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New Jersey enacts legislation providing state family medical leave to employees in a civil union as well as prohibiting discrimination on the basis of civil union status, gender identity and gender expression.

## East Coast Edition

*A Littler Mendelson East Coast-specific Newsletter*

### New Jersey Extends Statutory Rights and Protections to Civil Union Partners and Prohibits Discrimination on the Basis of Gender Identity or Expression

*By David I. Rosen and Steven J. Friedman*

On October 25, 2006, the New Jersey Supreme Court, in its landmark decision in *Lewis v. Harris*, 188 N.J. 415, ruled that the equal protection guarantee of the state constitution was violated because committed same-sex couples were denied the same rights and benefits accorded to their married heterosexual counterparts. The court held that the State could fulfill that constitutional requirement in one of two ways: either by amending the marriage statutes to include same-sex couples or by enacting a parallel statutory structure by another name, in which same-sex couples would not only enjoy the rights and benefits, but also bear the burdens and obligations, of civil marriage.

The New Jersey Legislature has responded to the court's mandate by enacting sweeping civil union legislation which, among other things, extends employment discrimination protections and statutory leave rights to civil union partners by amending the New Jersey Law Against Discrimination (LAD) and the New Jersey Family Leave Act (NJFLA). The new law takes effect on February 19, 2007.

Independently, the New Jersey Legislature has amended LAD by prohibiting discrimination against persons on the basis of their gender identity or expression. Those statutory amendments take effect on June 17, 2007.

#### The Civil Union Law

Under the new law, a "civil union" means a legally recognized union of two eligible individuals. In New Jersey, same-sex couples will be permitted to form a civil union by following virtually the same formalities as mandated for State-approved marriages between heterosexual couples, namely, by

obtaining a civil union license from an authorized licensing officer, and arranging for the civil union to be solemnized by a judge, government official, or member of the clergy. The new law also specifies that a civil union relationship entered into outside of the State of New Jersey, which is valid under the laws of the jurisdiction under which the civil union relationship was created, will be valid in New Jersey.

LAD currently forbids employment discrimination on the basis of marital status, among other legally-protected characteristics. Under the new legislation, LAD will be amended to prohibit employment discrimination on the additional basis of "civil union status."

Currently, under the New Jersey Family Leave Act (NJFLA), an eligible employee may take up to 12 weeks of leave within a 24-month period to care for a "family member" who is suffering from a "serious health condition." "Family member" is defined by the NJFLA to mean a child, parent, or spouse. The new legislation will amend the NJFLA by expanding the definition of "family member" to include "one partner in a civil union couple."

The new law offers other protections and rights to civil union partners. Causes of action for loss of consortium, emotional distress, or other torts or actions under contracts, which currently are dependent on spousal status and from time to time are joined with wrongful dismissal and/or LAD discrimination claims, will now be pursuable on the basis of civil union status. Further, workers' compensation benefits, including survivors' benefits and payment of back wages, will now be available to civil union couples in the same manner as they currently apply to spouses.

The new law also provides that all New Jersey laws relating to insurance, health and pension benefits shall, to the extent they apply to spouses, apply in a like manner to civil union couples.

## New Gender Identity or Expression Discrimination Protection

Separate from the new civil union law, LAD has been amended to proscribe employment discrimination on the basis of “gender identity or expression.” For purposes of LAD, the term “gender identity or expression” means “having or being perceived as having a gender-related identity or expression whether or not stereotypically associated with a person’s assigned sex at birth.” Although the amendment to LAD states that nothing in LAD shall “affect the ability of an employer to require employees to adhere to reasonable workplace appearance, grooming and dress standards not precluded by other provisions of State or federal law,” the amendment further provides that an employer “shall allow an employee to appear, groom and dress consistent with the employee’s gender identity or expression.”

## Impact of Federal Defense of Marriage Act

Under the federal Defense of Marriage Act (“DOMA”), the word “spouse” refers solely to a person of the opposite sex who is a husband or a wife. Because of the definition of “spouse” in DOMA, leave under the federal Family and Medical Leave Act (FMLA) to care for a seriously ill spouse need only be granted to an employee who seeks to care for his/her wife or husband of the opposite sex. The amended NJFLA, however, may provide family leave rights to partners of civil unions that they would otherwise be ineligible to receive under the FMLA.

DOMA also exempts states from being forced to recognize same-sex marriages from other states. As a result, within those states that prohibit recognition of same-sex marriages, benefits in those states will not be extended to couples who have entered into a civil union under New Jersey law, and employers most likely will be able to legally deny employment benefits to such individuals provided they are employed outside of New Jersey.

## Employee Benefit Plan Considerations

Many types of employee benefit plans are governed by the Employee Retirement Income Security Act (ERISA), not by state law. ERISA-governed plans need not follow state mandates to the extent that ERISA preempts a state law. Generally, ERISA preempts many state laws which relate to employee benefit plans. Accordingly, benefit plans that are governed by ERISA may not need to cover domestic partners or those joined in a civil union, irrespective of the provisions of state law. However, because states are expressly permitted under ERISA to pass legislation regulating insurance companies, the extent to which state laws such as the new civil union law may regulate insured employee benefits plans is often unclear. Accordingly, it may be necessary to wait and see how the courts interpret the interplay between the new civil union law and ERISA to determine the extent to which the new civil union law’s mandates concerning insurance, health and pension plans are preempted by ERISA.

## Recommendations

In light of these recent legislative developments, we recommend that employers conducting business or employing individuals in New Jersey take the following immediate steps:

- Personnel policies pertaining to discrimination and harassment should be updated to provide that discrimination and harassment directed towards employees on the basis of their civil union status, or their gender identity or expression status will be strictly prohibited.
- Personnel policies providing family leave pursuant to the NJFLA should be updated to provide that a partner in a civil union who otherwise meets that statute’s eligibility requirements will have the right to take leave to care for his/her seriously ill civil union partner.
- EEO and statutory leave rights training, for managers and rank-and-file staff alike, should be expanded to include these newly-enacted statutory rights and obligations. Notably, human resources personnel should be instructed that while

they may continue to deny a partner of a civil union leave under the FMLA to care for his/her seriously ill civil union partner, they must carefully evaluate a civil union partner’s entitlement to such leave under the NJFLA.

- Employers should consult with their legal counsel, health insurance carriers and pension administrators to determine whether the civil union law mandates the extension of insurance and pension benefits to those employees who are partners in civil unions.

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