

# CLIENT ALERTS

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## NEW JERSEY EXTENDS EQUAL RIGHTS TO SAME-SEX COUPLES

In October 2006, the New Jersey Supreme Court ruled that the New Jersey Constitution “guarantees that every statutory right and benefit conferred to heterosexual couples through civil marriage must be available to committed same-sex couples.” One impact of this decision is that, to the extent that any employer-sponsored benefits are governed by New Jersey law and are offered to opposite-sex married couples, such benefits may also have to be provided to same-sex couples.

The Court ruled that the New Jersey Legislature must enact legislation that either includes same-sex couples in the definition of marriage or establishes an equivalent form of civil union for same-sex couples. Until the Legislature takes action, it cannot be determined precisely how this ruling will impact an employer’s benefit plans and policies.

Nevertheless, certain conclusions can be reached. Employment policies that grant spousal benefits not governed by federal law (e.g., bereavement leave) will need to be expanded to provide the same rights for same-sex couples. Other policies that are impacted by both federal and state law (e.g., family and medical leave) will become more complicated to administer as different rules may apply to the definition of “spouse.” Policies and plans governed by ERISA must be reviewed with an eye toward whether ERISA will preempt the ruling in *Lewis v. Harris* and the resulting impact on the benefits offered under those plans.

### LEWIS V. HARRIS

In *Lewis v. Harris*, the New Jersey Supreme Court considered the claims of seven same-sex couples that, after being denied marriage licenses, challenged the constitutionality of New Jersey’s marriage laws. The Court stated that the New Jersey Constitution has been interpreted to “embrace the fundamental guarantee of equal protection,” and that this protection is implicated by the distinctions in New Jersey law between heterosexual and same-sex couples. In applying its equal protection analysis, the Court stated that New Jersey laws must “apply evenhandedly to similarly-situated people” unless those laws utilize distinctions that bear a substantial relationship to legitimate government interests.

The Court then found that no such interest existed in regard to same-sex marriage because (i) New Jersey law recognizes a right to the equal treatment of homosexuals, (ii) New Jersey's failure to recognize same-sex marriage deprives same-sex couples of a variety of important benefits, and (iii) there is no "legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples." For this reason, the Court stated:

We now hold that under the equal protection guarantee of Article I, Paragraph 1 of the New Jersey Constitution, committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples.

The Court ruled that the New Jersey Legislature has 180 days to enact legislation that either includes same-sex couples in the definition of marriage, or establishes a parallel (but equal) form of civil union for same-sex couples. At this time it is unclear which path the legislature will choose. Accordingly, the full impact of *Lewis* may not be clear for some time.

## THE DEFENSE OF MARRIAGE ACT

The New Jersey Supreme Court's ruling in *Lewis v. Harris* stands in stark contrast to federal law, as set forth in the Defense of Marriage Act ("DOMA"). DOMA states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, 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 a wife.

Thus, unlike New Jersey state law, federal law provides that the union of any same-sex partners cannot be considered "marriage."

Notably, federal law does not prohibit employers from extending certain benefits (most commonly group health plan coverage) to employees' domestic partners. However, DOMA prevents such benefits from receiving the tax-free status that applies to the benefits of opposite-sex spouses. As such, the value of domestic partner group health coverage is taxable income to the employee.

## ERISA PLANS

The application of the *Lewis* decision to employee benefit plans varies depending on the type of benefit plan being considered (e.g., pension plan vs. welfare plan; insured vs. self-insured). In the context of employee benefit plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), employers should also be aware that this ruling may be preempted.

In general, ERISA supersedes any state law relating to employee benefit plans. However, ERISA's "savings clause" provides that ERISA does not preempt any state laws relating to insurance. Thus, employee welfare benefit plans that offer coverage through insurance are subject to state regulation, while those that are self-insured are not.

In light of ERISA's preemption of state law, combined with the definition of "marriage" stated in DOMA, it would seem that same-sex spouses or partners do not have to be accorded spousal rights under ERISA pension plans (including qualified defined benefit and defined contributions plans). That said, the extent to which ERISA benefit plans will be subject to the new rules for same-sex partners could take years to play out in the courts.

Employers should, however, make certain that their ERISA plans explicitly state whether benefits will be provided to same-sex partners. To the extent that ERISA plans use terms such as "spouse" or "married," such terms may be construed as ambiguous. In such cases, it is unclear whether New Jersey courts will define those terms in accordance with DOMA or pursuant to state law (as defined by *Lewis*).

## **COBRA RIGHTS**

The Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA"), requires employers with 20 or more employees to offer employees the right to temporarily continue their health coverage, as well as the coverage of the employee's covered spouse and dependents, at group rates. COBRA is a federal law that must be interpreted in accordance with DOMA. Thus, same-sex partners are not considered "spouses" for COBRA purposes, and thus have no right to continuation coverage under that statute.

Notably, New Jersey has a "mini-COBRA" law (requiring small employers to provide continuation coverage to employees and their "spouses"), which will now be interpreted in accordance with *Lewis*.

## **Family & Medical Leave**

The federal Family and Medical Leave Act ("FMLA"), which provides an employee with up to 12 weeks of unpaid leave to care for a spouse, must be interpreted in accordance with DOMA. Thus, that statute does not give employees the right to take leave to care for a same-sex partner.

Conversely, the New Jersey Family Leave Act ("NJFLA"), which also provides leave to care for a spouse, must be interpreted in accordance with *Lewis*. Accordingly, pursuant to the NJFLA, most employees in the state of New Jersey will have the right to take leave to care for a same-sex spouse.

Employers should be aware that employees who take NJFLA leave to care for a same-sex spouse cannot simultaneously be charged with taking FMLA leave (since the FMLA does not cover such a circumstance). Accordingly, an employee who takes NJFLA leave to care for a same-sex spouse may still be eligible for up to 12 weeks of FMLA leave (for a different reason) upon his or her return.

## **Other Conditions of Employment**

Many employers provide their employees with benefits (such as life insurance), the substance of which are governed exclusively by state law. Such benefits fall squarely under the New Jersey Supreme Court's ruling in *Lewis*. Accordingly, to the extent such benefits are offered to opposite-sex married couples, they must also be offered to same-sex couples who are married (or participate in whatever alternative civil union is established by the New Jersey legislature).

Other benefits accorded to opposite-sex spouses under New Jersey law must also be accorded to same-sex spouses, following *Lewis*. For example, same-sex spouses are now entitled to the same survivor benefits provided to opposite-sex spouses under the New Jersey Worker's Compensation Act. Similarly, like opposite-sex spouses, same-sex spouses can now recover the back wages owed to a deceased spouse.

In addition to benefits provided by law, employers should ensure that any policies relating to spouses (e.g., bereavement leave, employee discounts, etc.) are applied equally both to opposite-sex and same-sex spouses.

## **Auditing Practices to Ensure Compliance**

To ensure compliance with the ruling in *Lewis v. Harris* (and the corresponding scheme of federal law), New Jersey employers should:

- Verify that their ERISA-covered plans clearly state whether terms such as “spouse” or “married” cover same-sex couples;
- Contact their insurance carriers to ensure that any insurance benefits (governed by state law) that are offered to opposite-sex spouses are also offered to same-sex spouses (or same-sex partners who participate in whatever alternative civil union is established by the New Jersey legislature);
- Communicate the fact that the New Jersey Family Leave is to be given to care for same-sex spouses;
- Make certain that all benefits are being treated appropriately for tax purposes; and
- Revise any employment policies that do not apply equally to both opposite-sex and same-sex couples.

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Please feel free to contact [Carmine A. Iannaccone](#) or [Michael D. Thompson](#) in the firm's [Newark](#) office if you have any questions or comments. Mr. Iannaccone may be reached at 973-639-8271, and his e-mail address is [ciannaccone@ebglaw.com](mailto:ciannaccone@ebglaw.com). Mr. Thompson may be reached at 973-639-8282, and his e-mail address is [mdthompson@ebglaw.com](mailto:mdthompson@ebglaw.com).

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