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Illinois has become the sixth state in the nation to have a civil union law that provides equal spousal rights to same-sex couples. The terms of the legislation likely will apply to a wide range of state employment laws and workplace policies and procedures, and employers must take affirmative steps to comply.

Illinois Enacts Civil Union Law with Broad Implications for Employers

By Jeremy Stewart

On February 1, 2011, Illinois Governor Pat Quinn signed SB 1716, the Illinois Religious Freedom Protection and Civil Union Act (“Civil Union Act”), which will become effective on June 1, 2011. The Civil Union Act is similar to other states’ laws that summarily provide the same rights to parties to a civil union – both same and opposite-sex couples – as that of spouses. However, like other states, the law does not label these unions as “marriage.” The new law provides that a “party to a civil union” is to be included in *any definition* used in state law where the term “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote “spousal relationship,” are stated. The Civil Union Act stops short of granting same-sex couples the right to “marry;” however, it does guarantee “[a] party to a civil union . . . the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses.” In addition, while the Civil Union Act does not go into effect until June 1, 2011, it guarantees that previously unrecognized marriages, civil unions or similar legal relationships, including those of same-sex couples, that were entered into in another jurisdiction and that meet the qualifications of the Civil Union Act, shall be recognized in Illinois as a civil union.¹

Illinois will be the sixth state to currently provide equal state-level spousal rights to same-sex couples entering into domestic partnerships or civil unions, where marriage is not available to same-sex couples.² Illinois is also one of only 22 jurisdictions (21 states and the District of Columbia) that currently extend protection from employment discrimination to individuals on the basis of sexual orientation.

Health and Benefits Plans

In light of the expansive definition of the term “party to a civil union” in the Civil Union Act, the new law will provide greater benefits to parties to an Illinois civil union than are provided under federal law, which, in large part, does not grant same-sex couples who enter into civil unions or domestic partnerships the same rights and benefits as married couples.³ An immediate area of potential conflict can be found in employee benefits.

Whether an employer’s benefits plan will be affected by the Civil Union Act will be largely dependent upon whether the benefits are subject to the Employee Retirement

Income Security Act (ERISA). An employer may not be required to offer coverage for same-sex spouses or domestic partners under the Civil Union Act if the employer's health and benefits plan is subject to ERISA. Additionally, there are certain federal benefits involving taxes that an employer probably cannot offer individuals who are in same-sex civil unions or marriages as a result of the definition of marriage found in the federal Defense of Marriage Act (DOMA), including pre-tax premiums for partners, if the partner is not a qualified tax dependent. Although no court in the Seventh Circuit has been faced with a challenge to the constitutionality of DOMA, this area of the law is subject to rapid change. Indeed, in 2010, DOMA was found to be unconstitutional in two separate cases in Massachusetts.⁴

While ERISA preempts state laws that apply to an ERISA benefit plan, it does not preempt state laws that regulate insurance. Thus, insurance companies issuing policies in Illinois may now be required to offer coverage for the partners of employees who enter into a civil union in Illinois or who have previously entered into a civil union in another state. As a practical matter, Illinois employers that do not already do so should consider voluntarily extending insurance coverage to employees in civil unions and domestic partnerships to avoid potential claims arising out of such relationships, including, but not limited to, charges of discrimination based upon sexual orientation or marital status. Moreover, to the extent normal qualifying conditions are met, the Civil Union Act also will likely extend Illinois' Health Insurance Continuation Rights (mini-COBRA) to same-sex couples if the employer is not subject to Federal COBRA.

Implications of the Act

It is still too early to tell what legal challenges, if any, the Civil Union Act will face and how far reaching it will be following enactment. For example, the Illinois Family Military Leave Act (the "Military Leave Act") requires Illinois employers to provide unpaid leave to individuals if certain members of their family, including spouses, are called away on military duty. If interpreted literally, the Civil Union Act will extend the protections afforded by the Military Leave Act to couples who enter into civil unions.

In addition to determining if health and benefits plans comply with the Civil Union Act and appropriately define the term "spouse," employers should be mindful of other areas that may also be affected by the law, including, but not limited to:

- Terms and conditions of employment contracts and/or collective bargaining agreements;
- Employment tax liability, especially under state law;
- Leave of absence policies where spouse has not been defined;
- Statutory leaves such as family medical leave, leave for victims of domestic abuse, sexual assault and related crimes; and
- Other policies, such as sick leave that applies to family members' illnesses, procedures, and training.

In light of the likely broad changes the Civil Union Act will have on the laws of the State of Illinois, some of which are identified above, Illinois employers should consult an experienced employment attorney to ensure that their policies (including health and benefits plans), handbooks, and harassment training programs are in compliance with the new law.

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 Jeremy Stewart is an Associate in Littler Mendelson's Chicago office. If you would like further information, please contact your Littler attorney at 1.888. Littler, info@littler.com, or Mr. Stewart at jwstewart@littler.com.

¹ Common law marriages are expressly excluded from those legal relationships that will be recognized as a civil union in Illinois.

² Other states with such laws are: California (recognition for certain marriages performed within a specified time period), Nevada, New Jersey, Oregon, and Washington. Marriage between same-sex couples is legal in: Connecticut, Iowa, Massachusetts, New Hampshire, Vermont, and the District of Columbia.

³ The federal Defense of Marriage Act (DOMA) defines the word "marriage" as "a legal union between one man and one woman as husband and wife," and the word "spouse" refers to "a person of the opposite sex who is a husband or a wife." See 1 U.S.C. § 7.

⁴ *Gill v. Office of Personnel Management*, 699 F. Supp. 2d 374 (D. Mass. 2010); *Commonwealth of Massachusetts v. U.S. Dep't. of Health and Human Services*, 698 F. Supp. 2d 234 (D. Mass. 2010).