New California Laws Affect Domestic Partnerships

Insights
12.10.04

Next month, two new laws will go into effect in California that are likely to have a significant impact on how employers enforce personnel policies and administer employee benefits which apply to spouses. Effective January 1, 2005, the laws will cover members of same-sex unions, and qualifying older, but unmarried, heterosexual couples.

Overview Of The Laws

California Domestic Partner Rights And Responsibilities Act of 2003 (DPRRA)
DPRRA is a far-reaching law designed to grant registered domestic partners the same rights, benefits, duties and responsibilities as spouses under California law. That means, for example, that community property laws that apply to married couples will also apply to registered domestic partners. The presumption that a child born to a married couple is the legal child of both parents will also apply to a child of registered domestic partners. Domestic partners will be required to use the court system to obtain a divorce if they wish to dissolve their union, similar to married couples.

The employment aspects of this law are also significant. To the extent California employers maintain personnel policies that benefit an employee's spouse, such policies must (with limited exceptions) also extend to an employee's registered domestic partner. For instance, the California Family Rights Act (CFRA) currently allows qualified employees to take up to 12 weeks of unpaid leave to care for the serious health condition of a spouse, or for the birth of a child. Under the DPRRA, an employee will be entitled to take CFRA leave to care for the serious health condition of a registered domestic partner, or for the birth of a domestic partner's child. Similarly, if your company offers bereavement leave for the deaths of an employee's spouse's immediate family members, then an employee will be entitled to bereavement leave for the deaths of a registered domestic partner's immediate family members.

California Insurance Equality Act (IEA)
The IEA impacts California employers indirectly by requiring HMOs and health insurers to provide equal coverage under all policies to spouses and registered domestic partners of covered employees. Existing law already requires HMOs and health insurers to offer policies that provide equal coverage to spouses and registered domestic partners. But the old law did not require California employers to make such coverage available to employees under their HMO and insured health plans.

The IEA will require HMOs and health insurers to *provide* (rather than simply *offer*) equal coverage to spouses and registered domestic partners. In effect, the IEA indirectly requires California employers to make such coverage available to employees under their HMO and insured health plans by limiting the HMO and health insurance products that are available for purchase in California. If a California employer wishes to purchase an HMO or insured health plan policy that covers employees' spouses, such a plan must cover employees' registered domestic partners, as well. This requirement will apply to HMO and group health insurance plan policies that are issued, amended, delivered or renewed in California on or after January 2, 2005.

Accordingly, if your HMO or group health insurance plan policy renews on January 1, 2005, the new requirements will not apply until the January 1, 2006 renewal (unless the policy is amended prior to that time). The requirements of the IEA will apply to other types of insurance (such as life and disability insurance) beginning on January 1, 2005. For example, any group life insurance policy that is issued, amended, delivered or renewed in California on or after January 1, 2005 and that defines an employee's spouse as the default beneficiary will be deemed to provide that, in the absence of a spouse, the employee's registered domestic partner is the default beneficiary.

What The Laws Do Not Cover

The DPRRA and IEA do not modify federal laws such as the Family and Medical Leave Act (although the DPRRA does modify the state equivalent, the CFRA) or the Employee Retirement Income Security Act (ERISA). The DPRRA also does not affect registered domestic partners' obligations under the federal tax code. However, the juxtaposition of the DPRRA and IEA and these federal laws is likely to raise conflicting obligations. Some of the potential problem areas are addressed below.

Who Qualifies For The Laws' Protections?

California imposes specific standards for persons to qualify as registered domestic partners for purposes of the DPRRA and IEA. The DPRRA defines domestic partners as same sex couples, or couples in which one or both of the members qualify for coverage under specific provisions of the Social Security Act. Opposite sex couples cannot qualify to be registered domestic partners unless at least one member of the couple is over the age of 62.

Only domestic partners who have legally registered with the State of California will qualify for the protections of the DPRRA and IEA. California began registering domestic partners on January 1, 2000. In the first three years of the Domestic Partner Registry's existence, approximately 20,000 same sex and opposite sex couples registered for domestic partner status.

To register, the partners must file paperwork with the California Secretary of State in the form of a notarized Declaration of Domestic Partnership. Once the partners register, they receive a Certificate of Registered Domestic Partnership from the Secretary of State.

The DPRRA and IEA do not recognize same sex marriages to be valid domestic partner relationships. Nor do they recognize legal domestic partnerships formed in other states, unless that state's form of domestic partnership is "substantially equivalent" to a California domestic

state's form of domestic partnership is "substantially equivalent" to a California domestic partnership. This ambiguous standard raises the question of what types of domestic partnership arrangements will be considered "substantially equivalent" to California arrangements. Such standards have not been delineated in any statute or regulations to date.

How The Laws Will Affect You As A California Employer

The most immediate impact the laws will have on employers is likely to be in the area of leaves of absence and insurance benefits. The DPRRA will allow qualifying domestic partners to take protected family leave under CFRA, as well as any other types of leave involving spousal rights, such as bereavement leave. Since the DPRRA also extends the same presumptions concerning parenthood that apply to spouses, to registered domestic partners, employers that offer paid sick leave to their employees will have to allow employees to take up to half of that paid sick leave to care for a sick registered domestic partner or the child of a registered domestic partner. If your company is required to offer unpaid Family School Partnership Leave, then such benefits will extend to employees who are registered domestic partners as well.

The IEA affects California employers indirectly by limiting the HMO and health insurance products that are available for purchase in California. If a California employer wishes to purchase an HMO or insured health plan that covers employees' spouses, such plan will automatically cover employees' registered domestic partners as well. Because the IEA's requirements do not apply directly to California employers, they will not affect coverage under self-insured health plans sponsored by California employers. Just like any other state-law insurance mandate, the IEA's requirements may be avoided by sponsoring a self-insured health plan, rather than purchasing an HMO or insured health plan.

Potential Problem Areas

California employers may encounter potential problems with DPRRA compliance, and most of those problems arise from the potential conflicts between the DPRRA and other laws with which employers are required to comply. For instance, the DPRRA, CFRA and FMLA have the potential to conflict because FMLA does not recognize a domestic partner as a qualifying family member for leave purposes. For instance, suppose an employee takes 12 weeks of FMLA leave to care for the serious health condition of her biological child. Two months later, the employee requests a six-week leave of absence under CFRA to care for the serious health condition of a registered domestic partner. Must you grant the second leave? The answer is unclear.

The CFRA specifically states that FMLA and CFRA leave are to run concurrently; thus, at least initially, employers will probably have a good faith reason to decline such a request for CFRA leave. But at the time CFRA was enacted, the CFRA and FMLA defined eligibility requirements in similar ways. Thus, it is unclear whether and how this key change in CFRA's definitions for qualifying family members will affect the interplay of FMLA and CFRA leave. Moreover, this dichotomy in the two leave statutes could raise marital status, sexual orientation or other discrimination issues under the California Fair Employment and Housing Act (FEHA), as the DPRRA provides specifically that

registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses.

FEHA discrimination issues are also possible in other employee benefits contexts. It appears certain that any employee benefit involving spouses that is not subject to ERISA, such as the leave benefits discussed above, must provide equal benefits to registered domestic partners in order to avoid potential FEHA discrimination issues. But any employee benefit that is subject to ERISA (excluding any HMO or insured health plan that is subject to the IEA), such as self-insured group health plans and retirement plans, should not have to provide equal benefits to registered domestic partners in order to avoid potential FEHA discrimination issues. This is because ERISA has a very broad preemption provision, which generally preempts the application of state laws like the DPRRA and FEHA (other than insurance laws like the IEA) to ERISA-covered employee benefit plans.

Nonetheless, given the clear direction of California state law in favor of domestic partner equality, ERISA's preemption of the DPRRA and FEHA may be challenged in the courts. If the courts decide that ERISA does not preempt the DPRRA and FEHA, even ERISA-covered employee benefit plans may be required to provide equal benefits to registered domestic partners in order to avoid potential FEHA marital status discrimination issues. The only certainty regarding the impact of the DPRRA and IEA on California employers is that the law will continue to develop in the coming months.

This Labor Alert is not intended as a comprehensive review of every provision of these new laws, and is no substitute for specific legal advice. For more information, contact any lawyer in one of Fisher Phillips California offices.