



DELAWARE

EMPLOYMENT LAW LETTER

Part of your Delaware Employment Law Service

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LEGISLATION

Same-sex civil unions recognized in Delaware

by Adria B. Martinelli and Lauren E. Moak

On April 14, the Delaware House of Representatives voted in favor of Senate Bill (SB) 30, a bill that would allow same-sex civil unions in Delaware and recognize civil unions performed in other states. The bill also changes all sections of the Delaware Code that mention marriage by requiring that the word "marriage" be read to mean "marriage or civil union."

SB 30 was approved by the Delaware Senate on April 7, and Governor Jack Markell has already declared that he will sign the bill into law "as soon as a suitable time and place are arranged." The bill will go into effect on January 1, 2012.

The Act cannot alter the fact that federal law doesn't recognize civil unions. So how will the new Delaware law affect employers?

Right to employment benefits

As we have previously indicated, the most significant impact of SB 30 is likely to be on employment benefits. When the bill becomes effective on January 1, you will be required to provide partners in a civil union with the same benefits you provide to partners in a marriage. It's important to remember that SB 30 is a state law, so it will affect only other state laws. It generally won't affect federal tax treatment of employee income or benefits or employee benefits governed by federal law. It's also limited to employers that are covered by the Delaware Discrimination in Employment Act (DDEA). Consequently, if you (1) have fewer than four

employees or (2) are a religious corporation, the law won't directly affect your business.

Equality of benefits

Employers should also be aware that equality of benefits is a two-way street. Many employers previously offered employment benefits to unmarried same-sex partners but not to unmarried heterosexual partners. Now that same-sex couples have access to civil unions that are substantively identical to marriage, you may be open to claims of reverse discrimination if you offer benefits to same-sex partners who haven't entered into a civil union, but do not offer the same benefits to unmarried heterosexual partners.

You should also be careful to impose the same requirements for receiving benefits on same-sex civil union partners as you do for married partners. While it's perfectly acceptable to ask an employee to verify his marital status before extending benefits, the same requests should be made of both same-sex and heterosexual partners. If you don't require a copy of a marriage certificate to establish benefits, you shouldn't require a copy of a civil union certificate.

Discrimination protection

As we have previously reported, the DDEA already protects Delaware employees from discrimination on the basis of sexual orientation. Keep in mind that homosexual employees who have kept their sexual orientation private may now, as a result of the new law, disclose that information so their partner may enjoy benefits. Therefore, you may gain knowledge of an employee's protected class that you might not otherwise have had. You should proceed cautiously with any adverse employment actions, particularly if they follow closely on the heels of the disclosure.

Bottom line

Employers currently providing benefits to unmarried same-sex partners should review that policy and consult legal counsel in light of the new law. Also keep in mind that sexual orientation is a protected class in Delaware, and treat disclosures that may result from the new civil union law accordingly.

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