

Oregon: State Authorizes Domestic Partnerships and Bars Sexual Orientation Bias

By Bullard Smith Jernstedt Wilson

On May 9, 2007, Gov. Kulongoski signed two bills, one creating same-sex domestic partnerships and the other prohibiting discrimination on the basis of sexual orientation, both of which are scheduled to take effect on Jan. 1, 2008.

[House Bill 2007](#), called the Oregon Family Fairness Act, permits same-sex individuals to enter into state-sanctioned domestic partnerships and be treated, for purposes of various state benefits, similar to married persons.

[Senate Bill \(S.B.\) 2](#), called the Oregon Equality Act, adds sexual orientation to the grounds on which state law prohibits discrimination in employment, housing and public accommodations.

Scope of Oregon Equality Act

S.B.2's effect on Oregon employers may vary depending on a number of factors, as follows.

Public- and private-sector employers, other than those falling within an exemption for churches, will be prohibited from discriminating on the basis of an employee's sexual orientation or the sexual orientation of a person with whom the employee associates. This will apply generally to all terms and conditions of employment. "Sexual orientation" is defined broadly to include "actual or perceived heterosexuality, homosexuality, bisexuality or gender identity."

Many private-sector employers provide benefits, such as health benefits, life and disability insurance, and pension and profit sharing plans that are subject to the federal Employee Retirement Income Security Act of 1974, as amended (ERISA). ERISA probably pre-empts any claim that some or all domestic partners must be treated like spouses under those plans (though it does not prevent employers from choosing to treat some or all domestic partners like spouses).

Many private-sector employers provide benefits that are not subject to ERISA (see list below). Those benefits probably are terms and conditions of employment that, if offered to employees' spouses, must also be offered on the same basis to employees' domestic partners. While not clear, this requirement likely applies to opposite-sex domestic partners as well as same-sex partners.

Non-ERISA benefits, which may be subject to S.B. 2, may include the following:

- Leaves of absence or paid time off, including uninsured and unfunded sick leave and disability benefits.
- Uninsured and unfunded death benefits, including burial expenses.
- Educational assistance benefits, including most scholarship programs.

- Adoption assistance benefits.
- Automobile or other property or casualty insurance.
- Commuting benefits.
- Dependent care assistance, other than on-site day care centers.
- Financial planning.
- Outplacement assistance.
- Onsite dining or athletic facilities.
- Employee stock option and stock purchase plans.
- Employee discounts or memberships, no-additional-cost services, working-condition fringe benefits and de minimis fringes.

Public-sector employers in Oregon have generally been required by the 1998 Oregon Court of Appeals decision in *Tanner v. OHSU* to treat employees' same-sex domestic partners like spouses.

- Some public-sector employers already treat employees' opposite-sex domestic partners like spouses. Public employers who do not do so may be required by S.B. 2 to do so, though that is not clear, as noted above.
- Public employers probably are not required to treat domestic partners like spouses where doing so would be inconsistent with federal law, including tax laws governing the favorable tax treatment of employee benefit plans.
- Public-sector employers that provide benefits through ERISA plans, such as multiemployer health or pension trusts do not get the benefit of ERISA pre-emption of the domestic partnership law and may have to negotiate with those trusts or their employees' collective bargaining representatives, or both, to comply with the new law.

Sexual Orientation as a Protected Class

As a result, effective Jan. 1, 2008, it will be unlawful for Oregon employers to discriminate in employment on the basis of sexual orientation. The protections will apply in all phases of the employment process, including but not limited to hiring, promotion, demotion, transfer, discipline, layoff and termination. Ahead of January, employers should review/update their policies, practices and forms. They may also want to provide training for supervisors/managers involved in the employment process, as well as including sexual orientation in anti-harassment training programs.

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