



DELAWARE

EMPLOYMENT LAW LETTER

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William W. Bowser, Editor; Scott A. Holt and Adria B. Martinelli,
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Young, Conaway, Stargatt & Taylor

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EMPLOYEE BENEFITS

Delaware's civil-union law, part II: benefits under federal law

by Lauren E. Moak and Adria B. Martinelli

In last month's newsletter, we addressed some of the implications of Delaware's Civil Union and Equality Act of 2011 (CUEA), which takes effect January 1, 2012. This article addresses the ways in which the bill may or may not affect employers whose benefit structure is governed by federal law.

As a preliminary matter, it's important to recognize that the CUEA is a Delaware law, so it has limited effect on matters governed by federal law. By contrast, the definition of marriage under federal law is governed by the Defense of Marriage Act (DOMA), which defines marriage as being between a man and a woman. While the Obama administration has indicated that it believes DOMA is unconstitutional and it will no longer defend the statute in court, the law is still in effect. Consequently, for purposes of federal taxes and the Employee Retirement Income Security Act (ERISA), the definition of marriage remains limited to heterosexual relationships.

Federal employee benefits

Many employers that provide benefits to their employees are governed by ERISA, not state law. Benefits governed by ERISA include both health care and retirement benefits (e.g., health insurance, life insurance, and 401(k)s). If you are a private employer that pays for a portion of the benefits provided to your employees, chances are you're subject to ERISA. Because ERISA preempts state law, an employer that's subject to the Act

generally can't be required to provide benefits to partners in a civil union.

There's an important distinction between insured and self-insured plans, however. While self-insured plans are fully governed by ERISA, insured plans are subject to an exception that leaves them open to state insurance laws. Consequently, to the extent that Delaware's insurance code or regulations imposed by the insurance commissioner require coverage or benefits for married spouses and civil-union partners, those laws or regulations will apply to insured ERISA plans.

It's important to remember that just because you may not be *required* to provide benefits to same-sex partners doesn't mean you *can't* provide them. Many employers have determined that it is good policy to provide equal benefits to homosexual and heterosexual partners, regardless of marital status. If your business subscribes to that philosophy, there's no reason to change it now.

Taxation of employee benefits

Federal taxation of employee benefits will not be altered by the CUEA. Under federal tax law, insurance and other benefits provided to an employee's spouse are generally tax exempt. Similar benefits provided to a civil-union or domestic partner are generally not tax exempt. That will not change.

However, there is an exception to the rule. Benefits provided to a civil-union or domestic partner who is a tax dependent (*i.e.*, the partner receives more than 50% of his support from the employee) are tax exempt regardless of marital status. For example, if an employee's partner stays home to care for the couple's children and is covered under the employee's health insurance, the value of the insurance benefit to the partner is tax exempt, regardless of marital status. The exception doesn't apply to cafeteria or flexible spending plans.

Bottom line

Even if you are an employer whose benefits are governed by federal law, there is no downside to having a policy that provides equal benefits to partners joined in a civil union. Choosing *not* to, however, is not an option if you're an employer whose benefits are not covered by federal law. Given the complicated web of laws now governing this matter, you are wise to consult with employment counsel before making changes in this area.

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