

# Domestic Partner Developments

*A look at different legal structures that convey rights and benefits to committed same-sex life partners in 10 U.S. jurisdictions*

14

*John J. Leonard*

The Winter Edition of *Human Resources 2008* discussed in detail the steps necessary to implement domestic partner health coverage plans in the workplace. In this edition, we provide an overview of the different legal structures 10 U.S. jurisdictions use to provide rights and benefits to committed same-sex life partners and their families, and describe how this nascent - yet quickly expanding - area of the law may affect a private-sector employer's obligations to its employees in those jurisdictions.

## **A Short History of Same-sex Domestic Relations Legislation**

In 1982, Quebec became the first Canadian province to offer legal benefits and protections to the committed life partners of gay men and lesbians. Berkeley, Calif. became the first U.S. municipality to do so in 1984. Since then, a hard-fought debate has erupted in the United States regarding whether same-sex marriage should be legalized. The triggers for the debate were court decisions in various U.S. jurisdictions holding that equality and fairness require state governments where these jurisdictions are located to either permit those in committed same-sex relationships to marry or create alternate legal structures that would provide them with the same rights and protections that state confers on married persons. Massachusetts has legalized same-sex marriage; in May 2008, California's Supreme Court overturned a voter-approved ban on same-sex marriage in that state.

Many states and the federal government have taken definitive steps to recognize only traditional marriages. Several states amended their constitutions via referendum to declare that a marriage is a union between a man and a woman, effectively prohibiting their legislative and judicial branches from declaring otherwise. The federal government enacted the Defense of Marriage Act (DOMA), which declares that for purposes of federal law a marriage is a union between a man and a woman. DOMA also says that under the public policy exception to the Full Faith and Credit Clause of the U.S. Constitution a state need not recognize a same-sex marriage solemnized in another state. The Government Accountability Office estimates that DOMA denies the members of committed same-sex relationships approximately 1,138 rights federal law confers on married couples,

*John J. Leonard, an attorney at Baker Hostetler LLP, provides counsel on a variety of commercial litigation matters. He can be reached at [jleonard@bakerlaw.com](mailto:jleonard@bakerlaw.com).*

including more favorable treatment than that accorded unmarried couples in the areas of taxation and immigration law.

Nine states – California, Connecticut, Hawaii, Maine, New Hampshire, New Jersey, Oregon, Vermont and Washington – and the District of Columbia have enacted laws to recognize same-sex committed relationships and families formally and provide the members of such families with many of the same rights the state confers on its married couples (see box).

**The 10 U.S. Jurisdictions That Recognize Same-sex Relationships Formally:**

- 1) California;
- 2) Connecticut;
- 3) District of Columbia;
- 4) Hawaii;
- 5) Maine;
- 6) New Hampshire;
- 7) New Jersey;
- 8) Oregon;
- 9) Vermont; and
- 10) Washington.

**Different Legal Structures**

Legislators in the 10 jurisdictions have implemented three different legal structures in an effort to provide heightened rights and protections to same-sex couples: (1) civil unions; (2) domestic partnerships; and (3) reciprocal beneficiary relationships. Each is discussed at length below, and each provides a different level of protection to the same-sex couple. Generally, civil unions provide the most complete coverage to the same-sex couple.

**Civil Unions**

Connecticut, New Hampshire, New Jersey and Vermont permit same-sex couples to enter into civil unions. A civil union generally is a union between two people of the same sex who are at least 18 years

of age, have the legal and mental capacity to enter into such a union and have no close familial relationship. Neither person may be party to another marriage, civil union or reciprocal beneficiary relationship, and neither party may be under a guardianship unless the guardian consents to the union in writing. As with marriages, a public official (judge or justice of the peace) or member of the clergy must officiate at the ceremony for it to be valid.

*History of Civil Union Legislation*

Of the four states permitting civil unions, New Jersey's and Vermont's laws were a direct response to decisions of those states' highest courts declaring that each states' constitution prohibited the denial of the rights and benefits of marriage to same-sex couples. To avoid having to permit same-sex marriage, both New Jersey and Vermont passed civil union laws that provided all of the state rights and benefits of marriage to committed same-sex couples. Vermont's law – the first of its kind – went into effect on July 1, 2000. New Jersey's law went into effect on Feb. 19, 2007.

Unlike New Jersey and Vermont, the civil union laws of Connecticut and New Hampshire were not enacted in response to judicial decisions of each state's highest court. Connecticut's law went into effect on Oct. 1, 2005; New Hampshire's on Jan. 1, 2008.

*Rights a Civil Union Confers*

The parties to a civil union enjoy the same benefits, protections and responsibilities under the state's law – statutory, regulatory, case law or common law – as marriage grants to spouses. Further, state statutes creating civil unions direct that a party to a civil union

shall be included in the definition of terms used in the state's general statutes such as "spouse," "family," "immediate family," "dependent" and "next of kin." This contrasts markedly from federal law under which a civil union member may not be considered a spouse. In addition, there are very few circumstances under which a party to a civil union will be considered a dependent under federal law.

Civil unions confer many rights on the parties to them, only some of which are of interest to businesses with employees in the affected jurisdictions (see box).

### Civil Union Rights Under State Law

Rights guaranteed to partners in a civil union under state law generally include the following, with some variation from state to state:

- family leave – partners to a civil union are entitled to take time off from work to care for the partner or the partner's child in accordance with each state's family leave law;
- bereavement leave – partners to a civil union will be entitled to take time off from a partner's death;
- workers' compensation benefits – same-sex partners are entitled to collect survivor benefits and back wages of their deceased partner;
- unemployment benefits – a person may not be disqualified from receiving unemployment benefits when relocated due to a partner's change of job;
- health insurance – civil union parties are entitled to health coverage under health plans governed under state insurance laws and when coverage is offered to spouses in a marriage;
- expanded privileges in court proceedings – as with married couples, partners to a civil union may not be compelled to testify against each other in court proceedings, and their conversations will be privileged against disclosure;
- protection from discrimination – civil union partners are protected from discrimination based on marital status;
- expanded tort claims – partners to a civil union may now have claims against a third party for wrongful death, loss of consortium and infliction of emotional distress in the death of the other partner;
- state tax exemption – although DOMA makes an employee's contributions to a health insurance plan for his/her civil union partner taxable under federal law, such contributions are exempt from state taxation.

### Other States' Recognition of Civil Unions

As discussed, a state need not recognize a same-sex marriage solemnized in another state under the U.S. Constitution's Full Faith and Credit Clause due to DOMA. Nevertheless, Connecticut and New Jersey have taken formal positions that their state laws will recognize the same-sex unions and partnerships other states create. New Jersey has taken the most liberal position in that it will recognize same-sex marriages, civil unions and domestic partnerships. Connecticut's attorney general's office has taken a formal position that the state will recognize other states' civil unions. New Hampshire and Vermont, however, have remained silent on the issue to date.

### Domestic Partnership

California, the District of Columbia, Maine, Oregon and Washington all extend same-sex couples over the age of 18 the right to register as a domestic partnership. Generally,

members of such a partnership must reside together, be jointly responsible for each other's basic living expenses and be legally able to consent to the partnership. The members of the partnership cannot be related by blood in such a way that marriage would be illegal already married or already belong to another domestic partnership. The registration of a domestic partnership requires no more than a summary filing with the state and does not require solemnization by any public or religious official.

### ***Rights Conferred***

Domestic partnerships are more limited in the rights they confer than civil unions because they do not confer on a same-sex couple all the rights guaranteed a married couple under the state's laws and do not include a domestic partner in their relational definitions. Thus, a domestic partner is only granted those rights the state legislative expressly identifies. Further, the rights the domestic partnership laws of the District of Columbia, Maine and Washington confer are significantly more limited than those California and Oregon bestow.

### ***California***

California's domestic partnership statute provides the most comprehensive rights to domestic partners. It provides all of the rights granted to civil unions described above; it also provides that a domestic partner may file for disability benefits on behalf of an incapacitated partner, and an employee may use his or her sick leave to care for a partner or partner's child.

### ***Oregon***

Oregon's domestic partnership law is less accommodating to same-sex couples than California's. The law extends rights to domestic partners concerning workers' compensation benefits, expanded standing to pursue wrongful death and emotional distress claims, a right to the deceased partner's unemployment benefits and benefits under Oregon's Family Leave Act and immunity from testifying against a partner; it also creates a privilege in communications between partners. Oregon's domestic partnership statute does not, however, guarantee such benefits as bereavement leave or health insurance coverage for non-employee partners. Rather, it leaves determinations of coverage to the express language of the policies at issue and the employer's intent.

### ***District of Columbia, Maine and Washington***

The District of Columbia, Maine and Washington all provide extremely limited protections to domestic partners that affect the private-sector workplace. None of these jurisdictions require private-sector employers to provide health insurance coverage or family leave or bereavement leave benefits to domestic partners. Similarly, none of them entitle a person to collect his or her deceased partner's workers' compensation benefits or unemployment benefits.

Only the District of Columbia and Washington give domestic partners standing to sue third parties for wrongful death, immunity from compelled testimony in court proceedings and privilege in their communications. Washington's domestic partnership statute also provides that personal injury actions a deceased domestic partner holds will accrue to the benefit of the surviving domestic partner.

## Reciprocal Beneficiaries

Hawaii recognizes reciprocal beneficiary relationships – which are legal partnerships between two people who cannot marry. Registration of a reciprocal beneficiary relationship requires nothing more than a summary filing with the state.

### **Rights Conferred**

Reciprocal beneficiaries are granted the right to receive workers' compensation survivorship benefits, standing to pursue wrongful death claims for the death of their partner, and immunity and communication privileges in the context of court proceedings. The reciprocal beneficiary relationship does not provide for health care coverage for non-employee spouses or any of the other rights provided to same-sex couples under civil unions or domestic partnership law.

## Ensuring Compliance

An employer in any of these 10 jurisdictions should take appropriate action to ensure compliance with these laws and to avoid potential litigation. Employers should review their benefits policies, employment handbooks and training manuals as well. Further, employers should educate their human resources and legal departments in the affected jurisdictions regarding the nuances of these domestic relations laws and current developments. You don't want them to be caught off-guard (see box).

### **Ensuring Compliance With New Jersey's Civil Union Law**

Events in New Jersey in 2007 demonstrate how misinterpretation or misapplication of the law can be, at the very least, a public embarrassment. According to the organization Garden State Equality, 1 out of 7 of the couples who entered into a civil union in New Jersey reported that their employers refused to recognize their civil unions, resulting in the denial to them of benefits to which they were entitled, such as health coverage. The report named three major U.S. overnight parcel services – UPS, Federal Express and DHL – as well as a number of *Fortune 500* companies as specific employers that denied the benefits.

UPS, in particular, took the position that New Jersey's civil union law did not require it to extend benefits to its employees' civil union partners because they are not considered "spouses" under the law. UPS offered such benefits to its employees' civil union partners, however, when, on July 20, 2007, Gov. Jon S. Corzine (D) issued a letter to UPS making it clear that New Jersey law required the company to provide such spousal benefits as health coverage to its employees' civil union partners.

## Avoiding Potential Litigation

It is unclear whether the law in each of the 10 jurisdictions will change significantly in the near future. Cases are pending in Connecticut and Iowa courts that challenge the exclusion of same-sex couples from the right to marry. As Connecticut already confers on same-sex couples all of the rights and benefits of marriage, it does not appear that a change of law in either jurisdiction would alter an employer's obligations in that state. There also is no indication that employment litigation has significantly increased since the statutes this chapter describes were enacted.

Given the litigious atmosphere surrounding this area of the law, however, it is certain that the scope of these laws will be tested in court. Some employers have therefore chosen to provide such benefits to their employees because the increased cost of

making the benefits available is negligible in comparison to the legal fees and costs they may incur defending their employment policies in court. Thus, private-sector employers that do not already provide the benefits discussed in this chapter to their gay and lesbian employees in these jurisdictions might also conduct a comprehensive cost analysis to determine whether it makes economic sense to offer such benefits.