

# CLIENT ALERT

FALL 2005

AN ACT CONCERNING CIVIL UNIONS

## Employer Obligations Regarding Civil Unions

On April 20, 2005, Connecticut became the second state in the United States to permit same-sex couples to enter into civil unions when the Governor signed Public Act 05-10, An Act Concerning Civil Unions (the "Act") into law. The Act provides same-sex couples the right to enter into a civil union, and enjoy most of the legal benefits and protections extended to married couples under Connecticut law.

Effective October 1, 2005, upon meeting criteria specified in the Act and obtaining a civil union license, same-sex couples may become "parties to a civil union." A civil union in Connecticut, however, is not a marriage. It is a legal status that is treated like a marriage for purposes of state law. Section 14 of the Act provides that:

[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted spouses in a marriage, which is defined as the union of one man and one woman.

Further, Section 15 of the Act provides that:

[w]henever in the general statutes the terms "spouse," "family," "immediate family," "dependent," "next of kin" or any other term that denotes the spousal relationship are used or defined, a party to a civil union shall be included in such use or definition, and wherever in the general statutes [with some specified exceptions regarding the civil marriage laws] the term "marriage" is used or defined, a civil union shall be included in such use or definition.

Accordingly, the Act will affect how public and private sector employers in Connecticut treat employees who become parties to a civil union with respect to workplace rights and benefits. As the Act has not yet been implemented, questions remain regarding the full extent of the Act's reach. However, based on our research and analysis, we offer the following guidance to employers in Connecticut regarding the implications of the Act.

### I. Federal Law Background - The Defense of Marriage Act

On September 21, 1996, President Clinton signed the federal Defense of Marriage Act ("DOMA") into law. The effect of DOMA is to define the term "marriage" *for purposes of federal law* as "only a legal union between one man and one woman as husband and wife," and the term "spouse" as "a person of the opposite sex who is a husband or wife." 1 U.S.C.A §7 (1996). These definitions mean that in most instances, Connecticut employers will not be required to, and in some cases may not, extend spousal benefits that are *based on federal laws* to parties to a civil union. For example, employers will not have an affirmative obligation to provide an employee leave for the illness of the employee's civil union partner pursuant to the federal Family Medical Leave Act ("FMLA"). Employers should note, however, that Connecticut law provides many spousal benefits similar to those provided under federal law, and DOMA will not restrict the definitions of marriage and spouse for purposes of such benefits grounded in state law, including the State's FMLA laws for private sector and state employees.

### II. Employee Benefits

#### **1. Health Plan Benefits**

##### **a. Public Sector Employers**

Under the Act, public sector employers, including the State, municipalities, and boards of education, must provide health benefits to parties to a civil union in the same manner as such benefits are provided to married employees. While Section 14 of the Act does not explicitly speak to this issue, the provision of health benefits to public sector employees is governed by state law, not federal law, so DOMA does not come into play for this purpose. Plans sponsored by public sector employers are exempt from the Employee Retirement Income Security Act ("ERISA"), the federal law that governs most employee benefit plans. Moreover, the expansive language of Section 14, as well as the legislative history and an accompanying report from the State's Office of Legislative Research ("OLR") support the conclusion that civil union partners of public sector employees must receive health plan coverage if spousal coverage is otherwise available to married employees.

The provision of health benefits for an employee's partner in a civil union will be treated differently for federal income tax purposes than the provision of such benefits for an employee's spouse in a marriage. See Section 1.c below.

#### **b. Private Sector Employers**

The effect of the Act on health benefits provided by private sector employers is currently subject to debate in the legal community. Such benefits are primarily governed by ERISA, which generally preempts any state laws that "relate to" employee benefit plans. If ERISA governs such plans, then based on DOMA's definition of spouse, private sector employers will not be required to extend spousal health benefits to parties to a civil union. The extent to which federal law (ERISA) governs private sector health plans depends on whether a plan is "self-insured" or "fully insured."

Under a self-insured plan, the employer pays claims from its general assets, except claims that are covered by a stop-loss insurance policy. Such self-insured health plans are wholly governed by ERISA and not subject to state insurance laws. Therefore, because of DOMA's restrictions on the terms "spouse" and "marriage" for federal law purposes, private sector employers providing health benefits under self-insured plans will not be required to extend spousal insurance benefits to parties to a civil union.

Whether private sector employers will be required to offer spousal benefits to parties to a civil union under fully insured health plans is less clear. To the extent that the Act amends state insurance laws that apply to fully insured plans, the State of Connecticut Insurance Department will presumably require any health insurer doing business in Connecticut to provide coverage for parties to a civil union on the same terms as married individuals. We expect that the Insurance Department and/or the Attorney General will provide further guidance on this issue, and that there will be litigation regarding the extent of the Act's impact on fully insured health plans. We will keep you advised of such developments as they unfold.

Of course, private sector employers could voluntarily extend health benefits to parties to a civil union, even in the absence of a requirement to do so, or while waiting for further guidance. If private sector employers do provide health benefits to an employee's civil union partner, such benefits will be treated differently for federal income tax purposes than health benefits provided to an employee's spouse in a marriage. These federal income tax implications are discussed below.

#### **c. Income Tax Implications**

Where a public or private employer extends health plan coverage to an employee's civil union partner, the value of such coverage will be taxable income to the employee for purposes of federal income tax (because of DOMA), unless the employee's civil union partner qualifies as the employee's dependent under the Internal Revenue Code ("Code"). However, it is our under-

standing, based upon representations by the State of Connecticut Department of Revenue, that the value of health plan coverage for an employee's partner in a civil union will not be subject to state income tax beginning January 1, 2006.

It is important to note that the state income tax treatment for civil union health coverage beginning in 2006 will be different than the existing state income tax treatment of health plan coverage for an employee's domestic partner, which follows federal law (i.e., domestic partner coverage is taxable income for purposes of state and federal income tax unless the domestic partner qualifies as the employee's dependent under the Code). Employers who currently provide domestic partner coverage have already had to grapple with differing tax treatment for the employee portion of the benefit (which is non-taxable for federal and state purposes) versus the domestic partner portion of the benefit (which is generally taxable for federal and state purposes). Civil unions will add another twist, in that the portion of the benefit attributable to a civil union partner will be subject to federal income tax, but not state income tax.

## **2. Retirement Plan Benefits**

Virtually all retirement plans sponsored by private sector employers are governed by federal law, namely ERISA and the Code. Spousal rights mandated by federal law provided under such private sector plans will not be affected by the Act because of DOMA's restrictions on the terms "spouse" and "marriage". For example, an employee with a civil union partner under Connecticut law must still be treated as unmarried for purposes of determining the automatic form of payment under a defined benefit plan. As a result, the automatic form of payment would be a single life annuity for a single person compared to a qualified joint and survivor annuity for a married person. Where federal law does not mandate specific treatment, an employer may have the ability to treat an employee's civil union partner as a "spouse" if the plan document so provides.

While public sector retirement plans are exempt from ERISA as governmental plans, nearly all such plans are intended to be qualified for purposes of the Code. Thus, to the extent the qualified plan rules of the Code are applicable to governmental plans, such plans will be subject to DOMA's restrictions as well. For example, under the qualified plan rules of the Code, a spouse has the right to roll over death benefits paid in a lump sum from a qualified retirement plan into another qualified plan or IRA without incurring any current income taxation. A "spouse" for purposes of this rollover right under the Code would be limited by the definition set forth under DOMA. However, where governmental plans are not subject to federal law (e.g., the qualified joint and survivor annuity rules of the Code do not apply to governmental plans), presumably state law will govern and the Act will require that the term "spouse" be defined to include a party to a civil union.

Please note that the rules applicable to retirement plans (both private and governmental) are complicated, and this over-

view is not intended to provide a comprehensive analysis of the potential issues that could arise in this area.

### **3. Plan Documents and Summary Plan Descriptions (SPDs)**

To the extent benefit plans are governed by ERISA, they are not required to extend spousal benefits to parties to a civil union because DOMA restricts the definitions of “spouse” and “marriage” under federal laws, including ERISA. However, employers may, to the extent permitted by law, voluntarily extend such benefits to parties to a civil union. Whether or not employers choose to extend such benefits, they should review their benefit plan documents, SPDs, and other employee communication materials to make sure that these documents accurately reflect the employer’s intention.

### **4. Employee Benefits Under Collective Bargaining Agreements and Employer Policies.**

Aside from employee benefits derived specifically from federal law, it is likely that courts or governmental agencies enforcing the Act will require employers in Connecticut to treat parties to a civil union in the same manner as spouses in a marriage. For instance, by policy, administrative regulations and through collective bargaining agreements, public sector employers throughout the State provide for benefits such as funeral leave for the death of a spouse or a spouse’s direct relative, such as a sister-in-law. We anticipate that agencies and courts construing the Act will require public sector employers to extend any such benefits to parties to a civil union, because these benefits are derived from “civil law,” or “policies” as stated in Section 14 of the Act. In the public sector, the fact that policies, administrative regulations and collective bargaining agreements are formally approved by state and municipal agencies supports this conclusion.

With respect to the provision of employee benefits other than health and retirement benefits by private sector employers, we anticipate that courts or governmental agencies enforcing the Act will treat public and private sector employers in Connecticut the same with respect to the application of the Act’s extension of spousal benefits to parties to a civil union. Given the state law prohibition on discrimination on the basis of both marital status and sexual orientation, private sector employers who are subject to these anti-discrimination laws will have difficulty claiming that they are exempt from the requirement to offer these other spousal benefits to parties to a civil union. Moreover, in the unionized setting, Connecticut law treats collective bargaining agreements as contracts and, therefore, as a source of civil law for purposes of the Act.

We advise public and private employers alike to extend such spousal benefits to parties to a civil union on the same basis as they are provided to spouses under Connecticut’s marriage laws, whether such benefits are derived from policies or collective bargaining agreements.

## **III. Domestic Partnership Benefits in the Civil Union Era**

Many public and private sector employers currently provide domestic partnership benefits to employees. Employers providing domestic partner benefits usually require an employee seeking such benefits to furnish a legal affidavit stating, among other things, that the employee and his/her domestic partner are in a committed relationship, that the employee and his/her domestic partner are financially interdependent, and that the employee and his/her domestic partner have a shared residence for a pre-determined period of time. It is important to keep in mind, however, that not all persons currently considered “domestic partners” will choose to become parties to a civil union, and that parties to a civil union cannot be required to complete such an affidavit. Therefore, the extension of domestic partner benefits to same-sex couples does not equate to compliance with the Act.

The basis for an employer to extend same-sex domestic partner benefits has traditionally been the inability for same-sex couples to marry. While the Act does not give same-sex couples the right to marry, it does grant most of the rights and benefits of marriage (to the extent governed by Connecticut law) to same-sex couples who choose to become parties to a civil union. Thus, to some degree, the rationale for the provision of same-sex domestic partner benefits no longer exists in Connecticut. For that reason, employers subject to the Act should consider terminating same-sex only domestic partner benefits at some point in the future, perhaps with a grace period to bridge any gap between domestic partner status and civil union status. In any event, Connecticut employers currently offering domestic partner benefits may want to review their domestic partner policies to determine whether and how to incorporate civil unions into their policies.

## **IV. Compliance and Enforcement**

In order to comply with the October 1, 2005 effective date of the Act, employers should begin examining their policies, procedures and collective bargaining agreements to determine the level of spousal benefits they provide, and whether they will be required to extend those benefits to employees that become parties to a civil union.

Employers should also consider the documentation that they require when granting spousal benefits. If an employer does not currently require proof of marriage from an employee seeking spousal benefits, the employer may not require proof of a civil union for an employee seeking spousal benefits for his/her civil union partner. Otherwise, such disparate treatment may lead to a discrimination claim by an employee who is a party to a civil union.

While the Act does not specifically provide for an enforcement mechanism for violations of the Act, such enforce-

ment will likely be governed by existing state agencies, such as the State Board of Labor Relations (“SBLR”) or the Commission on Human Rights and Opportunities (“CHRO”). Connecticut law already contains provisions prohibiting discrimination against individuals based on sexual orientation and marital status. If an employer fails to provide an employee who is a party to a civil union with “all the same benefits, protections and responsibilities under law,” such an employer may be subject to a discrimination claim based on sexual orientation or marital status under state law. Under the state laws governing labor relations in the public sector, an employee could claim that failure to provide spousal benefits under a collective bargaining agreement

to an employee's civil union partner constitutes a prohibited labor practice. Accordingly, employers should be mindful of the myriad of claims that could result from failure to comply with the Act and its requirements.

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