

# EMPLOYEE BENEFITS ALERT

## REGISTERED DOMESTIC PARTNER TO BE TREATED AS A SPOUSE UNDER OREGON INSURANCE POLICIES

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October 26, 2007

*The Oregon Insurance Division has circulated a draft of a Bulletin placing insurance carriers on notice that any insurance policy issued or renewed on or after January 1, 2008 must provide coverage and benefits to a registered domestic partner under the same terms as provided to the spouse of a married employee. This Alert discusses this Bulletin and its implications to employers.*

### BACKGROUND

Oregon House Bill (HB) 2007 was signed into law earlier this year. This new law allows for a qualified same-sex couple to receive a “Certificate of Registered Domestic Partnership” from a county clerk. Upon such registration, any privilege, immunity, right or benefit granted under Oregon law to a spouse must also be granted on equivalent terms to a registered domestic partner.

The Employee Income Retirement Security Act (ERISA) generally preempts any state law that relates to employee benefits plans. HB 2007 recognizes this rule, and expressly states that the new domestic partnership law does not extend to any ERISA-governed employee benefit plan. As such, the law does not affect any **self-insured** group health or welfare plan. Nor does it apply to any retirement plan, such as a 401(k) plan.

However, while the ERISA preemption rule protects an employee benefit *plan* from state regulation, the reach of this federal law does not extend to an insurance policy forming part of that plan. As a result, a state insurance commissioner is free to dictate the terms and provisions of any insurance policy issued in its state, including an insurance policy providing benefits under an ERISA-covered employee benefit plan.

## PROPOSED OREGON INSURANCE DIVISION MANDATES

The Oregon Insurance Division recently circulated to Oregon insurance carriers a draft of a Bulletin that explains the manner in which the Division will apply HB 2007 to insurance policies issued in Oregon. A copy of the draft Bulletin is included with this Alert.

In brief, the Bulletin states that any insurance policy issued or renewed on or after January 1, 2008 which covers, or otherwise applies to, a spouse must also cover or apply to a registered domestic partner. Examples of the application of this mandate are set forth below.

- **Health Insurance Policy:** A registered domestic partner must be eligible for coverage as a dependent of an employee under the same terms as the spouse of a married employee.
- **Life Insurance Policy:** If a life insurance policy covers a spouse, or if the policy allows an employee to voluntarily elect coverage for a spouse, then a registered domestic partner must also be eligible for that life insurance coverage.

In summary, all benefits, rights and responsibilities pertaining to a spouse under any insurance policy that is issued or renewed on or after January 1, 2008, will need to be applied equally, and in the same manner, to a registered domestic partner.

## FEDERAL TAX TREATMENT

The new Oregon registered domestic partnership law does not affect the federal tax laws in any way. Under these tax laws, the value of a benefit provided by an employer to an employee is excluded from the employee's income only if the benefit covers the employee, or the spouse or IRS-qualified dependent of the employee. The IRS does not generally recognize a domestic partner as a dependent of an employee for tax purposes. The application of these federal tax rules to the coverage of a registered domestic partner under an employee benefit plan will therefore include the following.

- An employee will not be eligible to pay the cost of the premium for the coverage of the registered domestic partner under a plan on a pre-tax basis pursuant to a Section 125 cafeteria plan or "premium only plan" arrangement.
- If an employer pays for all or a part of the coverage of a spouse under a plan, it will be required to do the same in regard to a registered domestic partner. However, the value of that subsidized coverage constitutes taxable wages to the employee, and will thus be subject to federal income tax and FICA withholding.

## **IMPLICATIONS FOR PLANS THAT CURRENTLY COVER DOMESTIC PARTNERS**

Many employers currently cover domestic partners under their group health or other employee benefit plans. In these cases, however, the coverage of the domestic partner is typically conditioned upon the employee filing an "Affidavit of Domestic Partnership" certifying that all of the employer's established conditions to domestic partnership status (e.g., cohabitation for a prescribed period and joint financial commitments) have been satisfied.

However, in addition to the enactment of HB 2007, the Oregon legislature in the 2007 session also enacted Senate Bill (SB) 2. This new statute prohibits employers from discriminating on the basis of sexual orientation in regard to the terms, conditions and privileges of employment. Coverage under a benefit plan is a privilege of employment. As such, SB 2 arguably precludes an employer from requesting a copy of the Certificate of Registered Domestic Partnership, or any similar attestation pertaining to a registered domestic partner, from an employee who elects to enroll a registered domestic partner because the employer does not (presumably) request a copy of a marriage certificate as a condition for the coverage of a spouse.

## **PREPARING FOR CHANGES**

HB 2007 becomes effective on January 1, 2008. The draft of the Bulletin indicates that the Oregon Insurance Division mandate will apply to insurance policies issued, or renewed, on or after that effective date. Moreover, the open enrollment period for many employee benefit plans is quickly approaching. Accordingly, employers should now begin to prepare for implementing these significant policy changes.

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Should you have any questions regarding this new Oregon domestic partnership law as applicable to employee benefits, please contact Wally Miller of the firm's Employee Benefits Practice Group via email at [wmillers@gleaveslaw.com](mailto:wmillers@gleaveslaw.com), or by phone at (541) 686-8833.

*Our firm's Employee Benefits Alerts are intended to provide clients with general information regarding recent changes and developments in the employee benefits area. These publications do not constitute legal advice, and the reader should consult legal advice to determine how this information may apply to any specific situation.*

<p>If you are not receiving our Employee Benefits Alerts via email but would prefer such method of delivery, or you would like to have your name removed from our mailing list, please contact Karen Ory at <a href="mailto:karen.ory@gleaveslaw.com">karen.ory@gleaveslaw.com</a>.</p>
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**9/27/07**

## **Oregon Insurance Division Bulletin INS 2007-x**

**TO:** All Insurers Transacting Insurance in Oregon

**RE:** Application of HB 2007, Oregon's Domestic Partnership Legislation

The purpose of this bulletin is to guide insurers in the application of HB 2007 to the transaction and regulation of insurance in Oregon. HB 2007 (now ch. 99, Oregon Laws 2007) recognizes and authorizes domestic partnerships in Oregon. This legislation takes effect January 1, 2008. A domestic partnership is defined in section 3, ch. 99, Oregon Laws 2007 to mean "a civil contract entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable and at least one of whom is a resident of Oregon."

Section 9, ch. 99, Oregon Laws 2007 states the general scope of legal rights and responsibilities to which domestic partnerships are subject. In summary, section 9 provides that a privilege, immunity, right or benefit granted to an individual by a statute, administrative or court rule, policy, common law or any other law because of the marital relationship is granted on equivalent terms to an individual because the individual is or was in a domestic partnership or because of a specific relation between the individual and another because of the domestic partnership. In addition, Senate Bill 2 (ch. 100, Oregon Laws 2007) prohibits discrimination in providing employment benefits, public accommodations and housing, as well as in other specific situations, based upon race, religion, color, sex, national origin, sexual orientation or familial status.

The Director will apply the following principles to implement this legislation:

1. Terms and provisions in the Insurance Code and in rules adopted under the Code that refer to or indicate the marital relationship, its dissolution and dependents in a marital relationship will apply in the same manner to domestic partnerships, to their dissolution and to dependents in the partnership. These references appear in the Code and rules with respect to a class or line of insurance in some cases and in other cases in connection with the regulation of insurance generally, such as in connection with credit scoring.
2. When terms and provisions in the Insurance Code or related rules described in the preceding paragraph specifically apply to provisions in a policy form, the terms and provisions must be applied to other provisions in the policy form. The same is true with respect to a privilege, immunity, right or benefit under provisions of the Code or rules that apply to an individual by virtue of the marital relationship.
3. A policy form that is issued or renewed on or after January 1, 2008 and covers or applies to a spouse must also cover or apply and be available to an individual in a domestic partnership.
4. The legislation does not alter federal law, which confers marriage rights and privileges only to opposite-sex married couples. (See 1 U.S.C.A. sec. 7, defining marriage, under Federal Defense of Marriage Act, as a "legal union between one man and one woman.")

The following are examples of statutes and their application, and are intended to assist in the application of these principles. These examples are not intended to be inclusive or comprehensive, or to limit or restrict application of the legislation to the Code, but are intended simply as examples of the application of HB 2007 to the Insurance Code and rules.

Health insurance: Code provisions governing health benefit plans as defined in ORS 743.730 apply to a domestic partnership to the same extent that they apply to the marital relationship. These plans include individual and large and small group policies covering enrollees' hospital expenses, medical expenses, or both, and HMO contracts. "Enrollee" is defined in ORS 743.730 to mean, in relevant part, "an employee, dependent of the employee or an individual otherwise eligible for a group, individual or portability health benefit plan who has enrolled for coverage under the terms of the plan." Because a spouse or child of an enrollee is a "dependent" of the enrollee, it follows that under ch. 393, a person who is dependent on an enrollee under a domestic partnership is similarly a dependent.

For another example, ORS 743.405 provides that an individual health insurance policy may insure an “adult member” of a family and, upon application by the adult member, “any two or more eligible members of that family, including husband, wife, dependent children or any children under a specific age . . . and any other person dependent upon the policyholder.” This right must apply in the same way to the partner in a domestic partnership and to dependents.

Life insurance: The right of a spouse to obtain individual life insurance on the life of the other spouse under ORS 743.027 without consent of the other spouse must apply in the same way to a member of a domestic partnership. The same is true under the same statute with respect to consent to coverage under a family policy, because a family policy may be issued insuring any two or more family members upon an application signed by either parent, a stepparent, or by a husband or wife. This statute also applies to health insurance.

Property and casualty insurance: For uninsured motorist coverage, ORS 742.504 defines an “insured,” when unqualified and when applied to uninsured motorist coverage, [to mean] . . . The named insured as stated in the policy and any person designated as named insured in the schedule and, while residents of the same household, the spouse of any named insured and relatives of either, provided that . . . if the named insured . . . is other than an individual or husband and wife who are residents of the same household, the named insured shall be only a person so designated in the schedule . . . .” “Insured” in this definition must apply to the domestic partner of a named insured and to relatives of either the named insured or partner in the same manner that the term applies to the spouse of a named insured and the relatives of either.

For the purpose of personal injury protection, ORS 742.520 requires that the benefits apply to the person insured under the policy and, in relevant part, to members of that person’s family residing in the same household. The references in this statute to members of a “family” apply in the same way to family members in a domestic partnership. The forms in this and the preceding examples must use the terms and definitions consistently throughout the policy.

In response to questions regarding application of the legislation to commercially insured ERISA plans, the Insurance Division must carry out its authority under the Insurance Code without distinction between commercial insurance plans sold to employers subject to ERISA and commercial insurance plans sold to employers not subject to ERISA. Commercially insured employee benefit plans that are currently subject to state regulation remain subject to the Insurance Code. Consequently, the exception in section 9(7), ch. 99, Oregon Laws 2007 does not include commercially insured ERISA plans that are subject to the Insurance Code.

In summary: A policy form that is issued or renewed on or after January 1, 2008 and covers or applies to a spouse must also cover or apply to members of a domestic partnership. For example, a group life insurance policy that allows a covered employee to elect to buy life insurance or coverage for the employee’s spouse must allow an employee with a domestic partner to purchase coverage for the partner. Similarly, with respect to coverages, benefits, coverage discounts, credit reviews and other rights and responsibilities under any insurance policy, terms in the policy that refer to or indicate the marital relationship, dissolution of the marital relationship and dependents in a marital relationship must apply in the same manner to domestic partnerships, to their dissolution and to dependents of the individuals in the partnership.

This bulletin is dated \_\_\_\_\_, 2007 at Salem, Oregon.

\_\_\_\_\_(Signed)\_\_\_\_\_  
Carl N. Lundberg, Acting Oregon Insurance Administrator