Legal Alert: Illinois Civil Union Law Impacts Employers

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Executive Summary: The Illinois Religious Freedom Protection and Civil Union Act (Public Act 096-1513), which took effect June 1, 2011, provides civil union partners in Illinois all of the legal rights and obligations to which opposite-sex spouses are entitled under Illinois law. Employers who offer welfare benefit plans (such as health, dental and vision plans) using insurance contracts issued in Illinois are affected by the new law, as those insurance contracts must extend benefits to civil union partners to the same extent as they are offered to opposite sex spouses.

Definitions

Although the law does not change the definition of marriage under Illinois law, it provides that the term "party to a civil union" "means and 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." Additionally, the law provides that Illinois will recognize as a civil union any same-sex marriage, civil union or substantially similar legal relationship other than common law marriage entered into in other states.

Impact on Employee Benefit Plans

Employers who offer welfare benefit plans (such as health, dental and vision plans) using insurance contracts issued in Illinois are affected by the new law, as those insurance contracts must extend benefits to civil union partners to the same extent as they are offered to opposite sex spouses. Employers who provide such benefits through self-funded plans are not required to extend coverage to civil union partners.

The Illinois Department of Insurance has issued guidance stating that all insurance policies issued on or after June 1, 2011, must immediately conform to the Civil Union Law. The Department also stated that all in-force insurance policies subject to the Law (generally, all insurance policies issued in Illinois) are amended by operation of law to conform with the Civil Union Law on that date. The guidance, in question and answer form, is available on the Department's web site at: http://www.insurance.illinois.gov/.

Health Insurance Continuation Coverage

COBRA is the federal law requiring employers to offer an extension of health insurance coverage to employees and their "eligible beneficiaries" (spouses and dependents) in certain situations. Because of the federal Defense of

Marriage Act (DOMA), which defines marriage as a legal union between a man and a woman, civil union partners of employees are not "eligible beneficiaries." However, continuation coverage may be required under the Illinois Spousal Continuation Law.

Tax Issues Relating to Benefits

The new law may complicate the analysis of the tax treatment of employer-provided benefits. Although the Internal Revenue Code and its regulations do not define spouse, they must be interpreted in a manner consistent with DOMA. Thus, for federal tax purposes, benefits provided to an Illinois civil union partner (who is not a dependent of the employee) generally will not be treated the same way as benefits provided to an opposite-sex spouse or to a dependent. For example, the Code excludes from an employee's gross income the value of employer-provided accident or health plan coverage of the employee and the employee's spouse and dependents. If an employer provides such coverage to a civil union partner, the value of the coverage provided to the partner must be included in the employee's gross income and is treated as taxable wages that must be reported on a W-2 form and are subject to federal income tax and Social Security tax withholding.

Additionally, the Illinois Department of Revenue has stated that the Civil Union law did not change the Illinois tax law, which conforms to, and is applied in the same manner as, federal tax laws. Thus, the value of employer-provided benefits provided to an employee's civil union partner is generally included in the employee's income for state income tax purposes as well.

Employers should also remember that benefits offered through a cafeteria plan (a/k/a Section 125 plan), which are subject to favorable tax treatment under Code § 125, will not be eligible for this favorable treatment when offered to civil union partners who do not meet the definition of spouse or dependent under federal law. Employees may still be offered the choice to purchase coverage for a civil union partner, but it would have to be offered either as a taxable benefit under a cafeteria plan, or outside the plan altogether.

Other types of benefits that are available only to employees' dependents or spouses under federal law are also not available to civil union partners, such as Health Savings Account payments for medical expenses or reimbursements under Health Reimbursement Accounts or Flexible Spending Accounts.

Retirement Benefits

As noted above, civil union partners are not "spouses" under the DOMA. Accordingly, they are not required to receive "spousal" protection under their partners' retirement plans, including pension plans, 401(k) plans, and 403(b) plans that are subject to ERISA. An employee may designate his or her civil union partner as a beneficiary under a plan, but that designation will not be automatic, as it often is for a spouse.

Other Employment Related Issues

State leave laws, such as the Illinois Family Military Leave Act, may be

interpreted to apply to civil union partners. However, the federal Family and Medical Leave Act (FMLA) is interpreted in accordance with the DOMA. Accordingly, an employee is not entitled to take leave to care for a civil union partner under the FMLA. If an employee is permitted to take such leave, the employer could not count this against the employee's twelve weeks of FMLA leave.

Employers may want to review their leave policies to ensure they comply with both federal and state law.

If you have any questions regarding the new law or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.