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## **CIVIL UNIONS – Considerations for New Hampshire Employers as the Rights of Marriage Are Extended To Civil Union Partners and Their Dependents**

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### **I. INTRODUCTION – NEW HAMPSHIRE CIVIL UNIONS LAW**

On a cold New Year's Eve in Concord, in front of the State House steps, approximately 20 couples waited until midnight for a much anticipated event – the solemnization of their civil unions. The New Hampshire civil unions law took effect on January 1, 2008, and, in a matter of two weeks, nearly 100 licenses were issued.<sup>1</sup> As of mid-March (author's deadline), 300 licenses have been issued, and over 250 couples have entered into civil unions.

This amazing change in the landscape of legal rights for same-sex couples has implications beyond the relationships themselves. If they have not done so already, New Hampshire employers must learn how to address a new status for a growing group of employees and their dependents.

New Hampshire is the fourth state in the country to recognize "civil unions," following Vermont, Connecticut and New Jersey.<sup>2</sup> The law also provides for recognition of same-sex marriages and civil unions which have been legally contracted in other states and which comply with the New Hampshire civil unions law. N.H. Rev. Stat. Ann. § 457-A: 8.<sup>3</sup> The New Hampshire law provides that, "[n]otwithstanding any other law to the contrary, the parties who enter into a civil union . . . shall be entitled to all the rights and subject to all the obligations and responsibilities provided for in state law that apply to parties who are joined together pursuant to RSA 457."<sup>4</sup> N.H. Rev. Stat. Ann. § 457-A:6. This language, extending the rights, obligations and responsibilities of marriage to persons in civil unions, is the only provision reflecting the Legislature's intent as to the reach of the law. New Hampshire employers are thus provided little guidance on how to comply with the new law.

#### **A. Civil Unions Laws of Other States**

In other jurisdictions where civil unions laws have been enacted, significantly more detail has been provided on what rights are to be extended to persons who enter into civil unions. For example, Vermont's statute provides that "[a] party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law." Vt. Stat. Ann. tit. 15 § 1204 (b) (2007). The statute also provides a non-exclusive list of legal benefits, protections, and responsibilities of spouses that will apply in "like manner" to parties to a civil union. These include group insurance for state employees, spouse abuse programs, prohibitions against discrimination based upon marital status, victim's compensation rights, workers' compensation benefits, coverage of laws relating to emergency and non-emergency medical care and treatment, including hospital visitation and notification rights as provided in the Vermont Patient's Bill of Rights and Nursing Home Residents' Bill of Rights, and family leave benefits.<sup>5</sup>

New Jersey's civil unions law similarly provides an extensive, non-exclusive list of legal benefits which have been extended to spouses or partners in a civil union. (New Jersey Pamphlet Laws, P.L. 2006, Chapter 103.) In addition to many of the same legal benefits and protections extended to partners under the Vermont statute, the New Jersey statute includes a specific reference to "laws relating to insurance, health and pension benefits."<sup>6</sup> As our New Hampshire statute lacks the specificity of these other states' civil union laws, additional legal analysis is required to ascertain the likely reach of the law in any particular area.

## **B. Impact of Federal Law on Civil Unions**

Federal law imposes constraints that limit the reach of the civil unions laws enacted in New Hampshire and elsewhere. Passed in 1996, the federal Defense of Marriage Act (DOMA), provides that the terms "marriage" and "spouse," as used in any federal law or regulation, refer only to legally united, opposite-sex spouses.<sup>7</sup> DOMA links and restricts a number of federal benefits to marriage between a man and a woman. Accordingly, considerations regarding the application of New Hampshire's civil union law may, for some purposes, be controlled or at least influenced by the non-recognition of same-sex unions for federal law purposes. Areas affected by DOMA include, but are not limited to: federal tax treatment, COBRA coverage, Social Security benefits, immigration rights and veterans' benefits. The federal Employee Retirement Income Security Act of 1974 (ERISA) also impacts the extension of benefits to individuals in civil unions.<sup>8</sup> ERISA was enacted to establish a comprehensive scheme for the administration of employee welfare benefit plans, including health plans, disability benefits and death benefits when offered by an employer as part of a plan.<sup>9</sup> The legislative goal was to ensure that plans and plan sponsors across the country would be subject to a uniform body of employee benefits law. As such, ERISA provides that its coverage "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefits plan . . . ."<sup>10</sup> The First Circuit Court of Appeals has construed the phrase "relate to" broadly.<sup>11</sup> Thus, ERISA serves, in essence, to "federalize" some benefit plan requirements. To the extent that DOMA governs ERISA plans and defines marriage as only between a man and a woman, the rights of persons in civil unions and their dependents are limited with regard to any benefits which ERISA governs.

## **C. New Hampshire Attorney General's Guidance**

It is beyond the scope of this article to address in any level of detail the difference in application of the civil unions law to public versus private employers. However, it is interesting to note the manner in which the state is addressing issues arising in this context which potentially affect its employees and constituents. In December 2007, the Attorney General's Office issued guidance to state agencies regarding implementation of the new civil unions law. While not strictly applicable to private employers, the memorandum provides insight into how attorneys representing the State of New Hampshire view the new law and its requirements.

The "Guiding Principles" section of the memorandum provides that the Executive Branch will implement the civil unions law in accordance with its legislative intent and effective date, in a manner that shows respect and provides equal treatment to all. It provides that while civil unions and marriages are separate and distinct legal relationships, the rights, obligations and responsibilities conferred under state law for parties in marriages and civil unions are identical. It also provides that state-issued forms or publications that make reference to a legal status derived from marriage or a civil union should distinctly recognize each status. The Attorney General's Office recommends the use of the term, "partner to a civil union" where spouse would otherwise appear in such a form or publication.<sup>12</sup>

## **D. Enforcement Mechanisms/Recourse for Failure to Comply**

The civil unions law does not contain an enforcement mechanism, nor does it describe the consequences for failing to comply with its terms. However, the New Hampshire Law Against Discrimination (NHLAD) makes it an unlawful discriminatory practice for a covered employer to:

- refuse to hire or employ or to bar or to discharge from employment such individual [based upon that person's marital status or sexual orientation] or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification.

N.H. Rev. Stat. Ann. § 354-A:7. Thus, based upon NHLAD should a covered employer fail to extend comparable compensation or comparable terms, conditions or privileges of employment to an employee in a civil union as it would to a married employee, or should the employer fail to extend health or other benefits in a way that is comparable to the way benefits are extended to married employees, a Human Rights Commission complaint could follow.<sup>13</sup> The discrimination law's definition of employer excludes employers with fewer than six employees, certain social clubs and fraternal or religious associations or corporations that are not organized for private profit.<sup>14</sup>

In the companion cases of *Bedford v NH Community Technical College System* and *Breen v. NH Community Technical College System*,<sup>15</sup> the State of New Hampshire was sued by two employees who had first filed charges of discrimination with the New Hampshire Commission for Human Rights

pursuant to RSA 354-A. The plaintiffs sought health and dental insurance benefits for their same-sex partners, entitlement to bereavement leave upon the death of either of their partners, and, in one of the two suits, dependent care leave to care for a child whom one of the plaintiffs was co-parenting with her partner. They argued that because these benefits were extended to spouses of married employees, and because New Hampshire law did not allow same-sex marriage, conditioning eligibility for the benefits on marriage constituted discrimination on the basis of sexual orientation and marital status.

The Commission for Human Rights found no probable cause that unlawful discrimination had occurred.<sup>16</sup> On appeal, the Superior Court reversed the Commission's ruling, finding that the plaintiffs had established a prima facie case of sexual orientation discrimination.<sup>17</sup> The Court further found that the legitimate non-discriminatory reasons proffered by the State for denying the benefits did not suffice to meet its burden, and that the plaintiffs had met their burden of establishing under a disparate treatment analysis that the State's policy impermissibly discriminated on the basis of sexual orientation.<sup>18</sup> The State's appeal to the New Hampshire Supreme Court was withdrawn following enactment of the civil unions law.<sup>19</sup> The health and dental benefits sought by Bedford and Breen for their same-sex partners are now available to the civil union partners of State employees.<sup>20</sup>

Federal law provides no protection against discrimination based upon sexual orientation, so a suit similar to the Bedford and Breen cases could not be brought under the federal employment discrimination laws. However, other types of actions are potentially available under state law, including claims of public policy wrongful discharge<sup>21</sup> or breach of contract. Given the nature of available state law claims, it is important to review all employee policies and handbooks in light of the requirements of the civil unions law. If benefits are promised to employees and their dependents and are not controlled by DOMA or ERISA, the administration of such benefits should account for the rights recently afforded to employees with civil union partners.

The issues presented by enactment of the New Hampshire civil unions law are complex and cross many disciplines. They are especially difficult to navigate because of the lack of specificity in the new law regarding its intended application. Despite the contrary mandates of applicable federal laws, particularly DOMA and ERISA, there are several areas in which it appears clear that private employers in New Hampshire will be required to extend benefits to same-sex partners who enter into civil unions. While some employers already offer domestic partner benefits, which may include same-sex partners, other employers may be unprepared for this new and relatively undefined change in the law. The purpose of this article is to alert employers to the issues arising in connection with civil unions.

## **II. IMPACT ON EMPLOYEE LEAVE AND NON-FEDERAL BENEFITS**

As suggested above, although the civil unions law is not specific on these issues, benefits not regulated by ERISA or affected by DOMA are considered very likely to be required to be extended to civil union partners. Examples of these employer-provided benefits would include bereavement leave and other leaves of absence, such as any non-federal Family and Medical Leave Act-type leave. Eligibility for these benefits is generally described in employee handbooks or policies, which should be updated to reflect the rights conferred by the new law. Other state-created rights not governed by federal law should also be extended to civil union partners in order to avoid discrimination or other claims.

### **A. Bereavement Leave, Sick Leave and One-Time Payments**

Employers providing paid time off from work for an employee to grieve the death of a spouse will be required to offer paid time off for an employee to grieve the death of a civil union partner. Similarly, an employer offering a bereavement leave policy providing time off from work to grieve the death of a spouse's parent or other family member will be required to offer paid time off for an employee to grieve the loss of a civil union partner's family member. Although an employer is not required by state law to provide bereavement leave as a benefit, an employer choosing to provide such leave is well advised to extend a similar benefit to an employee in a civil union to avoid a discrimination claim under the NHLAD. A contract claim might also be available to an aggrieved employee if the employer has both a bereavement leave policy and a non-discrimination policy that prohibits discrimination based upon sexual orientation or marital status.

An employer with a sick time policy that permits employees to use the paid time off to care for family members who are ill, including spouses, should allow employees who have entered into civil unions to use the same time off to care for ill civil union partners. However, if an employer has adopted a sick time policy that restricts use of paid time off to the employee's own illness and not that of family members, the employer will not be required to provide paid time off to care for a civil union partner because the benefit is not extended to spouses.

Benefits that involve one-time payments, rather than ongoing administration, are generally not considered to be a "plan," for purposes of ERISA.<sup>22</sup> For example, travel benefits, moving expenses, and memberships would fall outside ERISA and, therefore, DOMA for this reason. Referral-only employee assistance programs are also not governed by ERISA or DOMA. Thus, to the extent that employees' spouses are entitled to participate in these benefits, employees' civil union partners should also be permitted to participate.<sup>23</sup>

## **B. State-Created Rights**

State-created rights, such as rights to workers' compensation benefits, including survivor's benefits, will extend to civil union partners to the same extent as to opposite-sex spouses.<sup>24</sup> This is based upon the statutory language of RSA 457-A, which provides that "parties who enter into a civil union . . . shall be entitled to all the rights . . . provided for in state law that apply to parties who are joined together pursuant to RSA 457."<sup>25</sup> It is also supported by the Attorney General's Guidance Memorandum, which confirms that the rights, obligations and responsibilities conferred under state law for parties in marriages and civil unions are identical.

The New Hampshire Crime Victim Employment Leave Act became effective on January 1, 2006, and requires employers with 25 or more employees to provide unpaid leaves of absence to employees who are victims of crime or are the immediate family members of certain crime victims.<sup>26</sup> The New Hampshire crime victim leave provisions should now be interpreted as treating civil unions partners as family members. Moreover, through its definitions section, the law already defined as "immediate family" any "a person who is otherwise in an intimate relationship with and residing in the same household as the victim."<sup>27</sup> Accordingly, crime victim leave must be extended in the civil unions context.

## **C. Family and Medical Leave Act**

The Family and Medical Leave Act applies to private employers who employ at least 50 employees during 20 or more weeks during the year and public employers of any size.<sup>28</sup> It requires covered employers to allow eligible employees to take up to twelve (12) weeks of unpaid leave from work in a 12-month period for qualifying reasons.<sup>29</sup> The qualifying reasons for FMLA leave include needing time to provide care "for the spouse . . . of the employee, if such spouse has a serious health condition."<sup>30</sup> It is an open question whether leave under the federal Family and Medical Leave Act must be provided to employees to care for ill civil union partners to the same extent it is provided to care for ill spouses.

Under the FMLA, the term "spouse" is defined as "a husband or wife, as the case may be."<sup>31</sup> FMLA regulations promulgated by the United States Department of Labor further define the term "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides . . . ."<sup>32</sup> As mentioned above, DOMA regulates other federal laws to restrict their application to opposite-sex married spouses, and this point has been reinforced by a 1998 Department of Labor opinion letter explaining that the term "spouse" is limited to opposite-sex spouses for purposes of the FMLA.<sup>33</sup> However, as the FMLA regulations specifically reference the state law definition of "spouse," it is not entirely clear that DOMA would be interpreted to exclude application of the law to civil union partners. If not further clarified by the Department of Labor, this issue appears likely to be the subject of litigation in the future.

## **III. IMPACT ON EMPLOYER-SPONSORED BENEFIT PLANS**

To date, most of the discussion regarding the impact of the civil unions law on employer-sponsored benefit plans has focused on welfare benefit plans, such as group health plans. However, employers also sponsor pension plans intended to provide retirement benefits to employees. Due to the impact of DOMA, Code provisions applicable to pension plans that refer to "spouse" can only be read to apply to spouses in opposite-sex marriages. Therefore, some plan provisions cannot be interpreted to benefit civil union partners while maintaining the plan's tax-qualified status. Welfare benefit plans operate under their own web of state and federal requirements which are also affected by DOMA, as well as by ERISA's unique preemption provision.

As noted briefly in Section I, *supra*, ERISA regulates the creation, operation and administration of employee benefit plans, including both pension benefit plans and welfare benefit plans. The terms "employee pension benefit plan" and "pension plan" mean, in pertinent part, "any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both . . . that . . . (i) provides retirement income to employees, or (ii) results in a deferral of income by

employees for periods extending to the termination of covered employment or beyond . . . ." ERISA § 3(2)(A). "Employee welfare benefit plan" and "welfare benefit plan" mean, in pertinent part, "any plan fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits . . . ." ERISA § 3(1). ERISA excludes from its consideration plans that are "governmental plans"<sup>34</sup> and plans that are "church plans."<sup>35</sup>

In addition to ERISA, a plan that is a pension plan must also comply with applicable portions of the Internal Revenue Code.<sup>36</sup> A plan's tax qualification requirements are found in Section 401(a) of the Code. Section 401(a) provides that a "trust" which forms part of "a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries" is considered a "qualified" trust if, and only if, that trust is part of a plan that satisfies several dozen stated requirements.<sup>37</sup> Those subsections under Section 401(a) of the Code contain the tax rules related to the qualification of what is typically known as a pension plan, profit sharing plan, or 401(k) plan.

As under ERISA, the Code also states that many requirements under the Code do not apply to governmental plans.<sup>38</sup> Likewise, the Code's qualified plan provisions do not apply to church plans, unless such a plan makes a special election to become subject to ERISA's jurisdiction.<sup>39</sup>

## **A. Qualified Pension Plans**

As stated previously, DOMA affects the application of federal laws as they relate to civil unions. Both ERISA and the Code are federal laws. Therefore, provisions involving the terms "spouse" in pension, profit-sharing plans and 401(k) plans under ERISA and the Code refer only to a spouse in an opposite-sex marriage with a plan participant. The following examples give the reader a flavor of these restrictions.

### **i. Survivor Benefits**

Throughout ERISA and the Code, provisions that address payments from qualified pension plans to beneficiaries of deceased participants favor the spouse of a participant.<sup>40</sup> Code Section 401(a)(11) explains that a qualified plan must contain certain distribution provisions that favor distributions to a surviving spouse of a participant who passes away either before or during the time the employee is in benefit status.

Code Section 401(a)(11)(A)(ii) requires certain qualified plans to offer a "qualified preretirement survivor annuity" ("QPSA") only to a deceased participant's surviving spouse. This means that a surviving spouse can receive an annuity benefit even if a participant dies before retirement. No other beneficiary may be eligible for this benefit under a qualified plan.

In a similar vein, Code Section 401(a)(11)(A)(i) requires certain plans to offer a "qualified joint and survivor annuity" ("QJSA") form of benefit as the default benefit under these plans. By definition, this special form of benefit is available only to a deceased participant's surviving spouse.<sup>41</sup> Despite DOMA, a qualified plan may elect to offer a joint and survivor benefit as an optional form of benefit to a participant who is not deemed to be married under federal law. However, a plan may only offer a QJSA to a surviving spouse in order for the plan to maintain its qualified status under the Code.

### **ii. Minimum Distribution Requirements and Rollovers**

Section 401(a)(9) of the Code contains the tax rules that govern the distribution of benefits from a qualified plan. Among these rules are provisions for the rollover of benefits from a deceased participant's account to a designated beneficiary. A participant's surviving spouse enjoys the most flexibility as to the timing and character of distributions from a qualified plan account.<sup>42</sup> By operation of DOMA, only a surviving spouse may benefit from these distribution options.

The Pension Protection Act of 2006 ("PPA")<sup>43</sup> introduced the new provision that, regardless of the form of distribution provided under the plan to a non-spouse beneficiary, a plan can provide that the beneficiary may elect to roll over the plan distribution to an "inherited" IRA. At this time, a qualified plan may, but is not required to, offer this option of a direct rollover of a distribution to a non-spouse designated beneficiary.<sup>44</sup> This change offers some of the flexibility of the spousal distribution rules to civil union partners who are plan beneficiaries.

### **iii. Qualified Domestic Relations Orders**

Both the Code and ERISA require that the benefits provided under a qualified plan may not be assigned or alienated. Both statutes go on to provide, however, that this restriction shall not apply if a "qualified domestic relations order" creates, assigns or recognizes a right of another person to any

benefit payable with respect to a participant. I.R.C. § 401(a)(13); ERISA § 206(d).

A qualified domestic relations order, or "QDRO", is a domestic relations order<sup>45</sup> which creates or recognizes the existence of an alternate payee's<sup>46</sup> right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan.<sup>47</sup> A QDRO may provide, for example, that a former spouse will receive 50 percent of the value of a participant's 401(k) account, such value to be determined as of the date of the divorce decree on which the QDRO is based.

An alternate payee enjoys favorable income tax treatment when he or she receives property from an individual's qualified plan. For example, the portion of the plan proceeds that are transferred to the alternate payee under a QDRO is not treated as taxable income to the alternate payee upon transfer.<sup>48</sup> In addition, there is no additional ten percent (10%) penalty for early distributions from qualified retirement plans which would otherwise apply if a distributee were under the age of 59 1/2 years old.<sup>49</sup>

Since DOMA causes the Code and ERISA to define pertinent terms as limited only to members of an opposite-sex marriage, distributions under QDROs are not available to civil union partners in a divorce. As a result, none of the associated favorable income tax considerations would apply to such a distribution from a qualified plan. In fact, such a distribution to a civil union partner would not be possible at all from a qualified plan under the present terms of the Code or ERISA.

## **B. Employee Welfare Benefit Plans**

Employee welfare benefit plans are not subject to the same federal tax qualification requirements as a pension plan. Therefore, the Code is not a significant factor in determining whether such a plan complies with applicable law. However, ERISA and state insurance laws and the interaction of the two can have a significant impact on welfare benefit plans, causing the analysis of these plans with regard to the civil unions law to be more complex.

In the first instance, an employer must elect how to mitigate the risk of insuring its employees for health benefits. An employer may purchase commercial group coverage from a carrier to fully insure its plan. Alternatively, an employer may choose to pay for the health expenses of its employees through a self-insured arrangement, where payments from the employer's general fund cover health care costs of employees and their families. Plans that are fully insured are subject to state insurance laws. Self-insured plans are not. Both fully-insured and self-insured plans may be subject to ERISA's requirements.

### **i. State Guidance to Insurance Companies**

On December 18, 2007, the New Hampshire Insurance Department issued Advisory No.: INS 07-088-AB regarding the implementation of the civil unions law with regard to New Hampshire licensed insurance companies (the "Bulletin").<sup>50</sup> The Bulletin provides, in part, that "all in-force insurance as of January 1, 2008 and all policies or contracts solicited, delivered, and issued after January 1, 2008" must comply with the civil unions law to recognize that partners to a civil union are entitled to all the rights provided to married couples under state law. The Bulletin further states that "policy language shall be amended to provide the same benefits to those joined in civil unions as are provided to those joined in marriage." This means that "all policies will, without any action on the part of the insurer, insured or certificate holder, be interpreted and enforced so as to provide the same benefits to partners to a civil union as to those who are married." In light of this directive, employers are advised to review their certificates of coverage to understand the scope of coverage they will now be offering to employees.

The Bulletin also notes that "the civil union law does not apply to plans that are regulated under ERISA and are outside of the state's jurisdiction to regulate. Self-funded benefits provided through state and local 'governmental plans' are not regulated under ERISA or under state insurance laws."

### **ii. ERISA Preemption of State Laws**

As noted above, ERISA is intended to "comprehensively regulate[] employee pension and welfare plans."<sup>51</sup> As part of that expansive scope, ERISA contains a broad preemption provision, providing that ERISA supersedes "any and all State laws as they may now or hereafter relate to any employee benefit plan" subject to ERISA.<sup>52</sup> The purpose of the preemption clause of ERISA is to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation."<sup>53</sup> Recently, the issue was raised as to whether a Portland, Maine, ordinance requiring city contractors to provide health benefits to domestic partners could survive ERISA preemption.<sup>54</sup> The Federal District Court for the District of Maine determined that the ordinance was "concerned with the

substantive content and administration of employee benefit plans, an area of core ERISA concern". This was so, in spite of the fact that the ordinance was not directed at employers or their plans. Rather, the ordinance conditioned receipt of city-provided housing and community development funds on the provision of domestic partner benefits by a recipient employer. Nonetheless, the ordinance was deemed preempted by ERISA. As a result, the benefits could not be required to be provided under health plans subject to ERISA.

### **iii. Exclusions from ERISA Preemption**

Certain state laws are "saved" from ERISA preemption. State laws that relate to an ERISA plan but that "regulate" insurance, banking and securities are not preempted by ERISA.<sup>55</sup> On its face, the civil unions law is not a law that regulates insurance. Further, the New Hampshire Insurance Department has stated in the text of the Bulletin that its guidance to insurance carriers with regard to the civil unions law does not apply to ERISA plans.<sup>56</sup> Determining whether a state law survives ERISA preemption is ultimately the decision of the federal courts. If it is determined that the Bulletin or any future guidance related to the interpretation of the civil unions law as affecting welfare benefit plans are "laws" that "regulate" insurance, then these directives could be determined to affect ERISA's preemption provisions.<sup>57</sup>

## **D. COBRA**

Under both Federal and New Hampshire law, certain individuals have the option of maintaining health coverage after work-based coverage would otherwise end. The civil unions law will not presently affect the application of the provisions of the federal version of this law. However, the civil union partner of a covered employee will be eligible for continuation of health coverage under New Hampshire's continuation coverage law.

### **i. Federal COBRA**

Under Federal law ("COBRA") employers with 20 or more employees sponsoring group health plans must offer employees and their families the opportunity for a temporary extension of health coverage (called "continuation coverage") at group rates in certain instances where coverage under a plan would otherwise end.<sup>58</sup>

Only a "qualified beneficiary" is eligible for continuation coverage. A qualified beneficiary is either an employee, the spouse of an employee or a dependent child of an employee who is covered under the employer's plan and who loses coverage as a result of a "qualifying event."<sup>59</sup> For example, a spouse who is a qualifying beneficiary is entitled to continuation coverage for 36 months on account of a divorce from or death of the spouse-employee.<sup>60</sup> As a result of DOMA's effect on ERISA and the Code, any provision in the federal COBRA law related to benefits of a spouse of an employee is limited to spouses in opposite-sex marriages.

### **ii. New Hampshire "COBRA"**

New Hampshire law provides its own statute regarding continuation coverage, set out in RSA Section 415:18.<sup>61</sup> New Hampshire's continuation coverage law extends benefits to "individuals" who were receiving coverage under a group health plan, including the spouse and children of an employee.<sup>62</sup> Employers with two or more employees are subject to New Hampshire's continuation coverage law.<sup>63</sup> The Bulletin provides that coverage under the state COBRA law is extended to civil union partners of employees who are covered under fully insured plans.<sup>64</sup>

Since partners in a civil union are not treated as husband or wife or spouse under federal law, the state COBRA law will be the source of extended health benefits in the event of termination, divorce or death of an employee who is a partner to a civil union.

## **IV. FEDERAL INCOME TAX TREATMENT OF BENEFITS EXTENDED TO CIVIL UNION PARTNERS**

Once an employer elects or otherwise determines to offer benefits to civil union partners, there remains the consideration of how to properly tax such benefits under the income tax provisions of the Code. Unlike the discussion regarding the application of ERISA and state insurance laws to employer-provided benefits, the income taxation of benefits is applicable to all plans regardless of whether a given plan is subject to ERISA or not, and whether a plan is self-insured or fully insured.

Code Section 106 excludes from the gross income of an employee employer-provided coverage under any accident or health plan. In addition, when the health plan is included under a "cafeteria plan" pursuant to Code Section 125, the share of any premiums paid by the employee may be paid with pre-

tax dollars.<sup>65</sup>

These favorable income tax exclusions apply only to the extent that the benefit covers the employee, the employee's "dependents," as that term is defined under the Code, and the employee's spouse. A civil union partner cannot be considered a "spouse" under federal law. However, the civil union partner may be a "dependent" in appropriate circumstances.

Code Section 152(a) provides that a "dependent" may be a "qualifying relative." A "qualifying relative" includes an individual who is not the taxpayer's spouse, has the same principal place of abode as the taxpayer for a given year, and is a member of the taxpayer's household. In addition, the taxpayer must be providing over one-half of the "qualifying relative's" support for the calendar year. I.R.C. § 152(d)(1).<sup>66</sup>

If an employee's civil union partner satisfies both the residency test and the support test, as described above, then the employee's partner is a "dependent" and both the employer-paid and employee-paid share of the premium payment for coverage is not includable as income to the employee. If, however, the civil union partner is not a "dependent" under the Code (and cannot be a "spouse"), then the value of the benefit provided to the civil union partner must be included in the employee's taxable income.<sup>67</sup> The value of the employer-paid portion of the benefit must be imputed as income to the employee and the value of the portion of the premium paid by the employee that is applicable to the coverage related to the employee's civil union partner must be determined separately from that portion of the employee's premium which is paid with pre-tax dollars.<sup>68</sup> The employer bears the liability for the proper withholding of income and payroll taxes on employee compensation.<sup>69</sup>

## V. CONCLUSION

Employers should review their employee handbooks, workplace policies, benefits documentation and payroll practices to ensure that these documents and practices anticipate and comply with the new civil unions law. Where benefits are extended to spouses, they will often now extend to civil union partners as well, except where controlled by federal law. This is true in the area of voluntary benefits provided to employees, such as employer-provided bereavement leave, as well as state-created rights, such as workers' compensation survivor benefits and crime victim leave. In the case of federally regulated benefits, both the extension of and favorable tax treatment of spousal benefits will likely be curtailed by DOMA and/or ERISA. This is true with respect to benefits provided pursuant to ERISA-governed health plans and with respect to federal tax treatment of health benefits where such benefits are made available to civil union partners. Given the conflicting requirements of state and federal law, this is sure to be an interesting area to watch in the coming year.

## Endnotes

1. Sarah Liebowitz, *Nearly 100 civil unions knotted so far*, Concord Monitor, January 12, 2008 at A1.

2. See Vt. Stat. Ann. tit. 15, §1204; Conn. Gen. Stat. Ann. § 46b-38nn; and N.J. Rev. Stat. § 37: 1-31.

3. Currently, in the United States, only Massachusetts permits same-sex marriages. See *Opinion of the Justices to the Senate*, 802 N.E. 2d 565 (Mass. 2004); *Goodridge v. Department of Public Health*, 798 N.E. 941 (Mass. 2003). Canada, the Netherlands, Belgium, South Africa and Spain also provide legal recognition of same-sex marriages. Several States have domestic partner statutes or benefits, including California, New Jersey, Maine, the District of Columbia and Washington and Oregon.

4. RSA 457 is the New Hampshire marriage statute

5. 15 V.S.A. § 1204 (e) (5) - (10) and (12), citing 3 V.S.A. § 631; 8 V.S.A. § 8005; 3 V.S.A. § 18; 13 V.S.A. § 5351; 18 V.S.A. chapter 42; 33 V.S.A. chapter 73 and 21 V.S.A. chapter 5.

6. N.J. Rev. Stat. § 37:1-32(e)(2007).

7. Pub. L. 104-199, sec. 1, 110 Stat. 2419 (Sept. 21, 1996) codified at 1 U.S.C. § 7 (1997).

8. 88 Stat. 833, as amended, 29 U.S.C. § 1002(1). For purposes of this article, references to ERISA will follow references as set out in P.L. 93-406, Sept. 2, 1974.

9. *New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) quoting *Allessi v.*



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*Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

10. ERISA Section 514(a).

11. *Zipperer v. Raytheon Company, Inc.*, Slip op. (1<sup>st</sup> Cir. July 12, 2007). ("A State law can be considered 'related to' a benefit plan - and thus preempted - 'even if the law is not specifically designed to affect such plans, or the effect is only indirect.'")

12. There was no citation available for the Attorney General memorandum at the date of publication of this article.

13. See *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669, 682 (1983)(finding that health insurance and other fringe benefits were 'compensation, terms, conditions, or privileges of employment' for purposes of Title VII).

14. N.H. Rev. Stat. Ann. § 354-A:2, VII, in part, provides that, "[e]ntities claiming to be religious organizations, including religious educational entities, may file a good faith declaration with the human rights commission that the organization is . . . affiliated with, or its operations are in accordance with the doctrine and teaching of a recognized and organized religion to provide evidence of their religious status."

15. N.H. Superior Ct. Docket Nos. 04-E-0229 and 04-E-0230.

16. NH Human Rights Commission Docket Nos. ESO-0031-03 and ESO-0225-02.

17. Notice of Decision dated May 3, 2006, at p. 5 citing *Madeja v. MPB Corp.*, 149 N.H. 371, 378 (2003) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

18. Notice of Decision dated May 3, 2006 at p. 16.

19. N.H. Supreme Ct. Docket No. 200600432.

20. See Civil Union enrollment form, available at [www.nh.gov](http://www.nh.gov).

21. See, e.g., *Lacasse v. Spaulding Youth Center*, 154 N.H. 246, 248 (2006).

22. See Section III for more detail on what constitutes a "plan" as defined by ERISA.

23. See generally, Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 Tul. L. Rev. 373, 392 - 394 (2001).

24. N.H. Rev. Stat. Ann. § 281-A.

25. N.H. Rev. Stat. Ann. § 457-A:6.

26. N.H. Rev. Stat. Ann. § 275:62.

27. N.H. Rev. Stat. Ann. § 275:61, IV.

28. 29 U.S.C. §2611(4)(A).

29. 29 U.S. C. §2612.

30. 29 U.S.C §2612(a)(1)(C).

31. 29 U.S.C. §2611(13).

32. 29 C.F.R. § 825.113(a).

33. WHM 99:3109, Opinion FMLA-98.

34. ERISA § 3(32).

35. ERISA § 3(33). ERISA § 4(b) states with regard to church plans, that ERISA does not apply to church plans with respect to which no election has been made under Section 410(d) of the Code. ERISA § 4(b).

36. Internal Revenue Code of 1986, as amended. Hereinafter the "Code".

37. See I.R.C. § 401(a).

38. See e.g., Code § 401(5)(G) regarding minimum participation rules and nondiscrimination provisions. The Code's definition for a governmental plan is in Section 414(d).

39. I.R.C. § 410(d). The Code's definition for a church plan is in Section 414(e).
40. See generally, Neal S. Schelberg and Carrie L. Mitnick, *Same-Sex Marriage: The Evolving Landscape for Employee Benefits*, 22 Hofstra Labor & Employment Law Journal, 65, 68-69 (2005).
41. The corresponding form of this required annuity benefit for an unmarried participant is a single life annuity. Treas. Reg. § 1.401(a)-20, Q&A-25.
42. See e.g., I.R.C. § 401(a)(9)(B)(iv).
43. Pub. L. 109-280, August 17, 2006.
44. Notice 2007-7.
45. A domestic relations order, or "DRO", means any judgment, decree or order, including approval of a property settlement agreement, which relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of a participant, and is made pursuant to a State domestic relations law. I.R.C. § 414(p)(1)(B).
46. An "alternate payee" may be any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant. I.R.C. § 414(p)(8).
47. I.R.C. § 414(p)(1). ERISA and the Code are nearly identical in the treatment of qualified domestic relations orders. Unless otherwise noted, for purposes of this article, citations will reference only Code sections.
48. I.R.C. §§ 402(e)(1), 402(a), 402(c)(1).
49. I.R.C. § 72(c)(2)(C).
50. The full text of the Bulletin can be viewed at [www.nh.gov/insurance](http://www.nh.gov/insurance).
51. *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 732 (1985).
52. ERISA § 514(b). See also *Metropolitan Life Ins. Co. v. Mass.* at 732.
53. 120 Congr. Rec. 29197 (1974) as cited in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987).
54. *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp.2d 77 (D. Me. 2004).
55. See, e.g., *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 341 (2003) (requiring a state law to be specifically directed toward entities engaged in insurance and to substantially affect the risk pooling arrangement between insurer and insured to survive ERISA preemption); *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 744-45 (1985) (finding a state mandated-benefit law requiring minimum mental healthcare benefits saved from ERISA preemption).
56. Nor does the Bulletin apply to self-insured plans. ERISA specifically states that an employee benefit plan itself is not deemed to be engaged in the business of insurance, banking or securities. ERISA § 514(b)(2)(B). This provision exempts self-insured welfare benefit plans from state insurance law regulation. See *Metropolitan Life* at 740-41, 747.
57. As stated above, however, this potential preemptive effect of the Bulletin or another law would only apply to fully insured plans. Plans that are self-insured need not comply with state insurance laws. ERISA, as interpreted by DOMA, would be the operative guidance for a self-insured plan that is subject to ERISA.
58. The COBRA provisions can be found in ERISA in Sections 601 through 608 and in Code Section 4980B.
59. ERISA § 607(3).
60. ERISA § 603(3).
61. This statute was recently revised under HB 921.
62. RSA § 415:18, XV(c).
63. Id. at par. XVI(i).
64. See Bulletin at [www.nh.gov/insurance](http://www.nh.gov/insurance).
65. Likewise, Code Section 105(b) permits an employee to be reimbursed for medical expenses, such as through a "flexible spending arrangement" without being taxed on the reimbursement dollars.
66. Certain portions of Section 152 are not applicable for determining the tax treatment of employer provided health benefits. Ex: must

have gross income lower than the "exemption amount" under Code Section 151(d).

67. Treas. Reg. 1.61-21(b). See PLR 9603011.

68. PLR 9603011. The IRS has declined to rule on an acceptable method of calculating the fair market value of the benefit provided to a civil union partner who is not a dependent under the Code. See PLR 200108010.

69. See I.R.C. §§ 3402, 3403, 6671, 6672.

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