

New Hampshire Department of Insurance Issues Additional Guidance on Implementation of Civil Union Law

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As predicted, on December 18, 2007, the Department of Insurance (DOI) issued further guidance concerning the implementation of New Hampshire's civil union statute, which became effective on January 1, 2008. For a copy of this new advisory [click here](#).

The DOI guidance mandates that all insurers amend all policies and forms, issued after January 1, 2008, used in conjunction with the sale and issuance of insurance to comply with the civil union law. This means that generally, all policy language shall be amended to provide the same benefits to those persons joined in civil unions as are provided to those persons joined in marriage. Thus, where a policy defines a "named insured" to include a "spouse" or "husband or wife," the policy is now required to be amended to add the term "partner to a civil union." The DOI guidance also explains that all insurance contracts in force as of January 1, 2008, will be deemed to comply with the civil union law, even if the insurer has not yet amended the documents.

It is important to note that insurers are not presented with the option of offering a plan that would permit employers to opt out of providing the insurance to the partner of an employee in a legally recognized civil union. Thus, it appears that fully insured employers will not be able to purchase a plan that will give them the choice about whether or not to extend insurance benefits to the civil union partner of an employee.

To the extent that an employee wishes to purchase insurance coverage for a qualifying civil union partner, employers must remember that the employer's contributions related to the purchase of benefits for the civil union partner are taxable benefits that are included on the employee's annual Form W-2. The normal income tax withholdings (including FICA) apply to these taxable benefits. In addition, any contributions made by the employee related to the purchase of benefits for an employee's civil union partner must be treated as the equivalent of an after-tax contribution

With respect to continuation of group coverage, the DOI's guidance states that the rights conferred to a "spouse" under New Hampshire's continuation coverage law apply to all fully insured plans, regardless of size. In light of the civil union statute, this law would extend the same benefits to a civil union partner whose coverage is terminated for a qualifying event. However, federal law governing the continuation of benefits (COBRA) does not provide continuation rights to partners in a civil union.

The DOI does not address the issue of ERISA preemption as it relates to COBRA. This leaves employers who opt not to extend continuation rights to partners in a civil union in a legally vulnerable position, as they will need to be prepared to litigate the issue in the event they choose to withhold those rights on a ERISA preemption theory. Regardless of whether COBRA preempts the state law, employers are permitted to elect to provide continuation coverage. Whatever position an employer wishes to take concerning continuation coverage for civil union partners, employers should make sure that its documents and policies relating to the insurance plan clearly communicate whether the plan does (or does not) provide COBRA-type continuation rights to a civil union partner.

While these legal questions concerning ERISA preemption exist, we anticipate that insurers will be offering plans that include continuation rights to civil union partners as a standard component. This practice will likely leave employers without a real option of opting to explore ERISA preemption to avoid providing continuation coverage to civil union partners.

The DOI clarified that a civil union partner may be added to the existing plan through a special enrollment period. The special enrollment period is defined under the same terms as for an employee seeking coverage for a new spouse. See RSA 420-G:8. The DOI guidance also makes clear that New Hampshire will recognize as a civil union, civil unions or domestic partnerships entered into in Vermont, New Jersey, Oregon and Connecticut; same-sex marriages contracted into in Massachusetts; and same-sex marriages contracted in other countries so long as they comply with New Hampshire law. Domestic partnerships entered into in California, Maine, Hawaii, Washington, D.C., Washington, and Canada must be evaluated on a case-by-case basis to ensure that they comply with New Hampshire's civil union law.

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