

## **LEGISLATIVE UPDATE**

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### **SAME SEX MARRIAGE UPDATE**

In a decision of great significance for New Jersey employers, the state legislature has been ordered to guarantee equal rights for same sex couples. The ruling by the New Jersey Supreme Court means employers in the state must examine and potentially adjust their employee benefits and policies to insure legal compliance. In its October 2006 decision in *Lewis v. Harris*, the New Jersey Supreme Court decided the New Jersey State Constitution "guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be made available to committed same-sex couples." The Court directed the Legislature to provide this guarantee by either amending the marriage statutes to recognize same sex marriage or enacting an appropriate statutory structure, such as civil unions, within 180 days (April 23, 2007).

The court's decision raises issues with respect to employee benefits and policies. First, The Federal Defense of Marriage Act, enacted in 1996, provides a uniform federal law definition of "spouse." The DOMA provides, in pertinent part, that the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife. Thus, regardless of the path to be taken by the New Jersey Legislature, a same sex "spouse" cannot qualify as a spouse under any federal law.

In addition, the federal Employee Retirement Income Securities Act (ERISA) preempts state law with respect to retirement plans covered by ERISA. These include defined contribution retirement plans such as 401(k) plans and profit sharing plans, defined benefit pension plans such as traditional final average pay plans and cash balance plans. Since the DOMA applies to ERISA and ERISA preempts state law, the New Jersey Supreme Court decision and any subsequent New Jersey legislation will not impact retirement plans subject to ERISA.

With respect to self insured medical plans, ERISA preempts all state mandates. This includes any requirements pertaining to type of coverage, eligibility for coverage, length of coverage, claims procedures and funding. Accordingly, the New Jersey Supreme Court ruling will not impact self insured medical plans.

However, the rules are more complicated when an employer provides medical benefits through insurance. ERISA permits a state to regulate insurance and benefits provided through insurance - an exception to the general ERISA preemption of state law referred to as the "insurance savings clause." Based on this exception, a state may mandate that an insurance policy provide certain coverages and benefits. An employer who buys the regulated insurance

policy becomes contractually bound to provide the state mandated coverages and benefits. Thus, insured plans regulated by New Jersey may require the extension of benefits to same sex partners. The employer paid cost of providing coverage for same sex partners who are not dependents under the Internal Revenue Code would be considered taxable compensation. However, the benefits received by the same sex partner through such insurance will not be taxable.

The federal Family and Medical Leave Act (FMLA) gives employees up to 12 weeks unpaid leave to care for a spouse, parent or child. Because the DOMA applies to FMLA, employees are not entitled to leave to care for a same sex partner. However, the New Jersey Family Leave Act (FLA) also provides for unpaid leave for an employee to care for a spouse. In light of the New Jersey Supreme Court decision, this leave will extend to same sex spouses. Employers would not be permitted to run such FLA leave concurrently with FMLA leave.

The Court's ruling will apply to other employee related benefits. For example, life insurance and bereavement leave are examples of benefits which will need to be offered to same sex couples on the same basis they are offered to heterosexual couples. In addition, survivor benefits under the New Jersey Workers Compensation Law will be extended to same sex partners.