



FOR YOUR INFORMATION

January 2007

News for School and Municipal Clients

Domestic Partnership Benefits and the Constitutional Amendment

In November 2006, the electors in the State of Wisconsin voted in favor of a constitutional amendment that provides in part that “a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.” Prior to the election, a number of government and private employers offered domestic partnership benefits, such as health and dental insurance coverage for unmarried same-sex and opposite sex couples. Many commentators suggested that the adoption of the amendment would prevent government and private employers from offering domestic partnership benefits to unmarried same-sex and opposite sex couples. However, on December 27, 2006, as one of her last official acts as Wisconsin’s Attorney General, Peg Lautenschlager issued an advisory opinion for the City of Madison stating that even with the new constitutional amendment, government and private employers may offer domestic partnership benefits to employees.

The Attorney General cited a recent Wisconsin Supreme Court decision for the rule that a constitutional provision must be construed to give effect to the intent of the legislators who framed it and the people who adopted it. In applying this rule, the Attorney General explained that the Legislature and the people did not intend to invalidate domestic partnership relationships when they voted to pass the constitutional amendment that nullified any legal status similar to marriage. The Attorney General opined that a

domestic partnership is not a legal status identical to or substantially similar to marriage.

The Attorney General explained that the Wisconsin electors could have adopted a constitutional amendment similar to the amendment that passed in Nebraska, which explicitly nullified same-sex marriage, civil unions and domestic partnerships. According to the Attorney General, it can be reasonably inferred from the absence of a reference to domestic partnerships in the Wisconsin constitutional amendment that the Legislature and the voters did not intend to invalidate domestic partnerships by adopting the amendment.

The Attorney General acknowledged that her opinion only interpreted the impact of the new amendment to the Wisconsin Constitution on the issue of domestic partnership benefits. She advised that her opinion does not comment on the validity of domestic partnership benefits under other provisions of the state or federal constitutions.

The Attorney General’s opinion is not the first word nor the final word on domestic partnership benefits in Wisconsin. Presently pending in the Wisconsin court system is *Helgestad v. DETF*, a case filed in April 2005 by six current and former state employees in order to challenge the state’s refusal to provide domestic partnership benefits to its employees. Currently, the court is resolving a procedural issue; however, a decision on the merits is expected soon.

Additionally, a number of important decisions concerning domestic partnership benefits have already been decided by courts and administrative agencies. For example, the Wisconsin Employment Relations Commission issued a declaratory ruling in 2004 that affirmed that a municipal employer and a labor organization may enter into a labor agreement that limits benefits to legal spouses and that such a proposal is a mandatory subject of bargaining.

In 2001, the Wisconsin Court of Appeals ruled on a case concerning domestic partnership benefits and collective bargaining. In *Pritchard v. Madison Metropolitan School District*, a taxpayer filed suit against the school district arguing that it was illegal for the district and the teachers union to enter into a labor agreement that provided for domestic partnership health insurance benefits. Ultimately, the court held that the broad powers granted to school boards include the power to offer health insurance to the domestic partners of school district employees.

In 1992, in *Phillips v. Wisconsin Personnel Commission*, the Wisconsin Court of Appeals considered whether a public employer's refusal to provide domestic partnership benefits violated the protections in the Wisconsin Fair Employment Act. In the end, the court concluded that the public employer's eligibility requirements for benefits applied equally to all employees regardless of sexual orientation or gender. The court also explained that it is not marital status discrimination to require marriage or the presence

of dependent children to be eligible for family health insurance coverage.

Many municipal employers currently offer domestic partnership benefits to employees. Some municipal employers are considering offering domestic partnership benefits to employees or reviewing proposals from labor organizations that include domestic partnership benefits. All of these municipal employers must consider the risks of offering such benefits at a time when the law is still developing. In particular, these municipal employers must consider the impact on a labor agreement, employment contract or policy providing for such benefits if a court or other tribunal declared domestic partnership benefits invalid or otherwise unenforceable.

Many labor agreements include language which provides that the rest of the contract remains enforceable even if one provision is deemed invalid by operation of law or by any tribunal of competent jurisdiction. Such a provision, known as a "savings clause," may call for the evaporation of the offending language when declared invalid and/or it may require that the parties negotiate a replacement provision for the evaporated provision. For a municipal employer offering domestic partnership benefits or considering adding domestic partnership benefits to a labor agreement, it is imperative that the employer also consider the contract's savings clause, if one exists, in the event that domestic partnership benefits are declared invalid.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

Michael J. Julka (608) 286-7238
William L. Fahey (608) 286-7234
David E. Rohrer (608) 286-7249

Frank C. Sutherland (608) 286-7243
Joanne Harmon Curry (608) 286-7248
Shana R. Lewis (608) 286-7202
Richard F. Verstegen (608) 286-7233

Carrie M. Benedon (608) 286-7208
Todd J. Hepler (608) 286-7160
Jennifer G. Taylor (608) 286-7244

Disclaimer: Lathrop & Clark LLP provides this material as information about legal issues and not to give legal advice. In addition, this material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Lathrop & Clark LLP recommends the use of legal counsel on specific matters.