

December 2004

Domestic Partner Coverage Act Now to Postpone California's AB 2208 Until 2006

Employers can postpone the application of California's most recently enacted domestic partner coverage law, AB 2208, until 2006 by taking certain actions *on or before December 31, 2004*, as described below. Even employers already providing domestic partner coverage may want to postpone this mandatory coverage and continue the voluntary coverage being offered.

Background

AB 2208, also known as the "California Insurance Equality Act," was enacted on September 13, 2004, and generally requires insurance companies to provide insurance policies that cover registered domestic partners to the same extent they cover spouses. AB 2208 only applies to insurance policies, so self-insured health plans are not subject to its equal benefit requirements. However, if HMOs or other insured arrangements are provided as part of the employer's overall group health plan, AB 2208 is a concern. AB 2208 is a California law and will apply to policies issued in California.

Application of AB 2208 to Employers

Although it is fairly clear what AB 2208 requires from insurance companies, the obligations it imposes on employers are uncertain. In particular, AB 2208 requires insurance companies to provide equal coverage for domestic partners, but does not clearly specify if an employer must, in turn, offer such coverage to its employees.

If AB 2208 is interpreted to require employers to provide equal domestic partner benefits, it may be preempted by ERISA. In general, ERISA preempts state laws that relate to ERISA plans. There is an exception for state laws that regulate insurance. ERISA, however, provides that an insurance law that has the effect of regulating an ERISA plan will be preempted. Based on these ERISA preemption rules, it can be argued that AB 2208 is preempted to the extent it requires employers (rather than just their insurance carriers) to provide equal domestic partner coverage. Whether the pre-emption argument will prevail has yet to be determined.

Even for employers who are already providing or are willing to provide equal domestic partner benefits, AB 2208 presents certain issues. For example, AB 2208 applies to domestic partners who, among other things, are registered as domestic partners with the State of California. AB 2208, however, permits insurers to verify domestic partner status by proof of a declaration of domestic partnership filed in any state or local agency — not just the State of California. Under these terms, it is unclear whether an employer would be in violation of AB 2208 if it only accepts proof of domestic partnership registry with the State of California for coverage. Further, AB 2208 provides that if the health care plan requires proof of domestic partner registry, then the plan must also require proof of marital status.

Because of the very recent enactment of AB 2208, there is no additional guidance regarding its application. As a result, AB 2208 presents serious issues for California employers with insured health plans, including HMOs, who do not currently provide domestic partner benefits, as well as those who already provide such benefits.

Effective Date of AB 2208

AB 2208 is effective for group health insurance policies that are issued, amended, delivered, or renewed on or after January 2, 2005. With respect to other insurance policies (such as life insurance policies), AB 2208 is effective for policies that are issued, amended, delivered, or renewed on or after January 1, 2005. Accordingly, employers can postpone the uncertain application of AB 2208 (in order to make a business decision regarding domestic partner coverage or simply wait for more clear guidance) until 2006 by acting quickly.

Based on the language of AB 2208, an employer with a *calendar year policy* can postpone application of AB 2208 to its group health plans until 2006 if it makes sure that its policy is issued and delivered on or before January 1, 2005. Such an employer can postpone the application of AB 2208 to its other insurance policies, if it makes sure that such policies are issued and delivered on or before December 31, 2004.

An employer with a *non-calendar year* policy can postpone application of AB 2208 to its group health plans until 2006 if it contacts its insurer and has its current policy renewed and delivered, or a new policy issued and delivered on or before January 1, 2005. Such an employer can postpone the application of AB 2208 to its other insurance policies, if it makes sure that such policies are renewed and delivered or newly issued and delivered on or before December 31, 2004.

Please note that January 1, 2005 is a Saturday. Thus, as a practical matter the January 1, 2005 deadline for group health plan insurance policies should be treated as **Friday, December 31, 2004**. In addition, the policy must be "issued and delivered" prior to the effective date of AB 2208. Accordingly, a retroactive policy effective date alone appears to be insufficient to extend the application of AB 2208. Finally, employers should be aware that any amendments or renewal of the policy or the issuance of a new policy will automatically trigger the application of AB 2208. As such, to the extent possible, employers should ensure that they will not be required to amend their policy, unless they are in a position to address the domestic partner coverage issues of AB 2208.

Steps Employers Must Take On or Before December 31, 2004

What steps must be taken to postpone the application of AB 2208 depend on whether the employer has a calendar or non-calendar year insurance policy.

- ♦ *If the Employer has a Calendar Year Insurance Policy:* The employer must ensure that its policy is issued and delivered on or before December 31, 2004. Contact the broker or insurance company to be sure all the paperwork is completed and make it clear that the policy should be issued and delivered on time.
- ♦ *If the Employer has a Non-Calendar Year Policy:* The employer has a few options. First, the employer can determine that the current policy has been issued and delivered and have AB 2208 apply when renewal occurs in 2005. Second, the employer can negotiate with the insurance company to extend the current policy until 2006, although this may require some negotiation of rates and requires that the extension be issued and delivered on or before December 31, 2004. Third, the employer can contact its insurance carrier as soon as possible, terminate its existing policy on or before December 31, 2004, and obtain a new policy beginning on or before December 31, 2004, so long as that policy is issued and delivered on or before December 31, 2004.

For further details on California's AB 2208 and domestic partner coverages, please do not hesitate to contact your Seyfarth Shaw LLP attorney for assistance or contact any Employee Benefits attorney on the website at www.seyfarth.com.

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