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Civil Unions and Employee Benefits

Lewis set in motion an inevitable collision between New Jersey law and federal statutes

The New Jersey Supreme Court's holding in *Lewis* set in motion an inevitable collision between New Jersey law and several federal statutes, chief among them the Internal Revenue Code (Code) and the Employee Retirement Income Security Act of 1974 (ERISA). *Lewis v. Harris*, 188 N.J. 415 (2006). The Court held that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee" of the New Jersey Constitution and directed the Legislature to provide a remedy.

In his majority opinion, Justice Barry Albin notes that under N.J.S.A. 34:11A-20(b) (enacted by § 57 of the DPA), "an employer is not required to provide health insurance coverage for an employee's domestic partner." He failed, however, to note that §§ 47-56 of the DPA required any insurance plan, policy, or contract delivered, executed, or renewed in New Jersey on or after the effective date of the DPA that provides health benefit coverage to dependents to offer the same coverage to domestic partners. Since most people receive their medical benefits through such insurance contracts, there is not the

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dearth of health coverage of domestic partners that Justice Albin's statement would suggest.

On Dec. 21, 2006, Governor Jon Corzine signed into law a bill, effective Feb. 19, 2007, that authorizes persons of the same sex to form civil unions, § 4(a) of which provides, in N.J.S.A. 37:1-31(a), that:

Civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.

One benefit stated in N.J.S.A. 37:1-32, enacted by § 5 of the act, refers to "laws relating to insurance, health, and pension benefits." Conspicuous by their absence from the act, however, are provisions similar to §§ 47-56 of the DPA and to N.J.S.A. 34:11A-20(c), which provides that the failure of an employer to accord to domestic partners the same health care coverage accorded to married persons shall be not deemed to be unlawful discrimination under the New Jersey Law Against Discrimination, which § 88 of the act amended to prohibit discrimination based upon civil union status. Since N.J.S.A. 26:8A-4.1, enacted by § 91 of the act, precludes the

further formation of domestic partnerships by persons of the same sex and clearly contemplates that those now in domestic partnerships will form civil unions, these differences between the DPA and the act call for a "reality check" as to the reason for their inclusion in the DPA and the effect of their omission in the act.

There is a logical explanation for the apparent inconsistency between the inclusionary insurance provisions of the DPA and the exclusionary provisions of N.J.S.A. 34:11A-20. It lies in § 514 of ERISA, which broadly and expressly pre-empts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in § 4(a) and not exempt under § 4(b)." It is subject to an exception, in § 514(b)(2)(A), for "any law of any State which regulates insurance, banking, or securities," which, as applied to laws regulating insurance, is generally referred to as the "insurance saving clause," and, in turn, is subject to its own exception in § 514(b)(2)(B), usually referred to as the "deemer clause":

Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b)...nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer...or to be engaged in the business of

insurance ...for purposes of any law of any State purporting to regulate insurance companies [or] insurance contracts....

In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985), the U.S. Supreme Court recognized and accepted that the combination of the insurance saving clause and the deemer clause “results in a distinction between insured and uninsured plans, leaving the former open to indirect [state] regulation while the latter are not.” It can hardly be doubted that the DPA’s treatment of health benefits was prompted by the Legislature’s knowledge that, had it attempted to impose directly upon employers with self-insured medical benefit plans a requirement to afford coverage to domestic partners of their employees, its action would have been pre-empted by ERISA, as have laws adopted by two cities — San Francisco and New York — that would have required employers with plans subject to ERISA to grant health benefits to same-sex partners of employees entitled to such benefits. *Air Transport Ass’n of America v. City & County of San Francisco*, 992 F.Supp. 1149, 1165-80 (N.D. Cal. 1998), *aff’d in part and remanded in part on other grounds*, 266 F.3d 1064 (9th Cir. 2001) (the ERISA holding was not appealed); *In the Matter of Council of the City v. Bloomberg*, 6 N.Y.3d 380, 393-95, 846 N.E.2d 433 (2006). That this requirement is imposed through the anti-discrimination provisions of the LAD does not make it any less subject to ERISA pre-emption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Given its direct and intended application to employee benefits plan, virtually all of which are subject to ERISA, the act raises serious questions as to its validity and enforceability as to such plans.

While ERISA pre-emption precludes states from requiring employers with plans subject to ERISA to grant benefits in their ERISA-subject employee benefit plans other than through their regulation of insurance contracts purchased by such plans, nothing in ERISA precludes an employer with a self-insured health plan from voluntarily offering benefits to its employees’ same-sex partners, as some employers have

done. However, this does not assure that those employees will necessarily enjoy equally with their married heterosexual co-workers the benefits conferred upon them, and not because of anything their employer can control. It is, rather, a result of two federal statutes, the first being the Internal Revenue Code, § 105(a) of which provides that “amounts received by an employee through accident or health insurance for personal injuries or sickness shall be included in gross income of the employee to the extent such amounts (1) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (2) are paid by the employer.” To this, § 105(b) provides a limited exception for “amounts...incurred...for the medical care ...of the taxpayer, his spouse, and his dependents.”

For many years, the marital status of individuals as determined under state law was recognized for federal income tax purposes. That changed in 1996 with the Defense of Marriage Act (DOMA), which provides that: “In determining the meaning of any Act of Congress...the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or wife.”

Thus, under DOMA, no party to a same-sex relationship, whatever called by state law, can be considered the spouse of the other party under any act of Congress. Therefore, if the employer of one member of a civil union couple provides benefits to pay medical expenses of the other member, whether voluntarily or otherwise, the exclusion from gross income provided by § 105(b) is inapplicable and the employer’s payment of the benefit will result in tax to the employee unless the employee’s same-sex partner can qualify as his dependent. Although a nonspouse who “has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household” may be a “qualifying relative,” he or she will be a “dependent” of another only if the other provides over one-half of his or her support for the calendar year. Code §§ 152(d)(2)(H) and (d)(1)(C).

The act also raise issues under the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA),

which is incorporated in both ERISA and the Code and requires most employer-sponsored group health plans to provide for continuation coverage to “qualified beneficiaries, including a covered employee’s spouse.” ERISA § 607(3)(A). Thus, DOMA precludes any requirement for granting COBRA continuation coverage to a member of a same-sex union, even one accorded dependent status as a qualifying relative.

COBRA itself contains no independent pre-emption provision. However, § 514 of ERISA would apply to a plan subject to ERISA, permitting states to impose their own additional continuation coverage requirements upon an insured plan, but not upon a self-insured one.

Issues of benefit equality also arise under employee pension benefit plans, whether qualified under the Code or nonqualified under ERISA. Insofar as a pension plan participant may make anyone a beneficiary under a plan as of right, it obviously should not matter why he does so. Under DOMA, however, the requirement that a qualified joint and survivor annuity form of benefit and a qualified preretirement survivor annuity form of benefit be provided by a married participant for the benefit of his spouse unless the spouse waives it in writing would not apply to the participant’s civil union partner. Code §§ 401(c)(11) and 417(a) and ERISA § 205(a). Neither would the exception to the otherwise strict prohibition of the assignment or alienation of pension benefits in the case of a qualified domestic relations order (QDRO), which applies only to a spouse, former spouse, child or other dependent of a participant. Code § 401(a)(13)(B) and ERISA § 206(d)(3).

The conclusions to be drawn from the foregoing analysis may be summarized succinctly: ERISA pre-emption permits the state to mandate coverage of New Jersey civil unions in group health plans subject to ERISA in which the benefits are paid under insurance contracts subject to regulation by the New Jersey Department of Banking and Insurance. Where the DPA did this for domestic partnerships by specific insurance law amendments, the act purports to do this, if at all, only in general terms lacking provisions for their implementation. However, any attempt by the state to require coverage of civil unions by

employers maintaining self-insured ERISA-subject group health plans, as the LAD amendments in the act purports to do, in contrast to the express disavowal of any such intent by the DPA, would appear inconsistent with ERISA preemption and, as such, unenforceable.

Assuming an employer, whether through permissible state insurance requirement or voluntarily, provides

health benefits to civil union partners of its employees, those employees will, in most cases, be subject to tax on the benefits confirmed upon their partners. As to benefits under either a qualified or nonqualified ERISA-subject retirement plan, civil union partners will not be entitled to either the benefit protection or the rights under a QDRO that the spouse in a heterosexual marriage can enjoy.

These results cannot be altered by any State or employer action and will persist unless and until Congress either amends the Internal Revenue Code to broaden the scope of the definition of "spouse" or repeals DOMA, or a final decision, presumably of the United States Supreme Court, holds the relevant provisions of either violative of the United States Constitution. ■