

Impact of Illinois Civil Union Law on Plans Maintained by Religious Organizations

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Illinois recently made news when it legalized civil unions beginning June 1, 2011. Because civil union partners will have the same rights as spouses under state law, many religious organizations' benefit plans could be affected. Determining whether coverage of civil union partners is required hinges upon the type of benefit plan, whether the benefit is insured and whether the plan is subject to the Employee Retirement Income Security Act of 1974.

Illinois recently made news when it legalized civil unions beginning June 1, 2011. Civil unions are a new category of relationship in the State of Illinois that will be afforded with the same rights, privileges and obligations as spouses for all purposes under Illinois law. Both same-sex and opposite-sex couples may enter into a civil union in Illinois. The new civil union legislation will have a significant impact on various types of employee benefit plans. This client alert addresses the impact of the civil union law on plans maintained by religious organizations.

Religious organizations, such as churches and religious-affiliated hospitals, schools and social service organizations, maintain various types of employee benefit plans that nearly always provide coverage for spouses of employees. Because civil union partners will have the same rights as spouses under state law, many religious organizations are concerned with the impact that the new civil union law will have on their benefit plans and whether the law might require coverage of civil union partners under such plans. The analysis regarding whether coverage is required hinges upon the type of benefit plan, whether the benefit is insured and whether the plan is subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Health and Welfare Plans

Whether civil union partners must be offered coverage under health and welfare plans sponsored by religious employers depends largely on whether plans are insured (*i.e.*, benefits are partially or fully provided by insurance companies) or self-insured (*i.e.*, benefits are paid from the general assets of the employer). Self-insured plans are not subject to Illinois state insurance law, which after June 1, 2011, will require insurance contracts that provide coverage to spouses to also cover civil union partners. Therefore, self-insured plans have the flexibility to provide coverage to any parties prescribed under the plan document and will *not* be required to provide coverage for civil union partners, unless the employer chooses to amend its plan to do so. This is true both for non-“church” plans, which are subject to ERISA, as well as church plans, which, depending on whether the sponsoring employer has elected to be subject to ERISA under Internal Revenue Code (the Code) Section 410(d), may be exempt from ERISA.

On the other hand, insured health and welfare plans are subject to state insurance law. On or soon after June 1, 2011, the Illinois insurance code will be amended to require that civil union partners be offered the same coverage as spouses under Illinois insurance contracts in order to meet the requirements of the Illinois civil union law. Therefore, insured health and welfare plans that provide coverage to spouses *must* provide coverage to civil union partners beginning June 1, 2011. This may be a major change for religious employers maintaining insured plans within the State of Illinois.

Alternatively, employers that do not wish to provide coverage to civil union partners have the option to self-insure benefits beginning June 1, 2011. This issue should be considered immediately, as it will take some time to revise plan documentation and cancel insurance contracts prior to June 1, 2011. In addition, note that the cancellation of insurance contracts may carry with it penalties and payment of premiums for a period of time. A second option for employers with insured plans that do not wish to cover civil union partners is to fund their plans using insurance contracts that are not governed by the laws of the State of Illinois. For example, if the employer operates in Illinois but also has a business nexus in Michigan, the employer could choose to utilize a Michigan insurance contract in order to provide benefits under its plan. Because Michigan does not recognize civil unions under Michigan state law, the insured plan funded by a Michigan insurance contract would not be required to provide coverage to civil union partners.

Pension Plans

Whether or not pension plans must provide benefits to civil union partners (such as joint and survivor annuity coverage and pre-retirement survivor death benefits) depends on whether or not the plan is subject to ERISA. Plans maintained by religious organizations that do not qualify as church plans, and plans that otherwise qualify as church plans but have opted into ERISA by making a Code Section 410(d) election, are subject to ERISA. ERISA contains a broad pre-emption provision, under which all state laws applicable to employee benefit plans are pre-empted by federal law. Therefore, a plan governed by ERISA would not be subject to the Illinois civil union law. As a result, a plan governed by ERISA would *not* be required to provide death benefit coverage or joint and survivor annuity protection to civil union partners of employees.

On the other hand, church plans that have not made a Section 410(d) election to be covered by ERISA *are* subject to state law. As a result, if the law governing the pension plan is the law of the State of Illinois, any benefits provided to spouses under that plan would also need to be provided to civil union partners in order to comply with the new Illinois civil union law. Plans that are not covered by ERISA and do not wish to provide death benefit coverage to civil union partners could opt to amend their plan to modify the choice of law provision. However, there is no guarantee that such an approach would be successful if challenged by a plan participant or his or her civil union partner. Religious employers should closely examine their plan status and determine whether such plans constitute church plans under

ERISA and the Code. In addition, such employers may wish to seek a ruling from the Internal Revenue Service regarding whether the plan meets the church plan requirements.

Other Benefit Plans

Many religious employers offer benefit plans and programs other than health and welfare and pension plans. All employers are advised to examine all plan documents to determine how the term "spouse" is defined under such programs and which state's law governs such plans in the event such plans are not governed by ERISA. Without careful attention and planning, it is possible that such plans might provide coverage to civil union partners based on definitions in the plan or operation of the state law governing the administration of the plan.

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If you have any questions regarding these issues, please contact your regular McDermott Will & Emery attorney or Todd A. Solomon at +1 312 984 7513 or tsolomon@mwe.com.

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