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CHANGES IN NEW JERSEY LAW MANDATE CHANGES IN EMPLOYER PRACTICES AND POLICIES

CIVIL UNIONS NOW ACCORDED THE SAME RIGHTS AS
SPOUSES

By John H. Schmidt, Jr., Esq.

Effective February 21, 2007, New Jersey became one of only six states in the nation to enact legislation establishing Civil Unions. As the New Jersey Legislature determined in enacting this legislation, same sex couples living together in committed relationships in New Jersey should be afforded the same rights and benefits afforded to heterosexual couples who choose to marry. The New Jersey Legislature also determined that this legislation will promote stable and durable relationships by eliminating obstacles and hardships that same sex couples may face, and will reaffirm the State's obligation to insure equality for all New Jersey citizens.

Under the new law, a Civil Union is defined as a legally recognized union of two eligible persons of the same sex. The Civil Union Couple is entitled to confirm their relationship in a manner similar to, and will receive a Civil Union License as, heterosexual couples who choose to marry and receive a marriage license. Once the Civil Union is legally established, the Civil Union Couple is entitled to the same benefits, protections and responsibilities under New Jersey law as are granted to spouses in a marriage.

As a result of this new law, New Jersey employers are obligated to provide Civil Union Couples with the same employment benefits provided to married couples, except in those circumstances in which federal law would supercede state law, such as in ERISA benefit plans. For example, if an employer provides as an employee benefit, time off to get married, the employer must provide similar amounts of time off to an employee for a civil union ceremony. If an employer provides its employees with time off upon the death of a spouse, the employer is also obligated to provide its employees with time off upon the death of a civil union partner. An employer is obligated to give an employee up to 12 weeks of family leave to care for a civil union partner under the New Jersey Family Leave Act. If, however, an employer funds a pension plan for its employees that has a spousal benefit, that employer would not be legally obligated to provide a similar civil union partner benefit, because the pension plan would constitute an ERISA benefit governed by federal, and not state, law. Note that employers are not prohibited from providing equal benefits for spouses and civil union partners by amending their pension plan, they simply are not obligated to do so. (cont'd ➔)

Because of this new legislation, all employers doing business in New Jersey must review, and amend as necessary, their non-ERISA employee benefits policies to ensure that civil union partners residing in New Jersey are accorded the same benefits as those provided to spouses of employees. Similarly, employers should consider whether to amend their ERISA benefits to include identical benefits for spouses and civil union partners. Finally, New Jersey employers should review and revise any employee guidelines and handbook provisions addressing such benefits to specify that civil union partners are eligible.

It is important for employers to recognize that they should treat civil union partners the same as marital couples. In that regard, an employer should not require its employees to provide proof of a civil union, if it does not require similar proof of a marriage.

GENDER IDENTITY GAINS PROTECTED STATUS

Effective June 17, 2007, the New Jersey Law Against Discrimination was amended to prohibit discrimination against an individual based upon that person's *gender identity or expression*. As defined, 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.

This amendment to the New Jersey Law Against Discrimination codified a 2001 decision rendered by the Appellate Division of the Superior Court of New Jersey in *Enriquez v. West Jersey Health Systems*. In the *Enriquez* decision, the Court ruled that a person suffering from gender dysphoria, a recognized disorder in the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (the standard for psychiatric diagnosis) was entitled to protection from employment discrimination under the New Jersey Law Against Discrimination. The new law, however, protects a greater class of individuals than simply those suffering from gender dysphoria. Since there is no legislative history regarding this new amendment to the Law Against Discrimination, it is not particularly clear how broad the terms *gender identity or expression* will be interpreted by the courts. As one commentator on the new legislation has indicated, "Although the

amendment does not 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, employers must permit employees to appear, groom and dress consistent with the employee's gender identity or expression . . . review dress code policies to ensure compliance with the new law. Additionally, while the NJLAD provides that places of public accommodation may restrict certain facilities to members of one sex, such as restrooms and locker rooms, the new amendment mandates that individuals who express or identify themselves as members of the opposite sex must be admitted to such facilities in accordance with their gender identity or expression. Thus, restroom and locker room facilities must be accessible to such individuals, even if they have not elected to proceed with the gender reassignment surgery."¹

As stated in the commentary, New Jersey employers should immediately amend their anti-discrimination policies to prohibit discrimination based upon a person's *gender identity or expression*; replace their posted anti-discrimination policies with revised policies (policies suitable for posting can now be obtained online from the New Jersey Division on Civil Rights at www.njcivilrights.org); review and revise their dress code requirements, where necessary; and review and revise all other policies that draw distinctions between genders. For example, under the new law, an employer may be required to revise its policies to permit a transsexual male to utilize the women's locker room or women's restrooms. Finally, employers should engage in training to prevent workplace discrimination based upon an employee's *gender identity or expression*.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact John H. Schmidt, Jr. of the Labor & Employment Law Group at jschmidt@lindabury.com.

¹ *Gender Identity Gains Protection*, New Jersey Law Journal, Vol. CLXXXVIII-No. 2, April 9, 2007, by Catherine P. Wells, Esq. and Margaret Wood, Esq.

