

## SUMMARY OF THE NEW JERSEY CIVIL UNION LAWS

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1. **Background.** New Jersey originally enacted a Domestic Partner Act on January 12, 2004 (the "DPA"). The DPA initially required state and local governments to provide certain domestic partner benefits, but did not apply to general corporate employers and self-employed individuals. The DPA has not been repealed and some individuals may prefer to simply remain as domestic partners, where the full rights of a civil union are not desired.

The New Jersey Supreme Court in the decision of Lewis v. Harris, 188 N.J. 415, (October 25, 2006) held that the equal protection guarantee of the New Jersey State Constitution was violated by denying rights and benefits to committed **same-sex couples** which were statutorily given to heterosexual couples. The court stated that the state was required to fulfill the constitutional requirement by either amending the marriage statutes to include same-sex couples or enacting a parallel statutory structure of 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. Another alternative was to revise the New Jersey State Constitution.

Effective as of **February 19, 2007**, New Jersey has enacted a civil union statute for same sex civil union partners, as described below.

2. **Civil Union.** In order to establish a civil union in New Jersey the following actions must be satisfied:
  - a. Neither party must be in another civil union, domestic partnership or marriage in the State of New Jersey.
  - b. The parties must be of the **same sex** and therefore be excluded from the marriage laws of the State of New Jersey or any other state.
  - c. Both individuals must be **18** years of age, except where parental consent is provided for younger individuals.
  - d. Unlike States with typical domestic partner provisions (i.e., California), the New Jersey statute does **not require** the individuals to establish they are in a committed relationship through the establishment of joint bank accounts, living together for any period of time, or other joint property ownership. Only the above

requirements need be satisfied, which are minimal in nature, and the same as getting married.

If the parties meet the above requirements, they can obtain a civil union license or civil union certificate which establishes a civil union.

3. **Procedures.** Individuals seeking a civil union must pay a fee of **\$28** to obtain the civil union license. The license may not be issued for **72** hours after the application is made and is only valid for **30** days after issuance. The **\$28** fee consists of a **\$3** fee for the license, plus an additional **\$25** which is earmarked toward domestic violence shelters, and other purposes.
4. **Rights of a Civil Union.** Individuals in a civil union are entitled to all legal benefits, protections and responsibilities available to spouses, including but not limited to:
  - a. Laws relating to title, descent and distribution, survivorship, and ability to hold real and personal property as tenants by the entirety (*i.e.*, a law which only applied to married couples under which property automatically passes to the other upon death, and not their separate estates, and creditors of one party cannot attach such property).
  - b. Laws relating to insurance, health and pension benefits. This creates an interesting issue since employers with fully insured health plans in New Jersey must include civil union relationships. Under IRS Notice 2007-7, individuals can designate a domestic partner or civil union partner as the beneficiary of a retirement plan death benefit, which benefit can be rolled over to an IRA. However, naming a domestic or civil union partners as beneficiaries under a pension plan, which only provides a traditional joint and survivor annuity benefit to a surviving spouse, will not create a right for a domestic or civil union partner to a joint and survivor or preretirement survivor annuity. Federal law still does **not recognize** domestic or civil union partner relationships under the Defense of Marriage Act. Accordingly, individuals must carefully plan where federal law and state law conflict in terms of their planning.

For purposes of New Jersey employers, they must provide medical benefits for civil union partners where insured plans are maintained, and provide the same level of employer subsidy for coverage as any heterosexual couples. This law is believed to be effective as of February 19, 2007, regardless of the policy year for an insured medical or similar plan. For example, if an employer pays **80%** of the cost for employee health coverage, and **50%** of the cost for spouses, the employer must pay **50%** of the cost of medical coverage for a civil union partner. Under this scenario, the value of the benefit the employer is subsidizing for the civil union partner will be **“imputed”** into an employee’s income for purposes of federal income taxes. The employee portion of any cost must also be paid with after-tax dollars, and may not be paid on a pre-tax basis under a Section 125 or Flexible Benefits Plan. However, New Jersey has stated that it will not tax the

imputed income for New Jersey income tax purposes. Thus, imputed income will be subject to federal, FICA and certain taxes, but exempt from New Jersey income, state unemployment and other state payroll-related taxes. This follows the “California” model, which does not tax imputed income on a state level, even though it is taxed on a federal level.

- c. Advanced directives for healthcare and designation as a healthcare representative.
  - d. Family leave benefits are available to civil union partners. Once again, it would appear that an employee can take New Jersey Family Leave to care for a civil union partner. However, an employee would not be able to take federal leave for purposes of a civil union partner. The unique differences between New Jersey and federal leave must therefore be examined.
  - e. Laws relating to taxes imposed by the State of New Jersey or a municipality other than estate taxes, including but not limited to homestead rebate tax allowances, tax deductions based upon marital status or exemptions from realty transfer tax based on marital status.
  - f. The home ownership rights of a surviving spouse.
  - g. State pay for military service.
  - h. Legal requirements for assignment of wages. Accordingly, an employer could be required to attach the wages of an employee in order to pay benefits to a civil union partner.
  - i. Laws relating to tuition assistance for higher education for surviving spouses or children.
  - j. The statute identifies many other areas in which rights are given to civil union partners. However, they are not relevant for purposes of employers and employee benefit and employment matters in general.
5. **Dissolution of Civil Unions.** Civil union partners receive the same benefits as spouses, and also receive the corresponding obligations. Accordingly, upon the dissolution of a civil union the same procedures apply to subject civil union partners to the laws of annulment, premarital agreements, separation, divorce, child support, property division and maintenance, and post-relationship spousal support. It should be noted that premarital or pre-civil union agreements may not adversely affect the rights of child support and are only enforceable under certain terms, including the agreement being voluntarily entered into, the parties providing full and fair disclosure of earnings, property and financial obligations, voluntarily and expressly waiving any right to disclosure of property or financial obligations, and seeking the counsel of an independent attorney, unless such rights are expressly waived **in writing**.

6. **Miscellaneous Issues.** Most large employers have been offering domestic partner benefits for several years. Additional issues to consider in connection with the new civil union law include the following:
- a. P&E recommends that any “imputed income” for civil union or domestic partner benefits be **excluded** from the definition of compensation for qualified retirement plan purposes.
  - b. Ensure that the recordkeepers and/or actuaries for any qualified retirement plans are aware of any changes in the definition of compensation to administer all retirement programs in accordance with the terms of the applicable plan documents.
  - c. To the extent domestic partner benefits are provided outside the scope of a fully insured plan in the State of New Jersey, employers must give consideration as to whether or not COBRA rights will be provided. Federal law does not require COBRA rights to be extended to civil union or domestic partners.
  - d. Fully insured plans outside of New Jersey with employees in New Jersey must give consideration to offering optional civil union coverage for New Jersey employees.
  - e. Employers and payroll companies must ensure that any employer subsidy for civil union or domestic partner benefits are properly imputed into the income of an employee for federal income, FICA and FUTA taxes.
  - f. Employers and payroll companies should **exclude** the imputed income for purposes of New Jersey taxation.
  - g. Determine whether or not any Section 125 and/or underlying insurance contracts, permit changes to be made mid-year in order to elect civil union or domestic partner benefits. A civil union in May, 2007 will not be a qualifying event under Section 125 of the Code. However, an insured plan in New Jersey **will** permit an election change mid-year. As long as the employee cost for a civil union partner is paid with **after-tax** dollars, no violation of federal law will occur.
  - h. Confirm that employee contributions for civil union or domestic partner benefits are paid for with **after-tax** payroll deductions, and not on a pre-tax basis.
  - i. To the extent any nonqualified retirement programs exist, as typically exist for senior executives, the definitions of compensation must similarly be reviewed.
7. **Conclusion.** We hope this Summary is helpful in reviewing the basic rules regarding the New Jersey civil union statute and related domestic partner benefit issues. If we may be of assistance with regard to any other employee benefit or employment-related matters, please do not hesitate to contact us.

This Summary was prepared by the Law Firm of Palmieri & Eisenberg, located in Princeton, New Jersey, for clients and associates of the Firm. This Summary is being provided to help educate clients and employers regarding these new rules. P&E is **not** providing any legal advice to any employers to whom this Summary is provided, as a courtesy. Employers are strongly encouraged to work with their own legal counsel in reviewing these important issues.

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