

New Jersey's Domestic Partnership Act Expands Rights of Same-Sex Couples

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On July 12, 2004, New Jersey's Domestic Partnership Act (DPA) went into effect, changing the legal landscape that employers and New Jersey health insurance providers must navigate with respect to employee protections and benefits. The DPA creates a body of protections for same-sex partners (and certain opposite-sex partners), and requires that insurers offer dependent health coverage to domestic partners on the same basis as such coverage is offered to married couples. The DPA does *not* mandate that private employers offer dependent health coverage to domestic partners. However, state employees in domestic partner relationships are automatically eligible to elect and receive such benefits.

The DPA also amended New Jersey's Law Against Discrimination, N.J.S.A. 10:5-12 et seq. (LAD), to prohibit discrimination against domestic partners in employment. While the DPA does not recognize "same-sex marriages," as the Supreme Court of Massachusetts has done, the DPA raises a myriad of concerns for New Jersey employers and providers of health insurance

The DPA defines a "domestic partner relationship" as one that meets the following criteria:

- (1) Both persons have a common residence and are responsible for each other's common welfare;
- (2) Both persons are jointly responsible for each other's living expenses;
- (3) Neither person is in a marriage recognized by New Jersey law;
- (4) Neither person is related to the other by blood;
- (5) Both persons are of the same sex and therefore unable to enter into marriage under New Jersey law, or are of the opposite sex and are both over the age of 62;
- (6) Both persons have committed to a relationship of mutual caring;
- (7) Both persons are at least 18 years old; and
- (8) An "Affidavit of Domestic Partnership" is filed jointly with the Department of Health and Vital Statistics by the parties to the relationship.

The DPA also contains special registration and notice requirements, which are administered by New Jersey's Department of Health and Vital Statistics. When all of these requirements have been met, a "Certificate of Domestic Partnership" is issued.

Two areas of potential concern for employers stand out. First, the DPA extends the protection of the LAD to domestic partners. In other words, domestic partners cannot be treated differently than their married counterparts with respect to the terms and conditions of employment. The second area, somewhat of a lesser concern to private employers, is the Act's requirement that health insurance providers, including Health Maintenance Organizations, offer dependent health coverage to domestic partners on the same basis as such coverage is offered to spouses.

The DPA specifically prohibits discrimination against domestic partners in connection with the terms and conditions of employment (e.g., hiring, promotion, termination, etc.). In a general sense, the prohibition can be viewed as symbolic and unnecessary; as the LAD already prohibits discrimination against employees on the basis of their sex, sexual orientation or marital (or non-marital) status. Domestic partners are likely to have at least one of these protected traits. Thus, employers who have in place strong EEO policies and practices that prohibit discrimination on the basis of these characteristics should have little concern in that regard.

Where employers should be concerned, however, is with respect to their discretionary workplace policies and, in particular, policies relating to fringe benefits such as non-statutory leaves of absence (i.e., leaves not covered under the Family and Medical Leave Act or the New Jersey Family Leave Act). Such policies might include those relating to bereavement and personal leave and other policies that typically grant "spousal" benefits or are related to spouses in some fashion, such as a relocation policy. A specific example is a discretionary policy that allows an employee to take a leave of absence to care for a seriously ill "spouse" or "immediate family member," but which fails to define either term as inclusive of domestic partners. An employer who denies an employee's request for leave to care for his or her domestic partner likely will run afoul of the DPA's (and LAD's) proscription against discrimination if the employer provides such leave in other cases.

Perhaps of lesser concern to private employers is the DPA's amendments to various insurance-related laws. With its passage, the DPA now requires that providers of healthcare insurance *offer* to sell dependent health coverage to domestic partners on the same basis as such coverage is offered to married couples—both to the state and private employers. Domestic partners of state public employees are automatically deemed eligible for dependent care coverage and retiree benefits, whereas municipal and county governments may "opt-in" and provide such coverage if they elect to do so.

The legislature, however, exercised care not to overstep the bounds of its authority. Specifically, it appears that lawmakers were mindful of the preemptive scope of the federal Employee Retirement Income Security Act (ERISA), which generally prohibits states from regulating private, self-funded benefit and welfare plans. Accordingly, the DPA does not attempt to regulate private employer plans, providing that "nothing in [the Act] shall be construed to require an employer to provide dependent coverage for an employee's domestic partner." N.J.S.A. 34:11A-20(b). Moreover, employers will not be held to be in violation of the DPA or the LAD should they refuse to modify their existing benefit plans to provide coverage to domestic partners. Of course, nothing in the Act prohibits employers from extending dependent coverage to domestic partners in the same manner in which they provide coverage to spouses.

There are some very practical considerations that should be taken into account before making any plan modifications to extend benefits to domestic partners. Thus, employers should:

- Determine the status of domestic partnerships in the states where the employer has operations.
- Review all benefit plans and other relevant documents (e.g., SPDs, insurance contracts, handbooks/policy manuals) and ensure that these plans properly delineate domestic partners as being covered.
- Examine any domestic partner policies and consider whether those policies should be revised to the extent they apply to employees located in New Jersey.
- If domestic partner benefits are to be extended, consider (i) relevant tax reporting and withholding issues, (ii) whether such coverage is permitted under relevant insurance contracts, (iii) potential effects on qualified plan status, and (iv) where employees are covered by a collective bargaining agreement, whether there is a duty to bargain with the union regarding such extension of benefits.

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