of Birth
3. Birthplace	4. Sex <input type="checkbox"/> M <input type="checkbox"/> F	5. Age (See Note 2)	3. Birthplace 4. Sex <input type="checkbox"/> M <input type="checkbox"/> F 5. Age (See Note 2)
6. Domestic Status (at this time) (See Notes 3 and 5) Date Place		6. Domestic Status (at this time) (See Notes 3 and 5) Date Place	
<input type="checkbox"/> Single <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced <input type="checkbox"/> Annulled <input type="checkbox"/> Current Domestic Partner <input type="checkbox"/> Former Domestic Partner <input type="checkbox"/> Former Civil Union Partner		<input type="checkbox"/> Single <input type="checkbox"/> Widowed <input type="checkbox"/> Divorced <input type="checkbox"/> Annulled <input type="checkbox"/> Current Domestic Partner <input type="checkbox"/> Former Domestic Partner <input type="checkbox"/> Former Civil Union Partner	
For Remarriage to the same spouse, or Reaffirmation of Civil Union to the same partner, enter date and place of original ceremony. Date Place		For Remarriage to the same spouse, or Reaffirmation of Civil Union to the same partner, enter date and place of original ceremony. Date Place	
<input type="checkbox"/> Marriage <input type="checkbox"/> Civil Union		<input type="checkbox"/> Marriage <input type="checkbox"/> Civil Union	
7a. For Marriage License Applicants: Enter number of times ever Married (if applicable):	7b. Name of Most Recent Spouse (if any) (List name given at birth or on birth certificate):	7a. For Marriage License Applicants: Enter number of times ever Married (if applicable):	7b. Name of Most Recent Spouse (if any) (List name given at birth or on birth certificate):
8a. For Civil Union Applicants: Enter number of times ever in a Civil Union (if applicable):	8b. Name of Most Recent Civil Union Partner (if any) (List name given at birth or on birth certificate):	8a. For Civil Union Applicants: Enter number of times ever in a Civil Union (if applicable):	8b. Name of Most Recent Civil Union Partner (if any) (List name given at birth or on birth certificate):
9a. Father's Full Name	9b. Birthplace	9a. Father's Full Name	9b. Birthplace
10a. Mother's Full Maiden Name	10b. Birthplace	10a. Mother's Full Maiden Name	10b. Birthplace
11. Are you related to Applicant B? If "YES," how?	<input type="checkbox"/> Yes <input type="checkbox"/> No	11. Are you related to Applicant A? If "YES," how?	<input type="checkbox"/> Yes <input type="checkbox"/> No
INFORMATION TO BE COMPLETED BY EITHER APPLICANT			
12. In which Incorporated Municipality in New Jersey do you intend for the ceremony to be performed? (See Note 4)		13. Intended Date of Ceremony	14. Telephone Number where either applicant can now be reached:
15. Name and mailing address of person who is to perform the ceremony:		16. Mailing Address where you may be reached after the ceremony:	
(See Notes on Page 2)		Continue with Declaration of Identifying Witness and Oath.	
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The exclusion for dependents' health coverage is of limited value, however, because most civil union partners do not qualify as dependents. (To be an employee's dependent, the civil union partner must, among other things, receive over one-half of his or her support for the year from the employee.) The bottom line is that, in most cases, the monetary value of a civil union partner's coverage (net of any after-tax contributions an employee has made for it) is an item of taxable income to the employee.



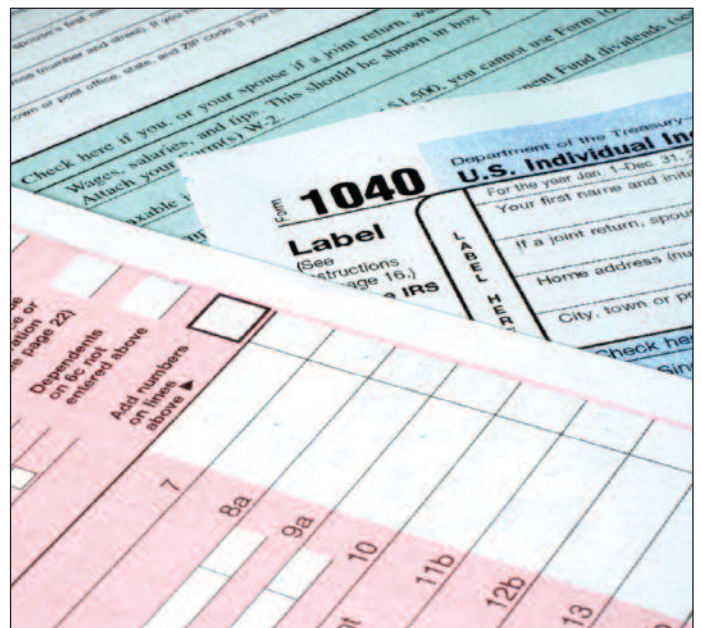
How an employer determines the value of a civil union partner's coverage is not clearly set out by the IRS. However, a review of various rulings and notices leads many experts to conclude that the best measure of the value is the underlying cost of the coverage. A proxy for that cost would be the COBRA premium for that benefit (less the two percent administrative fee). If the employee pays any of that cost with after-tax funds, that amount would be deducted from the taxable value. If an employee pays for civil union partner benefits through a cafeteria plan (which permits the employee to exclude the amounts paid for coverage from taxable income) those amounts are considered to be employer contributions to the plan and taxable to the employee to the extent that they pay for civil union partner coverage. Put another way, cafeteria plan amounts are *not* deducted from the value of the civil union partner's coverage when making the determination of how much to include in the employee's taxable income. (See Willis' *Employee Benefits Alert*, Issue 63, "Taxation of Benefits for Domestic Partners," for a detailed discussion of the determination of the taxable portion of the benefits provided for a domestic partner.)

The bottom line is that, in most cases, the monetary value of a civil union partner's coverage (net of any after-tax contributions an employee has made for it) is an item of taxable income to the employee. [However] how an employer determines the value of a civil union partner's coverage is not clearly set out by the IRS.

State Tax Implications

State income tax laws add another piece of administrative complexity because they do not always work the same way that federal income tax laws work. For example, under the New Jersey spousal parity rules, the health benefits provided to an employee's civil union partner generally are not taxable (that is, they are treated the same way for state taxes that benefits for married couples would be treated). This means that an employer must adjust its payroll system so that civil union partner coverage is treated as taxable for purposes of federal withholding and payroll taxes and is treated as non-taxable for New Jersey's withholding and payroll taxes.

An odd New Jersey law creates further confusion. Under that law, amounts that are subject to an employee's election under a cafeteria plan *are* considered to be taxable wages for New Jersey state income tax purposes, no matter whose coverage is purchased with those amounts. That rule must be taken into account for any portion of a civil union partner's coverage that is paid for through a cafeteria plan. (Of course, this tax rule is the same for spouses and parties to a civil union.)



Conclusion

State laws and federal laws paint a picture of a society in conflict over the rights and responsibilities that should be accorded to same-sex partners. Perhaps it should come as no surprise that benefits administrators will have their hands full keeping up with the sometimes conflicting requirements. Employers that operate in several states will have a particularly difficult time.

Key Contacts

US Benefits Office Locations

Atlanta, GA 404 224 5000	Farmington, CT 860 284 6147	Minneapolis, MN 763 302 7100	San Diego, CA 858 678 2000
Austin, TX 800 861 9851	Florham Park, NJ 973 410 1022	Mobile, AL 251 433 0441	San Francisco, CA 415 981 0600
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