906 - Update on Domestic Partner HR & Benefits Issues

Frank Westley Jackson III
Assistant General Counsel
Blue Cross Blue Shield of Michigan

Lori Meaders
Senior Attorney
Southern California Edison Company

Eric Tilles
Assistant General Counsel
Arkema Inc.

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Faculty Biographies

Lori Meaders

Lori A. Meaders is a senior attorney with Southern California Edison Company where she is responsible for employee benefits matters for SCE, its parent company Edison International and the Edison subsidiaries. Ms. Meaders is well experienced in the design, administration and compliance of qualified retirement plans and welfare plans. She has counseled plan fiduciaries of their obligations and liabilities under ERISA, and has negotiated benefits issues in numerous merger, acquisition and divestiture transactions.

With twenty-five years experience in the employee benefits field, Ms. Meaders has practiced employee benefits from multiple angles. Her experience includes serving as senior counsel at The Walt Disney Company, practicing benefits law at major California law firms, and consulting at international benefits consulting firms.

Ms. Meaders is a member of ACC's Labor and Employment Committee executive committee, co-chairing the ERISA subcommittee, and is a member the American Bar Association (Section of Taxation – Employee Benefits Committee). She was President of the Western Pension & Benefits Conference, Los Angeles Chapter, a Director for, co-chair for the WP&BC 39th Annual Meeting, and she continues to participate on the Chapter's Past Presidents' Council. She was president of the International Society of Certified Employee Benefit Specialists, Los Angeles Chapter. Ms. Meaders presently serves on the Board of Pensions for the California-Pacific Conference for The United Methodist Church.

Ms. Meaders received a B.S. from California State University, Northridge, and her J.D. from Southwestern University School of Law.

Eric Tilles

Eric Tilles is assistant general counsel and manager of ethics and compliance at Arkema Inc., where he is responsible for providing legal advice concerning all aspects of employment, labor, employee benefits, ethics and compliance, equal employment opportunity, executive compensation and immigration law, and for the day-to-day management of the company's Ethics and Compliance Program.

Mr. Tilles has been a lecturer-at-law at the University of Pennsylvania Law School where he taught Employment Discrimination Law. He is Chairman of the Delaware Valley ACC Chapter's Ethic and Compliance Committee. Prior to working at Arkema, Mr. Tilles was an associate general counsel at the University of Pennsylvania/University of Pennsylvania Health System, and an associate at the law firm of Morgan, Lewis and Bockius. He clerked for Chief Judge A. Leon Higginbotham at the United States Court of Appeals for the Third Circuit and for Senior Judge James L. Latchum in the District of Delaware.

Mr. Tilles received his B.S. from the New York State School of Industrial and Labor Relations at Cornell University and his J.D. from the University of Pennsylvania Law School.

Frank Westley Jackson III
Assistant General Counsel
Blue Cross Blue Shield of Michigan

25 Years of Domestic Partner Benefits: Update On Domestic Partner HR and Benefits Issues

ACC Annual Meeting: October 31, 2007

Presenters:

Frank Westley Jackson III
Lori Meaders
Eric Tilles

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- The panel would like to thank Hogan & Hartson LLP for the work done preparing the ACC InfoPAK, upon which this presentation is based.

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What Are Domestic Partner Benefits?

- Employer benefits offered to unmarried couples.
- First considered by the City of San Francisco in 1981.
- First implemented by the Village Voice in 1982.

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What Are Domestic Partner Benefits?

- Two broad categories:
  - Same-sex partner benefits only
  - Same-sex and opposite-sex partner benefits

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What Are Domestic Partner Benefits?

- Two broad categories:
  - **Same-sex domestic partner benefits**: The Human Rights Campaign reports that 53% of the Fortune 500 provide domestic partner benefits. A 2006 Mercer survey indicates 29% of large employers (500+ employees) provide benefits to same-sex domestic partners.
  - **Both same-sex & opposite-sex partners**: Of those large employers that offer partner health benefits, 59% offer them to same- and opposite-sex partners of employees. (Hewitt Associates, July 2005 Survey.)

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What Are Domestic Partner Benefits?

- Health and welfare plans
  - What law applies: insured vs. self-funded

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What Are Domestic Partner Benefits?

- Health and welfare plans
  - What law applies: insured vs. self-funded
- CDHPs

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What Are Domestic Partner Benefits?

- Health and welfare plans
  - What law applies: insured vs. self-funded
- CDHPs
- Cafeteria plans

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What Are Domestic Partner Benefits?

- Health and welfare plans
  - What law applies: insured vs. self-funded
- CDHPs
- Cafeteria plans
- Pension plans

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What Are Domestic Partner Benefits?

- Health and welfare plans
  - What law applies: insured vs. self-funded
- CDHPs
- Cafeteria plans
- Pension plans
- Family leave?

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Why Adopt Domestic Partner Benefits?

- Recruitment Tool
  - There is no universal health care in the US; 52% of private sector workers participate in employer-provided health care plans. (US Bureau of Labor Statistics, National Compensation Survey, March, 2006.)
- Fairness – Equal Pay for Equal Work
  - Employee benefits comprise 29% of an employee's total compensation package. (US Bureau of Labor Statistics.)

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Why Adopt Domestic Partner Benefits?

- Avoid losing talent:
  - The University of Wisconsin reported that it lost a leading nanotech researcher because the state legislature would not authorize domestic partner benefits. From 2000 through 2006, the researcher brought $3.4 million in grants to the Madison campus.

    - Milwaukee Journal Sentinel, Sept. 6, 2006

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Why Adopt Domestic Partner Benefits?

- Recognizing Diversity
  - Corporate Equality Index (Annual survey conducted by Human Rights Campaign Foundation)
- State and local anti-discrimination laws
  - Domestic partner benefits may be evidence that the employer does not harbor animus based on sexual orientation in those jurisdictions that prohibit such discrimination.

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What Law Applies?

- Defense of Marriage Act ("DOMA"):
  - *The* definition for all federal law.
  - "Marriage" means only the legal union between one and one woman as husband and wife.
  - "Spouse" refers only to a person of the opposite sex who is a husband or a wife.
  - No state is required to give full faith and credit to a same-sex marriage performed in another state.

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What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
  - Amounts Received Under Accident and Health Plans

What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
- IRC § 106
  - Contributions by Employer to Accident and Health Plans

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What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
- IRC § 106
- IRC § 152
  - Dependent Defined

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What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
- IRC § 106
- IRC § 152
- IRC § 125
  - Cafeteria Plans

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What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
- IRC § 106
- IRC § 152
- IRC § 125
- IRC § 213
  - Medical, Dental, Etc., Expenses

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What Law Applies?

- Defense of Marriage Act ("DOMA")
- IRC § 105
- IRC § 106
- IRC § 152
- IRC § 125
- IRC § 213
- IRC § 223
  - Health Savings Accounts

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What Law Applies?

- Pension Protection Act of 2006

What Law Applies?

- Pension Protection Act of 2006
- COBRA
  - ERISA §§ 601-607

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What Law Applies?

- Pension Protection Act of 2006
- COBRA
- ERISA § 514
  - Preemption

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What Law Applies?

- Pension Protection Act of 2006
- COBRA
- ERISA § 514
- ERISA § 502
  - Standing

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What Role Does State Law Play?

- State Laws
  - Anti-Discrimination
  - Mini-DOMAs
  - Insurance
  - Civil Union and Same-Sex Marriage
- Equal Benefits Ordinances (requires contractor who provides services to a state or local gov't to offer equal benefits to its employees)

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How Does It Work?

- ERISA:
  1. Permits plans to provide domestic partner benefits
  2. Preempts most state laws to the contrary
- ERISA preempts sexual orientation claim (Partners Healthcare System Inc. v. Sullivan, No. 06-11436 (D.Mass June 25, 2007))

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How Does It Work?

- It can be (federally) taxing – the "dependent" question
- State tax laws – imputed income for domestic partner benefits might qualify for exemption from state income tax

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How Does It Work?

- What state are you in?
  - California
  - Connecticut
  - DC
  - Hawaii
  - Maine
  - New Jersey
  - Vermont
  - Massachusetts
  - New Hampshire?
  - New Mexico?
  - Oregon?
  - Washington?

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State issues marriage licenses to same-sex couples (Massachusetts only, 2004)

Statewide law providing the equivalent of state-level spousal rights to same-sex couples within the state (5 states*)

- Vermont (civil unions, 2001)
- Connecticut (civil unions, 2005)
- California (domestic partnerships, 2006**)
- New Hampshire (civil unions, effective January 2008)
- New Jersey (civil unions, 2007)
- Oregon (domestic partnerships, effective January 2008)

Statewide law providing some statewide spousal rights to same-sex couples within the state (3 states and Washington, DC)

- Hawaii (reciprocal beneficiaries, 1997)
- Maine (domestic partnerships, 2004)
- Washington State (domestic partnerships, 2007)
- District of Columbia (domestic partnerships, 2002***)

** California domestic partnership law has been expanded several times, most recently in 2006.

*** The District of Columbia passed a domestic partnership law in 1992 that did not become effective until 2002, because Congress prohibited implementation of the law.

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How Does It Work?

- To require certification or not to require certification?

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Other Fascinating Issues

- HRAs
- HSAs
- COBRA
- Cafeteria plans
- Pension plan limitations

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What Will Domestic Partner Benefits Cost?

- Banks, Domestic Partner Benefits Won't Break the Bank (http://www.urban.org/url.cfm?ID=900439) and *D. Black, G. Gates, S. Sanders, and L. Taylor, Demography 37, no. 2 (2000).*

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What Will Domestic Partner Benefits Cost?

- 64% of large employers report domestic partner benefits constitute less than 1% of total benefits costs
- 88% of large employers report total costs of less than 2%

* "Benefit Programs for Domestic Partners & Same-Sex Spouses," Hewitt Associates. July 2005.

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What Will Domestic Partner Benefits Cost?

- Backlash?
  - Public Response
  - Adverse Publicity
  - Consumer Boycotts

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What Will Domestic Partner Benefits Cost?

- According to the pro-family group Christian Civic League of Maine (CCL), an amendment to Maine's Family Medical Leave Act that includes language for "domestic partners" in state statutes will now allow homosexual couples to take unpaid time-off to care for their ill partners. LD 375, sponsored by State Senator Dennis Damon of Hancock County, passed overwhelmingly in both houses of the legislature and grants up to ten weeks of unpaid leave if homosexual couples meet the definition of "domestic partners."
  - * OneNewsNow.com, June 7, 2007
- California Family Rights Act (CFRA) – Employee can take up to 12 weeks of leave to care for domestic partner; since domestic partner not recognized under FMLA, this CFRA leave does not run concurrently with FMLA.

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Sample Workplace Policies for Domestic Partner Benefits

- www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=5338&TEMPLATE=/ContentManagement/ContentDisplay.cfm

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Employee Benefits For Domestic Partners and Same Sex Spouses

Association of Corporate Counsel
1025 Connecticut Avenue NW, Suite 200, Washington, DC, 20036
ph: 202.293.4103 www.acc.com

Employee Benefits For Domestic Partners and Same Sex Spouses

April 2007

A company's decision to offer domestic partner or same sex spouse benefits can be fraught with complications. The legal landscape that governs such benefits is constantly changing as a result of on-going political battles that result in changes to statutes and state constitutions. This InfoPAKSM addresses both the types of benefits that companies may provide to domestic partners and same sex spouses and the impact of both federal and state laws on those benefits.

This material was compiled by Hogan & Hartson, LLP at the direction of Association of Corporate Counsel. For more information on Hogan & Hartson, LLP, visit their web site at www.hhlaw.com.

Authors:

Evan Miller, *Partner*, Hogan & Hartson, LLP, Washington DC
Brian L Shiker, *Associate*, Hogan & Hartson, LLP, Washington DC

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Lori Meaders, *Senior Attorney*, Southern California Edison Company

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I. Introduction

In the drive to attract and retain talented employees, many companies offer benefits to domestic partners or same sex spouses. Over fifty percent of the Fortune 500 companies currently provide some benefits to domestic partners or same sex spouses.[1] The types of benefits very widely, but they mainly include health and welfare benefits. As we will discuss below, companies are severely limited in their ability to provide pension or cafeteria plan benefits to domestic partners and same sex spouses.

A company's decision to offer domestic partner or same sex spouse benefits can be fraught with complications. The legal landscape that governs such benefits is constantly changing as a result of on-going political battles that result in changes to statutes and state constitutions. This InfoPAK℠ addresses both the types of benefits that companies may provide to domestic partners and same sex spouses and the impact of both federal and state laws on those benefits.

II. Types Of Benefit Plans For Which Companies Provide Coverage To Domestic Partners & Same Sex Spouses

A. Health Benefit Plans

The primary benefit plan for which companies provide, or consider providing, domestic partner or same sex spousal coverage is the company's group health plan for employees. These plans -- whether medical, dental, vision, or drug -- often provide coverage for the opposite sex married spouses, and many employers choose to, or their employees seek to, have coverage extended to same sex spouses or domestic partners. Group health plans tend to be either insured, in which case the employer purchases a group insurance policy from a licensed carrier and benefits are provided through the policy, or by self-insuring and retaining an outside third party to administer benefits along with acquisition of a stop-loss policy. From the standpoint of domestic partner and same sex spousal coverage issues, whether a company insures or self-insures its health benefits is important, because in the case of insurance the insurance company, and, therefore, indirectly the employer, will be subject to state insurance law, which may speak to the issue of domestic partner coverage.

1. Consumer Driven Health Plans – HRAs and HSAs

The extension of domestic partner coverage raises additional issues in connection with an increasingly popular form of health benefit known colloquially as "consumer-driven health." There are two primary forms of consumer-driven health plans -- Health Reimbursement Arrangements ("HRAs") and Health Savings Accounts ("HSAs").

B. Cafeteria Plans

As an ever-increasing percentage of companies require their employees to pay for a portion of the monthly premium charge for group health plan coverage, many companies provide group health plan coverage through so-called cafeteria plans regulated under section 125 of the Internal Revenue Code of 1986, as amended ("Code"). Section 125 of the Code allows for employee contributions to be paid on a pre-tax basis, including those contributions paid for opposite sex married spouses. Numerous other benefits are provided through cafeteria plans, including flexible spending account benefits and dependent care assistance benefits. If a company chooses to extend domestic partner coverage, or same sex spousal coverage, to its health plan and provides that plan through a cafeteria arrangement, it needs to consider the impact of the cafeteria plan provisions of the Code to that extension of benefits. Moreover, companies need to be mindful of the prohibitions against extending domestic partner and same sex partner benefits to flexible savings account and dependent care plans.

C. Pension Plans

Pension plans cover employees and former employees, and so the domestic partner issues that arise in connection with pension plans relate to the status of the domestic partner as a potential survivor beneficiary. The applicable rules here are not as complicated as they are when companies choose to extend domestic partner or same sex spousal coverage in the context of health benefit plans, but it is important for employers to understand these rules.

III. Applicable Federal Law

A. Federal DOMA

The 1996 federal statute entitled the Defense of Marriage Act ("DOMA") defines "marriage" and "spouse" for all federal law. DOMA contains two operative sections. The first section defines marriage as between one man and one woman for purposes of federal law: "In determining the meaning of any Act of Congress, or

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of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only the legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[2] Accordingly, when the terms "marriage" and "spouse" are used in ERISA, the Internal Revenue Code, or any other federal statute or rule, DOMA's definitions prohibit those terms from including domestic partners, including domestic partners whose relationship is recognized for state law purposes and spouses of same-sex marriages conducted pursuant to Massachusetts, or another state or country's law.

The second section of DOMA provides that no state will be required to give full faith and credit to a same-sex marriage performed in another state. Under this section of DOMA, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as marriage under the laws of such State, territory, possession, or tribe, or a right to claim arising from such relationship."[3] Thus, DOMA grants states the option of recognizing same sex marriages by relieving them of any federal statutory obligation to do so.

B. Federal Tax Law Governing Welfare Benefits

1. Internal Revenue Code Section 105

Generally, an employee does not include in gross income the cost of employer reimbursements for medical expenses, and for this purpose medical expenses are defined in section 105(a) of the Code, except in the case of amounts attributable to deductions allowed under section 213 (relating to medical expenses).[4] This exclusion extends to an employer's reimbursement for medical expenses for "spouses" and "dependents," as defined in section 125 of the Code. Also excluded from income are payments for the "permanent loss or loss of use of a member or function of the body, or the permanent disfigurement, of the taxpayer, his spouse, or a dependent," so long as the payments are "computed with reference to the nature of the injury without regard to the period the employee is absent from work."[5]

2. Internal Revenue Code Section 106

Generally, an employee does not include in gross income the cost of employer provided coverage under an "accident or health plan."[6] This exclusion extends to employer provided health insurance coverage for the employee's "spouse" and "dependents," as defined in section 125 of the Code: "The gross income of an employee does not include contributions which his employer makes to an accident or health plan for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152."[7]

3. Internal Revenue Code Section 152

A domestic partner or same sex spouse cannot be considered a "spouse" under the Internal Revenue Code as a result of DOMA. Therefore, health benefits for a domestic partner or same sex spouse are excludable from gross income under sections 105 and 106 of the Code, discussed above, only if the domestic partner or same sex spouse qualifies as a "dependent" under Code section 152. There are two primary requirements for a domestic partner, or a same sex spouse, to qualify as a "dependent": (1) the person must have the same principal place of abode as the taxpayer and be a member of the taxpayer's household,[8] and (2) at least half of the domestic partner's support must be provided by the employee.[9] To be sure, under Code section 152(d)(1)(B), a domestic partner or same sex spouse will not qualify as a dependent of a taxpayer if such domestic partner's or same sex spouse's income exceeds the "exemption amount" set by section 151(d), which is $2,000 or less. However, as to the exclusions in Code sections 105 and 106 for employer reimbursement of medical expenses or employer-provided "accident or health plan coverage," the "exemption amount" maximum does not apply.[10] Thus, if a domestic partner has annual income in excess of $2,000, such domestic partner will not be considered a dependent of a taxpayer for purposes of the taxpayer's federal income tax obligations. But for purposes of whether the value of employer-provided health benefits to the domestic partner of such taxpayer will be excluded from the taxpayer's income under Code sections 105 and 106, as long as the first two requirements discussed above are satisfied, such payments would be excluded because the domestic partner will be considered, for purposes of Code sections 105 and 106, to be a dependent.

It should be pointed out, however, that if the two above-mentioned requirements are satisfied, technically, a domestic partner or same sex spouse still will not be considered a "dependent" for purposes of section 152, and by extension sections 105 and 106 of the Code, if the same sex relationship "is a violation of local law."[11] However, in light of the Supreme Court's decision in Lawrence v. Texas,[12] this provision is not likely to be enforceable with respect to a local law that prohibits consensual sodomy or otherwise prohibits consensual same sex conduct. But what about state laws that merely prohibit same sex marriages? Would such a local law cause the dependent relationship to be considered, in that jurisdiction, "a violation of local law" for section 152 purposes? Here again, probably not. Such a law would not by itself prohibit or render illegal co-habitation by same sex couples. It would merely prohibit application of the legal benefits of marriage to such relationship. Thus, such laws probably would not be considered to be "in violation of local law" for section 152 purposes. Moreover, to the extent such laws were so interpreted, such a broad interpretation might well run afoul of the federal constitutional protections found in Lawrence v. Texas. The issue, however, is not free from doubt.

4. Internal Revenue Code Section 125

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A cafeteria plan is one in which employees may "choose among two or more benefits consisting of cash and qualified benefits."[13] Code section 125 provides that "no amount shall be included in the gross income of a participant in a cafeteria plan solely because, under the plan, the participant may choose among the benefits of the plan."[14] Employee salary reductions under a cafeteria plan are treated as employer contributions for purposes of sections 105 and 106. Thus, employee payments toward group health benefits, or other forms of benefits that are offered under a cafeteria plan, are excluded from taxable income. However, employee salary payments under a cafeteria plan may only be used for benefits for the employee and his spouse or dependent. Thus, employee salary payments are not allowed to be made to a cafeteria plan to cover medical expenses or the cost of coverage for a domestic partner or same sex spouse unless such domestic partner or same sex spouse is considered a "dependent" under Code section 152, as discussed above. This is because taxable benefits are not allowed under a cafeteria plan.[15]

5. Internal Revenue Code Section 213

This section allows for the deduction of expenses paid during the taxable year, not compensated for by insurance or otherwise, for medical care of the taxpayer, his spouse, and his dependents, to the extent that such expenses exceed 7.5% of adjusted gross income.[16] Therefore, only if the domestic partner is considered a dependent under section 152, will a deduction be allowed for "medical care expenses." In determining if the domestic partner is a dependent for allowing a deduction under section 213, section 152(d)(1)(B) is not applicable. This means that the domestic partner's gross income does not have to be below the "exemption amount" in order to qualify as a dependent for section 213 purposes.

6. Internal Revenue Code Section 223

Section 223 governs Health Savings Accounts, and allows for certain deductions on cash contributions by or on behalf of an individual to an HSA that benefits such individual.[17] An HSA is a trust that is created for the purpose of paying "qualified medical expenses," and amounts paid from an HSA for such "qualified medical expenses" will not be considered taxable income to the HSA beneficiary. In this regard, HSA amounts can be used to pay "qualified medical expenses" for the HSA beneficiary, his "spouse," and any "dependent." Consistent with sections 105 and 106, as discussed above, in determining if a domestic partner is a dependent for purposes of allowing an exclusion under Code section 223, section 152(d)(1)(B) is not applicable. But reimbursement out of an HSA for the otherwise qualified medical expenses of a non-dependent domestic partner will not be treated as a proper HSA distribution.[18] In such a case, any amount paid from an HSA to cover medical expenses of a non-dependent domestic partner would be included in gross income of the HSA beneficiary and would be subject to an additional 10% excise tax. [19]

C. Federal Tax Law Governing Pension Benefits

Until recently, only a "spouse" was allowed to roll over eligible distributions from a tax-qualified pension plan without triggering a taxable event.[20] However, the recently enacted Pension Protection Act of 2006 revised Code section 402(c)(11) to provide that non-"spouse" beneficiaries (including domestic partners and same sex spouses) may, through a direct trustee-to-trustee transfer, transfer eligible distributions from a tax-qualified pension plan into an Individual Retirement Account (an "IRA") without negative tax impacts. The IRA would be treated as an "inherited IRA."[21]

If an employee dies, benefits can be paid on a schedule to the opposite sex spouse as if the spouse were the employee, without a tax penalty.[22] This tax advantage is not offered to same sex spouses or domestic partners, because the tax advantage is granted to spouses, and the effect of DOMA is to exclude same sex spouses and domestic partners from the definition of "spouse."

A qualified plan under Code section 401(a) must offer "spouses" certain survivorship rights. Specifically, these plans must provide spouses with Qualified Preretirement Survivor Annuities ("QPSAs") and must give joint ownership of vested pensions through Qualified Joint and Survivor Annuities ("QJSAs"). Similar rights are replicated in the Employee Retirement Income Security Act of 1974, as amended ("ERISA").[23] But these requirements apply only to an opposite sex spouse.[24] These requirements do not apply to a same sex spouse or a domestic partner because of the application of DOMA.

D. ERISA

1. COBRA Rights -- ERISA Sections 601-607

Domestic partners and same sex spouses are not entitled to continuation coverage under COBRA.[25] Under COBRA, only "qualified beneficiaries" are entitled to continuation coverage, and a qualified beneficiary can only be either a "spouse" or a dependent child.[26] The effect of DOMA is to cause the spousal rights provided under COBRA to be granted only to opposite sex spouses. Thus, opposite sex spouses are entitled to continuation of group health coverage in the event of the death of the employee or divorce, but domestic partners and same sex spouses are not.[27]

Nevertheless, this does not preclude an employer from offering COBRA-like coverage to domestic partners and same sex spouses. If health coverage is offered through an insured plan, the employer must determine if COBRA-like benefits will be covered by the insurer. (See Section V.A.6, below.)

2. Preemption Provision -- ERISA Section 514

ERISA supersedes most state laws, including state and municipal statutes, regula-

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tions, and judicial precedent, generally takes precedent over state laws regarding employee benefit plans, but state insurance law is "saved" from ERISA preemption.[28] ERISA contains a broad preemption provision, generally preempting any form of state law, including state constitutional law, state agency action, state judicial precedent, and any other forms of "state action" to the extent that such action may "relate to any employee benefit plan" regulated by ERISA.[29] ERISA does, however, provide an exception for state law that regulates "insurance, banking, or securities," or is a "generally applicable criminal law."[30] Since state insurance laws are expressly saved from ERISA preemption, to the extent that an employer provides coverage to its employees through acquisition of insurance policies in jurisdictions that mandate forms of domestic partner coverage, such employer will be indirectly required to act consistently with those insurance rules.

In addition to the exception from preemption granted to state insurance law, ERISA also exempts from preemption Qualified Domestic Relations Orders ("QDROs").[31] Moreover, ERISA requires that pension plans provide for payment of pension benefits in accordance with a QDRO.[32] This raises an interesting question in the context of divorces of same sex spouses, which currently may occur in the Commonwealth of Massachusetts. Can a divorce decree involving a same sex spouse, and provides for an allocation or assignment of qualified pension benefits, ever be a "QDRO" for ERISA purposes? The answer is unclear, but there is certainly an argument that it cannot. The term "domestic relations order" is defined, in pertinent part, as an order or decree that "relates to the provision of . . . alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant."[33] Applying DOMA literally, an order or judicial decree relating to a same sex spouse is not a "domestic relations order" because it necessarily will not relate to a "spouse." Therefore, under such an argument, such order would not be a domestic relations order in the first place, and could never qualify as a "qualified" domestic relations order.

3. Standing to Sue Under ERISA -- ERISA Section 502

ERISA grants standing to bring suit to enforce its substantive terms to four classes of entities: (1) plan participants, (2) plan beneficiaries, (3) plan fiduciaries, and (4) the U.S. Department of Labor.[34] To the extent that an ERISA-regulated health plan extends coverage to same sex spouses and domestic partners of enrolled employees, such must be explicitly listed as beneficiaries under the terms of the plan in order to have standing to sue a plan under ERISA.[35] A plan may restrict the class of beneficiaries to opposite sex spouses and dependent children or relatives.[36]

IV. Potentially Applicable State Law

A. State Civil Union and Same Sex Marriage Laws

A small minority of states have expressly sanctioned and required recognition of same sex unions. Massachusetts now permits same sex marriage. Vermont and Connecticut permit civil unions, Hawaii and Vermont provide reciprocal beneficiary relationships, and California, Maine, New Jersey and the District of Columbia provide state domestic partnership registries. The laws of each of these states were enacted for different reasons and provide different benefits and protections through different mechanisms.

In Massachusetts, the right to same sex marriage is provided not by statute but due to the ruling of the Massachusetts Supreme Judicial Court that same sex couples have the right to marry under the state constitution's principles of individual liberty and equality.[37] The court's ruling went into effect on May 17, 2004, and the constitutional requirement is now read into the common and statutory laws of Massachusetts.

Similarly, Vermont's law came about as a result of the Vermont Supreme Court's ruling that held that same sex couples are constitutionally required to have access to the rights and benefits of marriage.[38] However, unlike the Massachusetts court, the Vermont court allowed the legislature to effectuate the ruling by authorizing "civil unions." The Vermont statute reads: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other sources of civil law, as are granted to spouses in a marriage."[39] A few of these rights and responsibilities relating to employment law are: the ability to utilize prohibitions against discrimination based upon marital status; the availability of group insurance for state employees; and the availability of family leave benefits.[40]

In April 2005, the Connecticut legislature passed a civil union law giving couples who enter into such unions all of the same rights and responsibilities as spouses under state law. Similar to Vermont's civil union law, Section 14 of the Bill states that: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[41]

The method by which the Vermont and Connecticut legislatures chose to recognize same sex relationships spared employers in those states from deciding whether they were required to offer domestic partner coverage for employees. The legislatures created the new classification of "civil union" rather than expand the definition of "spouse." If the legislatures had allowed same-sex couples to marry, a

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domestic partner would have been immediately eligible for any benefit offered to a spouse. If the employer did not want to cover such partners, the employer would have had to amend the plan to make clear that the only spouses covered were from opposite-sex couples and the employer would have had to assert that ERISA preempts the law as applied to the employer's benefit plans.

In California, the updated Domestic Partner Registration Act also purports equivalency to marriage. As of January 1, 2005, the statute reads: "Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of state law, as are granted to and imposed upon spouses."[42] The California courts have upheld the validity of the statute. The Superior Court for Sacramento County held that the statute did not violate California's Defense of Marriage Act.[43]

Other states' laws allow for only specific vestiges of marriage. Hawaii's Reciprocal Beneficiaries law provides some specific marriage-like benefits including hospital visitation rights, the ability to sue for wrongful death, and property and inheritance rights.[44] Similarly, Maine recently enacted a domestic partnership law offering some limited benefits to registered partners, mostly related to disability and end-of-life issues. Most other marital rights are not included.[45]

New Jersey's domestic partner law provides equality with married couples in medical decision making and the choice of filing joint state tax returns. However, the law does not provide for inheritance rights, the right to petition for spousal support if the relationship ends, or automatic parental rights. In addition, while the law requires health insurance providers (i.e., health insurance companies) that offer dependent coverage to offer such coverage to registered domestic partners, it does not require private employers to provide dependent health coverage to an employee's domestic partner.[46]

The District of Columbia has had a domestic partnership registry since 1992, and domestic partnership status confers several benefits, including the right to make medical decisions, the right to control the remains of a deceased partner, the right to take sick leave to take care of a partner, and the right to sue for the wrongful death of a partner.[47]

It remains to be seen what effect the laws in California, Connecticut, Hawaii, Maine, Massachusetts, New Jersey, Vermont, and the District of Columbia will have on other states. Couples who are not Vermont residents are allowed to register their civil unions in Vermont, but it is doubtful that other states will recognize their status (except in states where the statutory or case law explicitly states or indicates that civil unions and domestic partnerships will be recognized). In contrast, according to a law recently upheld by the Massachusetts Supreme Judicial Court, out-of-state couples may not marry in Massachusetts if the marriage would be forbidden in their state of origin.[48]

Some states have explicitly stated that they will not recognize same sex marriages or other unions legally entered in other states either by statute or constitutional amendment. Officials in other states, however, have at least suggested that such unions would be recognized for at least some purposes.[49]

Additionally, suits in California, Connecticut, Iowa, Maryland, and Oklahoma are currently pending to determine the constitutionality of denying access to same sex marriage.[50] In several other states, courts have rejected arguments that federal and state constitutions require same sex marriage rights. Most recently, New York ruled that the state had a rational basis for denying same sex marriage.[51]

B. State Mini-DOMAs

A far greater number of states expressly prohibit same sex marriage and/or other forms of legal recognition for same sex partnership. The National Conference on State Legislatures (NCSL) tracks statutory and constitutional prohibitions on a regular basis. The following chart, adapted from the NCSL Web site, is current as of December 2006.[52]

STATES WITH STATUTES DEFINING MARRIAGE AS BETWEEN A MAN AND A WOMAN	STATES WITH CONSTITUTIONAL LANGUAGE DEFINING MARRIAGE AS BETWEEN A MAN AND A WOMAN	STATES WITH NO PROVISION PROHIBITING SAME-SEX MARRIAGE
Alabama	Alabama [1]	Connecticut
Alaska	Alabama	Massachusetts
Arizona	Arkansas	New Jersey
Arkansas	Colorado [2]	New Mexico
California	Georgia	New York
Colorado	Hawaii [3]	Rhode Island
Delaware	Idaho [2]	
Florida	Kansas	
Georgia	Kentucky	
Hawaii	Louisiana	
Idaho	Michigan	
Kansas	Mississippi	
Kentucky	Missouri	
Louisiana	Montana	
Maine	Nebraska	
Maryland [1]	Nevada	
Michigan	North Dakota	
Minnesota	Ohio	
Mississippi	Oklahoma	

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Missouri	Oregon	
Montana	South Carolina [2]	
New Hampshire	South Dakota [2]	
North Carolina	Tennessee [2]	
North Dakota	Texas	
Ohio	Utah	
Oklahoma	Virginia [2]	
Pennsylvania	Wisconsin [2]	
South Carolina		
South Dakota		
Tennessee		
Texas		
Utah		
Vermont		
Virginia		
Washington		
West Virginia		
Wisconsin		
Wyoming		
	[1] Constitutional amendment approved by voters in June 2006	
	[2] Hawaii's constitution was amended in 1998 to read "The Legislature shall have the power to reserve marriage to opposite-sex couples." The Hawaii legislature subsequently passed a law prohibiting marriage for same-sex couples.	
[1] In January 2006, a state judge found the Maryland statute unconstitutional, but it remains in effect pending appeal	[3] Constitutional amendment approved by voters in November 2006.	

Each mini-DOMA includes at least one of three different provisions proscribing same sex marriage statutorily or constitutionally. These provisions are (1) specifically defining marriage as a legal union between a man and a woman, (2) denying recognition of same sex marriages solemnized in other states, and (3) making same sex marriage a violation of public policy. Three states, Vermont, Maryland, and Wyoming, already had similar laws concerning same sex marriage before the federal DOMA was enacted.[53]

Several state marriage-restriction statutes have been challenged in court. Though some have been struck down as procedurally invalid, a substantive challenge has yet to prevail. The constitutional amendment passed in Nebraska banning same sex marriage was originally struck down in federal district court as a violation of the U.S. Constitution for its breadth. The amendment, which prohibited "civil union, domestic partnership and other similar same sex relationships,"[54] was declared unconstitutional on the grounds that it would deprive citizens of the right to form intimate relationships and to advocate for important rights and benefits through the legislative process.[55] This decision was recently reversed by the Eighth Circuit.[56] Plaintiffs stated the Nebraska statute is "the most extreme of all the anti-gay family laws in the nation"[57] and requested a rehearing from the Eighth Circuit; cert for rehearing and rehearing en banc was denied. Courts have generally upheld DOMAs that are less broad in their reach.[58]

C. State Insurance Law

In California, the insurance code explicitly requires equal coverage of same sex "registered" domestic partners as compared to that of spouses (i.e., the equal coverage is limited to those registered with the Secretary of State as domestic partners; the equal coverage does not extend to domestic partners that have not registered).[59]

Hawaii similarly requires availability of "reciprocal beneficiary family coverage" to cover domestic partners whenever family coverage is available.[60]

New Jersey requires that individual and group health insurance offering dependent coverage must cover domestic partners.[61]

In Vermont, parties to a civil union are entitled to the same coverage offered to married spouses.[62]

In Maine, health insurance contracts must offer domestic partner benefits "at the same terms and conditions as those benefits or options for benefits are provided to spouses of married policy-holders."[63]

In Connecticut and Massachusetts, the state of the insurance laws is somewhat more complicated. State insurance laws in Massachusetts include a non-discrimination clause providing that insurers cannot "mak[e] or permit[] any unfair discrimination between individuals of the same class. . . for any policy or contract of . . .health insurance or in the benefits payable thereunder."[64]

In Connecticut, the civil unions law gives all benefits of marriage to parties of a civil union.[65] The insurance code does not indicate that spouses should be covered, and thus it would seem that the insurance law doesn't speak to the issue of providing benefits to those in civil unions. However, the Connecticut Commissioner of Insurance issued a letter on August 4, 2005, stating, "It is the position of the Connecticut Insurance Department that health plans are required, under the new law, to treat partners who have entered into civil unions the same as spouses are treated for purposes of health benefits."[66]

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Virginia had a statute that expressly forbade insurers to cover same sex domestic partners, but it was amended in March of 2005. Virginia now allows extension of coverage to "[a]ny other class of persons as may mutually be agreed upon by the insurer and the group policyholder."[67] No state currently forbids domestic partnership coverage through insurance laws.

In addition to state laws, some cities and counties have implemented "equal benefits ordinances" which require companies that do business with the local government to provide equal benefits treatment for domestic partners as those provided to spouses.

D. State Anti-Discrimination Laws

1. Anti-Discrimination Laws Based on Sexual Orientation

Seventeen states (including D.C.) currently have laws that prohibit employment discrimination on the basis of sexual orientation, as indicated in the following chart.[68]

STATES BARRING SEXUAL ORIENTATION DISCRIMINATION IN PRIVATE EMPLOYMENT

STATE	CITATION & DATE	PUBLIC EMPLOYMENT	PUBLIC ACCOMMO-DATIONS	PRIVATE EMPLOMENT	EDUCATION	HOUSING	CREDIT	UNION PRACTICES
California	Labor Code § § 1101, 1102 & 1102.1 (1992	X	X	X	X			
Connecticut	Public Act 91-58 (5/29/91)	X	X	X	X	X	X	X
Hawaii	Rev. Stats., §§ 368-1 & 378-2 (3/21/91)	X	X	X		X		X
Illinois	Illinois Human Rights Act as amended by SB3186 (January 2005)	X	X	X		X	X	
Maine	112th Maine Leg. Bill LD No. 1146 (eff. 6/29/05)	X	X	X	X	X	X	
Maryland	Senate Bill 205, Anti-discrimination Act of 2001 (5/15/2001)	X	X	X		X		X
Massachusetts	Gen. L., ch. 151B, §§ 3-4 (West 1995)	X	X	X	X	X	X	
Minnesota	Ch. 22, H.F. No. 585 (4/2/93)	X	X	X	X	X	X	
Nevada	NRS 610.010 et seq. (eff. (10/1/99); Nev. Assem. Bill No. 311 (1999)	X		X				X
New Hampshire	RSA 21 (as amended by H.B. 421, 3/19/97)	X	X	X		X		
New Jersey	Ch. 519, L.N.J. 1991; Hum. Rts. Law [C.10:5-3] (1/92)	X	X	X	X	X		
New Mexico	HB277 (2004) covers sexual orientation and gender identity	X	X	X		X	X	
New York	The Sexual Orientation Non-Discrimination Act (S.720/A.1971) as amended 1/16/03	X	X	X	X	X	X	
Rhode Island	95-H 6678 Sub. A (5/22/95)	X	X	X		X	X	
Vermont	Hum. Rts. Law (4/23/92)	X	X	X	X	X	X	X
Washington, DC	Hum. Rts. Act, 1977, D.C.L. 2-38, D.C. Code §1-2541(c) 12/13/77	X	X	X	X	X	X	X
Wisconsin	Laws of 1981, ch. 112	X	X	X	X	X	X	X

Some states specifically indicate that discrimination includes discrimination on the basis of employee benefits, while others more broadly forbid discrimination in the terms and conditions of employment. In California, the definition of "sex" was expanded under the Fair Employment and Housing Act (FEHA) to include "gender," "perceived gender," and "gender identity."[69] The additional classification of gender has been included in the definition of "sex" under the Act for purposes of prohibiting sexual discrimination and harassment. FEHA coverage now extends to transsexuals, transvestites, and individuals who are not traditionally associated with their gender. [70]

Some legal scholars argue that state anti-discrimination laws send internally conflicting signals about the states' public policies toward gay rights.[71] Some states

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compound this problem by including language in their state discrimination laws to the effect that nothing in their statutes authorizes the recognition of same sex marriages. The vague language and marriage exceptions may provide an "escape hatch" for courts that do not want to read bans on sexual orientation employment discrimination broadly.

Although many states do not have laws against employment discrimination based on sexual orientation, executive orders have been issued against this practice and, as a result, governmental employers may believe they are required to offer domestic partner benefits to same-sex couples. Several courts have upheld such anti-discrimination laws as applied to state employees. The Supreme Court of Alaska has held that the University of Alaska could not exclude domestic partners from benefits coverage because the Alaska Human Rights Act bars discrimination on the basis of marital status.[72] A Maryland Court of Appeals upheld a county's decision to enact legislation extending benefits to domestic partners of county employees. The court found that extending the benefits did not attempt to redefine marriage, nor did it infringe on the state's ability to regulate marriage. [73]

2. Anti-Discrimination Laws Based on Marital Status

Other anti-discrimination laws forbid employers from discriminating based on marital status. According to Unmarried America, an advocacy organization, 21 states have statutes prohibiting marital status discrimination in employment.[74]

These laws typically forbid an employer from discriminating in compensation based on marital status. However, some such laws specifically exempt benefits -- so as to make clear that married people can receive spousal benefits that unmarried people do not.

V. Coverage Of Same Sex Spouses And Domestic Partners

A. Can an Employer Voluntarily Extend Coverage in Health Benefit Plans? Yes!

In general, ERISA will preempt state laws other than insurance laws. As indicated above, no state currently has in effect a health insurance law that would prohibit a carrier from providing coverage to same sex domestic partners or spouses. A non-insurance state law that would prohibit or prevent employers from providing same sex coverage is likely to be preempted by section 514(a) of ERISA. ERISA itself contains no language that would restrict or impede the provision of such benefits. Thus, there should be no state-based prohibitions on employers extending ERISA-regulated health benefits coverage to same sex partners and spouses of their employees.

Because of the operation of the federal DOMA, however, neither same sex spouses recognized under state law nor domestic partners can be considered as "spouses" for purposes of the Internal Revenue Code, and, thus, must be taxed for federal tax purposes on the value of the welfare benefit conferred.

1. What If a State Mini-DOMA, or State Law Other Than Insurance Law, Prohibits It?

Some state Mini-DOMAs are limited in their reach. Vermont's DOMA, for example, simply defines marriage as between a man and a woman. This statute co-exists with recognition of same sex partnerships and requirements that they be treated equally with opposite sex marriage. Other states have DOMAs that are very broad in scope. Virginia's Affirmation of Marriage Act, for example, provides that: "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership, contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable."[75] Such broad statements may appear to preclude recognition of any same sex partnerships, including in the contractual provision of benefits by private employers.

ERISA, however, is likely to preempt broadly designed state mini-DOMAs to the extent that they otherwise would be interpreted to preclude employers from providing same sex ERISA-regulated benefits. The only scenario in which a state mini-DOMA could affect the ability of employers to offer same sex ERISA-regulated benefits would be if the mini-DOMA specifically amended the insurance code or regulation to limit carriers to offering benefits only to legal dependents and non-domestic partner spouses. However, we know of no insurance law limiting benefits in this way at the present time.

2. The Federal Tax Issue: Is the Same Sex Spouse or Domestic Partner a Dependent for Federal Tax Purposes?

As discussed in Section III.B above, the value of benefits provided on behalf of a domestic partner or same sex spouse are generally included in an employee's gross income since the exclusion from tax is only available for benefits provided to the employee's spouse and dependents.

Federal DOMA defines "spouse" to be a person of the opposite sex who is a husband or wife. This definition is applied to the use of spouse in the Internal Revenue Code. Therefore, a same sex spouse cannot be considered a "spouse" for federal tax purposes. However, the same sex spouse or domestic partner can still

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be considered a dependent for federal tax purposes if the requirements of Code section 152 are satisfied. (Most domestic partners do not meet these requirements, but some do.) Consequently, employer-provided health benefits for a domestic partner or same sex spouse are excludable from gross income under sections 105 and 106 only if he or she qualifies as a dependent under section 152, as modified in application to sections 105 and 106, as noted above.[76]

a. Consequences -- Value of Coverage is Taxable Income to the Employee.

Under section 61(a)(1) of the Code, gross income includes compensation for services, including fees, commissions, fringe benefits, and similar items. A fringe benefit provided in connection with the performance of services is considered to be compensation for such services.[77] Also, the taxable fringe benefit is included in the income of the person performing the services in connection with the furnished fringe benefit.[78] Therefore, a fringe benefit may be taxable to a person even though that person did not receive the fringe benefit.[79]

If a same sex spouse or domestic partner cannot qualify as a dependent under Code section 152 for sections 105 and 106 purposes, then the fair market value of the health coverage becomes a taxable fringe benefit, and the employer must include it in the employee's gross income. According to Treasury Regulation section 1.61-21(b)(1), the employee's gross income must include the amount by which the fair market value of the fringe benefit exceeds the sum of the amount, if any, paid for the benefit on behalf of the recipient and the amount, if any, specifically excluded from gross income by some other section of Subtitle A of the Internal Revenue Code. The employee's wages also must include the additional FICA attributable to the same sex spouse or dependent coverage that the employer pays on the employee's behalf.[80]

In cases in which an employer provides group health benefits to non-tax dependent domestic partners or same sex spouses, that action will not affect the tax status of other participants in the plan.[81] Therefore, the health coverage provided to certain employees' domestic partners or same sex spouses will not adversely affect the exclusion from gross income under Code section 106 or under Code section 105(b) of amounts contributed by the employer for health coverage provided to other employees, or their spouses and dependents.[82]

(1) Withholding Obligations for Employer

If the domestic partner or same sex spouse does not qualify as a tax dependent, then the amount includible in gross income of the employee by reason of the coverage constitutes wages under section 3401(a) of the Code. Consequently, the employer that provides the domestic partner or same sex spouse coverage is required to undertake income tax withholding on those amounts pursuant to Code section 3402. The imputed income is also considered wages under Code sections 3121(a) and 3306(b), and thus also subject to tax and withholding under the Federal Insurance Contributions Act ("FICA") and the Federal Unemployment

Tax Act ("FUTA").[83] If the employer pays the additional FICA that is due from the employee as a result of the imputed income for the coverage, the employee's income must be further "grossed up" by that amount under Revenue Procedure 81-48.[84]

b. How Is the Value of Coverage Calculated?

The Treasury Regulations state that the fair market value of a fringe benefit is determined on the basis of all the facts and circumstances.[85] Specifically, the fair market value of a fringe benefit is the amount that an individual would have to pay for the particular fringe benefit in an arm's length transaction.[86] However, the Internal Revenue Service has not objected to valuing domestic partner coverage as the individual COBRA coverage rate.[87] Arguably, if the Internal Revenue Service wanted strictly to value the coverage as an arm's-length transaction, then it would not have approved this method because such method can result in a value that is possibly either higher or lower than in an arm's-length transaction, depending on the facts and health risks of the individual.

Where the particular coverage provided to the individual is group medical coverage, the amount includible in the employee's gross income is the fair market value of the group medical coverage.[88]

The Internal Revenue Service has said that it will not issue rulings concerning the fair market value of property.[89] Therefore, it has not approved any particular method of computing imputed income, and asserts that, because computation of fair market value is an issue of fact, it cannot approve any particular employee's method in advance.[90]

(1) Various Approaches to Compute Fair Market Value

There are several approaches employers typically use to compute fair market value.[91]

- COBRA Rate –The first option is to calculate fair market value as the plan's individual COBRA rate (minus the 2% allocated to overhead and administration). This seems to be the most easily computed method and also is legally conservative. The Internal Revenue Service did not object to valuing domestic partner coverage by the actuarially determined rate for individual COBRA coverage less any payment that a participant may be required to pay the employer for the domestic partner coverage. [92]
- Difference between Family and Individual Premiums – The second option is to subtract the cost of the single employee coverage premium from the cost of family coverage and then impute the difference as income for the employee. This method could also be done by subtracting the cost of the single employee coverage premium from the cost of the employee plus spouse coverage. In situations in which an employer offers employee plus spouse coverage, by backing out the cost of the single employee rate that insurance carriers charge, employer

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is necessarily left with the actuarial determined rate for the dependent spouse or domestic partner. This approach seems to be an eminently reasonable method of determining fair market value of domestic partner health insurance.[93] To the extent that the employer chooses, but does not offer employee plus spouse and only offers employee plus family, then this approach may be problematic, since backing out the cost of the single employee rate would yield cost for potential multiple dependents.

- Per Capita Allocation – A third suggested approach is that an employee may claim that the cost of covering the domestic partner is just a share of the total family premium, which would depend on the number of dependents. Under this approach, the employer is trying to determine the cost of an individual dependent from the quoted aggregate family rate. This approach depends on a random number and is unique to each taxpayer. Since it is based on the particulars of each employee's situation, it might conflict with Treasury Regulations section 1.61-21(b)(2). Also, if an employee already has family coverage because of children the employee must still include the fair market value in gross income. The employee can not claim that the fair market value is zero even if there is no actual additional cost.[94]
- External Method – A fourth approach is for the employer to determine the fair market value by hiring a consulting firm to conduct a survey, or asking the insurance company that issued the group health policy and underwritten premium rate to develop the rate for the domestic partner coverage. It is unlikely that that an employer would use this method because they would have to pay, but this approach would assuredly be accepted by the Internal Revenue Service.

(2) Suggested Approach

If the employer paid for the entire coverage, then the fair market value of the employee plus spouse coverage minus the single employee coverage would be included in income. For example, if the cost of the COBRA premium for a single employee is $500 and the cost of the COBRA premium for employee plus spouse is $1200, then $700 would be imputed as income on the employee's W-2. However, it could be argued that the COBRA premium for the single employee ($500) is the amount that should be imputed as income.

However, most employers offer plans where both the employee and employer contribute to the coverage. This makes the calculation more difficult, but here is an example on how to calculate the amount included in the employee's gross income. First, look at how much the employer contributes to the health coverage, and then calculate how much of that is paid on behalf of the domestic partner. The portion paid on behalf of the domestic partner should be added on the employee's W-2 as "grossed up" income. Continuing with the hypothetical above, assume that out of the $1200 for employee plus spouse coverage the employer pays $700 and the employee pays $500 a month. It must be determined what portion of the $700 is paid on behalf of the domestic partner. To calculate this portion use the ratio of the COBRA single coverage over the employee plus spouse coverage (500/1200).

The result, which multiplied by $700 is $292, the amount per month that is included in the employee's gross income. Therefore, $3,504 ($292 x 12) is the amount added to the employee's W-2 for the taxable year. The other $408, which is paid on the employee's behalf, is excluded from income under Code section 106, because this represents the employer's contribution to employee's health coverage.

Next, look at the amount the employee contributed for health coverage. Using the same example, the employee contributes $500 a month. The portion of that $500 that is attributable to domestic partner coverage should be contributed on a post-tax basis, and, therefore is not a deduction from net pay. The portion of payment made for employee coverage can be paid on a pre-tax basis consistent with Code section 125. Arguably, the same ratio used above should be used to determine the portion of $500 that is paid on a pre-tax basis under Code section 125 and the portion that should be paid on an after-tax basis. Therefore, $208 should be paid on a pre-tax basis and $292 should be paid on a post-tax basis, since it is attributable to the employee's cost for domestic partner coverage.

The hypothetical regarding employer provided health care in which the employee contributes is represented in the following table:

Assume these COBRA rates are offered by employer: Premium for single employee: $500 Premium for employee plus spouse: $1,200
Ratio of single coverage to employee plus spouse coverage = 500/1200 = .4166667
Assume the following contributions for employee plus spouse coverage: Employer pays: $700 Employee pays: $500
Calculation of employer contribution ($700) that is included and excluded from gross income: $700 x .4166667 = $292 ‡ Represents amount paid by employer on behalf of the domestic partner. $292 x 12 = $3504 ‡ Represents amount included on employee's W-2 for the taxable year $700 - $292 = $408 ‡ Represents amount paid by employer on behalf of the employee. This is excluded from income under I.R.C § 106
Calculation of employee's contribution ($500) that is included and excluded from gross income: $500 x .4166667 = $208 ‡ Represents amount paid on behalf of the employee, so should be paid on pre-tax basis consistent with I.R.C. § 125 $500 - $208 = $292 ‡ Represents amount paid on behalf of domestic partner so should be paid on a post-tax basis

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c. What About Dependent Children of Domestic Partners and Same Sex Spouses?

Domestic partnership coverage may entitle the domestic partner's dependent children to health coverage.[95] A child can be claimed as a dependent if the child is legally adopted or a child by blood, has the same principal place of abode for more than one-half of the year, and is under 19 or is a student under age 24.[96] If the child is not legally adopted by the employee, but is claimed as a dependent on the tax return, then there are still no adverse tax consequences.

3. The State Tax Issue: Are the Same Sex Spouse or Domestic Partner Benefits Excludable from Gross Income for State Tax Purposes?

In most states, imputed income (i.e., the fair market value of a domestic partner's health coverage) for federal tax purposes is also subject to state income tax. However, some states specifically provide otherwise – if certain criteria are met. For example, in California, if a domestic partner completes a Declaration of Domestic Partnership and registers with the Secretary of State (i.e., becomes a "registered domestic partner"), the fair market value of the domestic partner's health coverage is not included in the employee's income for state tax purposes. As a result, the employer's payroll system must treat the value of the domestic partner's health coverage in a bifurcated manner: for federal tax, the coverage is taxable to the employee, but for state tax purposes it is not taxable.

Presently, the following states have domestic partnership, civil union, or spousal-like laws for same-sex couples: California, Connecticut, District of Columbia, Hawaii, Maine, New Jersey and Vermont. Domestic partnership legislation is pending in New Hampshire, New Mexico, Oregon and Washington. If you have employees in any of these states, the imputed income for the domestic partner coverage might qualify for exemption from state income tax.

In Massachusetts, health coverage for same sex spouses is exempt from state income tax, but health coverage for domestic partners is not exempt.

4. The Domestic Partner Certification – Why Is It Needed?

An employer may rely on its own domestic partner certification to establish that a domestic partner is a dependent, as long as the certification contains representations that the support test and the residency test of Code section 152 are met and the relationship does not violate local law.[97] The Internal Revenue Service has approved this and the use of an annual recertification to determine that the domestic partner is a dependent for each taxable year.[98]

Some states have domestic partner registries, which usually require that the applicants share a permanent residence, are over 18 years old, are unmarried, and are competent to enter into a domestic partnership. The couple usually must show proof of their shared residence. For example, in the District of Columbia,

in order prove they share a residence, the couple must show proof of a residential lease naming both applicants, a residential mortgage that names both applicants as mortgagors, a residential deed stating both applicants share title, or an affidavit executed under perjury stating that they share a residence.[99] It is important to check the requirements of each state's registry, but if it is similar to the District of Columbia's, then it seems that an employer may rely on the domestic partner registry for satisfying the residency requirement of being a dependent. An employer would still need to obtain independent proof that the domestic partner satisfies the support test of Code section 152.

An employer's domestic partnership certification should contain a clause that requires the employee to notify the employer immediately upon his failure to satisfy the domestic partner criteria or failure to maintain a domestic partner registry with the state. In most states, a domestic partner registry will automatically terminate upon the failure to satisfy the requirements. If the employee fails to notify the employer of the termination of the domestic partnership, it is possible that the employer could retroactively deny coverage.

a. Model Domestic Partner Certification[100]

The model domestic partner certification (attached as Exhibit A) requires that the employee and the domestic partner sign the form verifying that they share the same principal place of residence. Since this is also the requirement for a domestic partner registry, it should be acceptable for the employee and domestic partner to simply prove they are on a domestic partner registry. If the couple could just show some documentation of their registry then it would streamline the process. Of course, if the domestic partner is a dependent, then the employer also needs to obtain verification that the employee provides over one-half of the domestic partner's support, the domestic partner's gross income is less than the exemption amount, and the relationship does not violate local law.

5. Consumer Driven Health Plan Issues

a. Health Reimbursement Accounts ("HRAs")

While no guidance has been issued by the IRS regarding the treatment of domestic partners and same sex spouses under HRAs, most practitioners apply the existing rules that have been developed under Code sections 105 and 106. An HRA is essentially a variant on a self-insured group health plan. The plan sponsor is reimbursing medical expenses from its general assets by establishing a book keeping account funded by the plan sponsor on behalf of a participant. Therefore, just as with a regular group health plan, a domestic partner or a same sex spouse may participate in an HRA, but he or she must do so on an after-tax basis. In the same manner in which the employer-paid portion of a group health plan premium on behalf of a domestic partner or same sex spouse would be imputed income to an employee, the value of the employer contribution to the HRA would be imputed income to the employee.

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b. Health Savings Accounts ("HSAs")

The statute that established HSAs does not specifically address domestic partners or same sex spouses. That being said, the treatment of domestic partners or same sex spouses under Code section 223 is straightforward. First, if a domestic partner or same sex spouse is allowed to participate in the high deductible health plan ("HDHP") that is paired with the applicable HSA, the individual who is the owner of the HSA may use the higher "family coverage" contribution limit established under Code section 223(b). The individual owner may make use of the family coverage limitation even if his or her "family" only constitutes himself or herself and his or her domestic partner or same sex spouse on the grounds that "family coverage" under Code section 223(c)(4) is defined as any coverage other than self-only coverage.

Second, distributions from an HSA may only be made for "qualified medical expenses" as defined under Code section 213(d). As discussed above, qualified medical expenses may not include payments with respect to the medical expenses of domestic partners or same sex spouses unless the domestic partner or the same sex spouse otherwise qualifies as a tax code dependent. If a distribution is made from an HSA to pay the medical expenses of a non-dependent domestic partner or same sex spouse, the owner of the HSA will be required to take the amount of the distribution into his or her income and, on top of that, pay an additional 10% tax on the distribution.

6. COBRA

a. No right to COBRA

Code section 4980B(g)(1) provides that only the (1) spouse and (2) the dependent children of a covered employee are "qualified beneficiaries" that are required to be offered health continuation coverage under COBRA. As previously discussed, DOMA limits the term "spouse" in all federal laws to mean an opposite sex spouse. Such limitation results in the exclusion of domestic partners and same sex spouses from the mandatory COBRA requirements of Code section 4980B.

Although domestic partners have no independent right to elect COBRA continuation coverage, there is one situation where an employee's domestic partner could become entitled to continuation coverage indirectly. The COBRA regulations provide that each beneficiary must be provided the same open enrollment rights as a similarly situated active employee with respect to whom a qualifying event has not occurred.[101] An employee would have the right to add his or her domestic partner to plan coverage during an annual open enrollment period as long as the following three conditions are met. The employee must:

1. be covered by a health plan that provides coverage for domestic partners;
2. lost coverage under the health plan due to his or her termination of employment or reduction in hours; and
3. elect COBRA continuation coverage.

Thus, while an employee may not be able to cover his or her domestic partner immediately upon becoming entitled to COBRA, he or she may have the right to enroll the partner during an open enrollment period that falls within his or her COBRA period.

b. Employers Can Provide Voluntarily, But Check with Carrier in Connection with Insured Plans

Nothing in federal law prohibits an employer from voluntarily electing to provide COBRA-like health continuation coverage to domestic partners and same sex spouses. If an employer desires to provide continuation coverage to domestic partners and same sex spouses, it should first consult with its group health plan carrier and its COBRA administrator to confirm (1) that the applicable group health plan will permit such coverage and (2) that the COBRA administrator is capable of administering such a benefit.

7. Other Issues

a. VEBAs

As long as spending on health coverage for non-dependent domestic partners is no more than a "de minimis amount," the VEBA's exempt status will not be affected.[102] Historically, a maximum cost for such non-dependent domestic partners coverage, including employment taxes, of between 2.88% and 3.31% of total expenditures has been held by the Internal Revenue Service to be de minimis.[103] As a result, many practitioners use 3% as the rule of thumb for complying with the VEBA "de minimis" request.

b. ERISA Prohibited Transactions

Use of plan assets to pay the employer's share of FICA and FUTA taxes on the imputed income of an employee does not violate ERISA § 406(a)(1)(C)-(D), ERISA §§ 403(c)(1), 404(a)(1) and would not be an improper expenditure of plan assets or give rise to a prohibited transaction.[104] In addition, paying the employee's share of FICA and grossing-up the employee's imputed income accordingly does not violate ERISA, provided the payments are clearly labeled as plan benefits in the plan document.[105]

B. Can an Employer Choose To Exclude Domestic Partner and Same Sex Spouse Coverage in Health Plans?

In the majority of those states that recognize same sex unions, it appears that state insurance laws explicitly or implicitly require that same sex partners be covered by any plan that covers opposite sex spouses.

In states that have mini-DOMAs, same sex spouses need not be covered. Even

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if insurance laws have strong non-discrimination provisions, they will not apply to opposite sex spouses where the state has excluded same sex unions from being legally recognized.

In states without mini-DOMAs, the answer is somewhat unclear, but it is likely that employers are free to define "spouse" in their plan document so as to avoid recognition of same sex spouses in the absence of language in the insurance laws to the contrary.

1. Can State Civil Union or Same Sex Marriage Laws Require Coverage?

A civil union or same sex marriage law likely cannot require coverage in its own operation, as such laws are generally preempted by ERISA. However, such laws may interact with state insurance laws in such a way so as to require coverage.

In Massachusetts, for example, it is understood that the equality principle of Goodridge, in requiring same sex marriage, must now be read into the more general anti-discrimination provisions contained in the insurance law. Such a reading would require Massachusetts employers to cover same sex spouses on the same terms as they cover different sex spouses.[106] It is our understanding that insurance companies in Massachusetts are currently only selling plans that cover same- and opposite sex spouses equally.

Given that same sex spousal coverage is now available in Massachusetts, some employers have discontinued the provision of domestic partnership benefits. However, gay rights advocates have warned that, because of continued non-recognition of same sex marriage at the federal level and in other states, marriage is not a viable option for many same sex couples. Surveys have indicated that most Massachusetts companies that previously offered domestic partnership benefits did not cease to do so after Goodridge.[107]

In Connecticut, the Commissioner of Insurance has interpreted the new civil unions law to be read into the insurance laws, and requires equality of treatment between same and opposite sex couples. Even if this interpretation is not correct, policies in states like Connecticut may require coverage by their wording. If an insurance policy does not define "spouse," or if it makes reference to state law to define "spouse," rules of contract interpretation may require coverage, as state law has traditionally defined marriage and its incidents.

In other states that offer domestic partnership or civil unions, the question of whether the same sex partnership laws require coverage is moot since the insurance laws more directly address the question (as discussed in subsection B.3 below).

Employers in states that have enacted DOMA-type statutes may probably rely on these laws, along with federal DOMA, to avoid recognition of same sex marriages,

civil unions, or domestic partnerships entered legally in other states for all employee benefits purposes.

The situation is less clear for employers in states such as New York that have not enacted local DOMA-type statutes and have indicated that they will recognize same sex marriages legally performed in Massachusetts (or elsewhere). New York State Attorney General Eliot Spitzer, in an informal opinion, indicated that New York same sex couples who had legally married elsewhere must be given all the rights and protection of marriage.[108] Thus, depending on the scope of New York insurance law, and the definitions of "spouse" contained in insurance policies in New York, there may be a good argument that New York employers who provide insured coverage to spouses must include same sex couples who have been lawfully married elsewhere. It is unclear whether the recent decision by the New York Court of Appeals that state marriage laws constitutionally exclude gay couples from marrying will affect this outcome. But this appellate decision will likely mean that New York residents cannot lawfully marry in Massachusetts, where the Supreme Judicial Court of Massachusetts ruled that Massachusetts cannot marry out-of-state residents if that state has limited marriage by a constitutional amendment, statute, or "controlling appellate opinion."[109] However, where Massachusetts residents marry in Massachusetts and then move to New York, coverage may be required.

2. Can State Anti-Discrimination Laws Require Such Coverage?

General anti-discrimination laws likely cannot require coverage by an insurance policy, as they are preempted by ERISA. However, as discussed above, where anti-discrimination clauses are written into insurance codes, they may require equal coverage.

Even if ERISA does not preempt the discrimination laws, or the anti-discrimination laws can be read into the insurance laws, many of the state anti-discrimination laws specifically exempt benefit plans from the reach of the statute.[110]

3. Can State Insurance Laws Require Such Coverage for Employers that Purchase Employee Coverage Through Insurance?

As outlined in Section IV.C above, several states expressly require coverage of domestic partners through insured plans in their insurance laws (which are not preempted by ERISA). Insurance laws in California, Hawaii, Maine, New Jersey, and Vermont require domestic partnership coverage equal to coverage provided to spouses.

In Massachusetts and Connecticut, as discussed above, it can be argued that the principles of equality between same- and opposite sex unions should now be read into the insurance laws and spouses must be treated equally whether they are same or opposite sex.

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Where the insurance laws do not expressly require equal coverage, it is likely that companies can deny coverage, even to couples married in Massachusetts. However, if a state does not have a mini-DOMA and the insurance laws contain an applicable non-discrimination provision, it may be argued that equality of coverage is required. Employers should take care to define "spouse" in their employment contracts and plan documents if they wish to exclude coverage of same sex couples married in other jurisdictions.

C. Can an Employer Choose To Include Domestic Partner and Same Sex Spouses Coverage in Cafeteria Plans?

1. No, it Cannot, and the Stakes are Higher if it Does

The Treasury has made clear that cafeteria plans may not provide any benefits through a cafeteria plan that are taxable benefits. Prop. Treas. Reg. section 1.125-2, Q/A4. As a result, benefits for domestic partners or same sex spouses who are not otherwise tax dependents may not be included as benefits under a cafeteria plan because such benefits are taxable to the applicable employee. For a more detailed discussion of the tax treatment of domestic partner and same sex spouse benefits, see Section V.A. above.

Employers must pay attention to the prohibition on the provision of domestic partner or same sex spouse benefits under a cafeteria plan. If an employer deliberately either (1) drafts a plan that permits such cafeteria plan benefits or (2) chooses to ignore the cafeteria plan document provisions that would otherwise prohibit the provision of domestic partner or same sex spouse benefits through the cafeteria plan, the IRS may choose to "disqualify" the entire cafeteria plan for a failure to comply with law. Such a disqualification would result in the loss of favorable tax treatment to all participants in the plan.

D. Pension Plan Issues

As outlined above, DOMA excludes domestic partners and same sex spouses from the definition of "spouse" under federal law. The result of such exclusion is that all of the pension plan rights that have been established explicitly for "spouses" are not applicable to domestic partners and same sex spouses unless such rights are expressly provided for.

1. Federal DOMA Prevents Domestic Partners and Same Sex Spouses from Having Certain Beneficiary Rights

a. Rollover Treatment

Following the death of a spouse, the surviving spouse has the right to treat a distribution from the deceased's spouse's pension plan as an eligible rollover contribution that may be rolled over into his or her pension plan without adverse tax implications. Previously, Code section 402(c)(9) explicitly limited such a roll-over to "spouses" and, thereby, excluded domestic partners and same sex spouses. However, the recently enacted Pension Protection Act of 2006 revised Code section 402(c)(11) to provide that non-"spouse" beneficiaries (including domestic partners and same sex spouses) may, through a direct trustee-to-trustee transfer, transfer eligible distributions from a tax-qualified pension plan into an IRA without negative tax impacts. The IRA is treated as an "inherited IRA."[111]

b. No QJS Annuity Rights/QPS Annuity Rights

Code sections 417(b) and (c) create certain qualified joint and survivor annuity rights and qualified pre-retirement survivor annuity rights for "spouses." As with rollovers, these rights are explicitly limited to spouses and, thereby, exclude domestic partners and same sex spouses.

2. Minimum Distribution Rights for Spouses

Code section 401(a)(9)(B)(iv) provides additional minimum distribution rights for spouses of deceased pension plan participants. These rights are explicitly limited to "spouses" and, again, exclude domestic partners and same sex spouses.

3. Hardship Distributions

Until recently, hardship distributions under a 401(k) plan were only allowed for hardships involving "spouses" and dependents (as defined by Code section 152). The recently enacted Pension Protection Act of 2006 revised the law to permit that to the extent an event would constitute a hardship for purposes of Code section 401(k)(2) if it occurred with respect to a "spouse" or a dependent, such event shall constitute, to the extent permitted by the applicable plan document, a hardship if it occurs with respect to a person who is a non-"spouse" beneficiary under the plan.[112] The non-"spouse" beneficiary includes a domestic partner or a same sex spouse if the domestic partner or the same sex spouse has been designated a beneficiary under the plan.

4. Spousal Authorizations

Some employee elections require an authorization from the spouse to be valid (e.g., if the employee designates someone other than the spouse as the primary beneficiary). Since DOMA does not recognize same sex spouses, these federally mandated requirements arguably would not apply to same sex spouses.

VI. Practical Considerations

Employers should review their plan documents, summary plan descriptions, and employee communications to determine how, or if, these documents define spouse for purposes of the employer's benefit plans. If "spouse" is defined by reference

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to “applicable law” or “applicable state law,” or as one who is “legally married,” health care plans may have no choice but to recognize same sex spouses when the marriage is legally valid (e.g., married in Massachusetts or another country that permits same sex marriages). An employer may elect to specifically define “spouse” in ERISA-governed plans as a “spouse of the opposite sex” or as a “legally married spouse recognized by federal tax law.”

Employers should determine which benefits, if any, to extend to domestic partners and same sex spouses. Employers with employees in Massachusetts may elect to cover same sex spouses of such employees, but then must decide whether to continue to permit domestic partner coverage for Massachusetts employees that do not marry. This may be a more difficult decision (policy wise and practically speaking) for employers that have employees in multiple states. Employers must also consider whether to provide benefits to any same sex spouse that is validly married (regardless of location of marriage or present state of residence). Employers may request a marriage license to determine validity of a same sex marriage, but only if the employer requests the same to determine the validity of opposite sex marriages.

VII. Additional Resources

ACC Resources

Richard F. Ober, Jr. and Ian Ayres, The Hollow Promise: Sexual Orientation Nondiscrimination Policies, ACC Docket 24, no. 10 (October 2006): 48-64, available at http://www.acc.com/resource/v7583

Theos McKinney and Michael Lotito, The California Employment Law Revolution, ACC Docket 23, no. 2 (February 2005): 22-47, available at http://www.acc.com/resource/v6241

Bradley S. Paskievitch and David B. Kahng, When the Employment Class Action Comes Knocking: Avoiding One If Possible and Reducing Risk Once Suit Is Threatened or Filed, ACC Docket 23, no. 2 (February 2005): 68-81, available at http://www.acc.com/resource/v5197

209 Benefits 101- A Primer on Employee Benefits Laws, ACC 2006 Annual Meeting Program Material, available at http://www.acc.com/resource/v8168

406 Preparing for & Effectively Handling Employee Issues During Times of Crises, ACC 2006 Annual Meeting Program Material, available at http://www.acc.com/resource/v8189

Journal Articles

Andrew Koppelman, The Difference the Mini-DOMAs Make, 38 LOY. U. CHI. L.J. 265 (Winter 2007).

M.V. Lee Badgett, R. Bradley Sears, and Deborah Ho, Supporting Families, Saving Funds: An Economic Analysis of Equality for Same-Sex Couples in New Jersey, 4 RUTGERS J. L. & PUB. POL'Y 8 (Fall 2006).

Peter Hay, Recognition of Same-Sex Legal Relationships in the United States, 54 AM. J. COMP. L. 257 (Fall 2006).

Ian Ayres and Jennifer Gerarda Brown, Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark, 104 MICH. L. REV. 1639 (June 2006).

James A. Sonne, Love Doesn't Pay: The Fiction of Marriage Rights in the Workplace, 40 U. RICH. L. REV. 867 (March 2006).

Janice Kay McClendon, A Small Step Forward in the Last Civil Rights Battle: Extending Benefits under Federally Regulated Employee Benefit Plans to Same-Sex Couples, 36 N.M. L. Rev. 99 (Winter 2006).

Books, Guides, and Directories

KAREN MOULDING AND NATIONAL LAWYERS GUILD, LESBIAN, GAY, BISEXUAL AND TRANSGENDER COMMITTEE, SEXUAL ORIENTATION AND THE LAW (Thomson/West 2007).

TODD A. SOLOMON, DOMESTIC PARTNER BENEFITS: AN EMPLOYERS GUIDE (Thompson Publishing Group 2007).

RONALD J. COOKE, ERISA PRACTICE AND PROCEDURE (Thomson/West 2006).

JEFFREY D. MAMORSKY, EMPLOYEE BENEFITS HANDBOOK (Thomson/West 2006)

SUSAN M. OMILIAN AND JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION (Thomson/West 2006).

PAUL J. ROUTH, WELFARE BENEFITS GUIDE: HEALTH PLANS AND OTHER EMPLOYER SPONSORED BENEFITS (Thomson/West 2006).

Databases and Websites

DOMA Watch http://www.domawatch.org

Human Rights Campaign http://www.hrc.org

Lambda Legal http://www.lambdalegal.org

National Conference on State Legislatures www.ncsl.org

Unmarried America http://unmarriedamerica.org

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VIII. About Hogan& Hartson LLP

Hogan & Hartson's employee benefits and executive compensation practice is recognized for achieving successful solutions for companies and organizations, be they large or small, public or private. Our multidisciplinary team of lawyers has extensive experience not only with ERISA and the federal and state tax laws, but also with SEC and stock exchange requirements, general corporate, tax-exempt, and partnership law requirements, health privacy protections under HIPAA, and labor laws, such as the Age Discrimination in Employment Act (ADEA), Americans with Disabilities Act (ADA), Family and Medical Leave Act (FMLA), and Fair Labor Standards Act (FLSA). We have in-depth knowledge of a variety of industries, including aviation, biotechnology, education, financial services, health care, Internet services and technology, manufacturing, media, real estate, and telecommunications. While the depth and breadth of our experience allow us—in consultation with you—to provide integrated solutions tailored to your organizational and cost constraints, we are equally able to work seamlessly with your accountants, actuaries, consultants and advisors.

We design the full range of benefit programs. Our services include qualified retirement plans, such as unit-benefit pension, cash-balance pension, floor-offset pension, profit sharing, 401(k) and ESOP plans, as well as nonqualified deferred compensation plans, such as executive pensions or SERPs. We also create health and welfare programs, such as flexible spending accounts, health savings accounts and retiree medical plans, and fringe benefit programs, such as cafeteria plans, dependent care assistance plans, pre-tax parking plans, and tuition reimbursement plans. Our practice encompasses design of compensation programs such as long-term and annual performance-based bonus plans, stock option plans and omnibus equity plans, providing for the award of options, bonus and restricted stock and stock units, SARs, dividend equivalent rights, and performance and deferred awards.

The members of our group deliver the sound and resourceful communication, implementation and compliance strategy that must support any design. We can help you master the process-based ERISA fiduciary compliance requirements or implement a nondiscrimination testing methodology that helps you focus resources on valued members of your workforce. When problems arise under health and compensation plans, we routinely guide clients through successful negotiations with the U.S. Internal Revenue Service, the U.S. Department of Labor and the Securities and Exchange Commission. We are at the forefront in handling ERISA fiduciary and other forms of benefits litigation.

In transactions such as acquisitions, mergers, and spin-offs, we help assess the compensation and benefits liabilities you face, including for deferred compensation, underfunded pensions, retiree medical, and golden parachute payments.

Attorneys in our international offices counsel clients on the application of local government regulations to employee benefit plans and employee compensation matters. U.S. and international partners and associates work closely on cross-border transactions to address the many issues such as data privacy and labor union rules that arise in the international arena.

Our clients range from Fortune 500 companies to start-ups. We also count among our clients pension and welfare benefit plan providers.

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IX. Sample Form and Policy

A. Certification Of Domestic Partnership

1. We maintain the same principal place of residence and intend to continue to do so in the future.
2. We have maintained the same principal place of residence for at least six (6) months.
3. We have agreed to be responsible for each other's basic living expenses in the event that either of us is unable to provide such expenses for him or her self.
4. We both are 18 years of age or older. Neither of us is legally married. We are not related by blood to such a degree that we would be prevented from marrying in the state in which we reside.
5. Neither of us has maintained coverage for another Domestic Partner under any Company or other health or dental plan within the last six months.
6. We agree to notify the Company Benefits Department promptly upon our failure to satisfy any of these Criteria of Domestic Partnership.
7. We understand that benefits extended to the domestic partner of the Company employee are not tax advantaged; not only will the employee's contributions be taxed, but the subsidy paid by the Company will be considered imputed income and will be taxable as required under applicable federal and state tax laws.

Employee and Domestic Partner Information

Employee's Name (print) Domestic Partner's Name (print)

Employee's Residential Address Domestic Partner's Residential Address

Please check one of the following:

____ I certify that my domestic partner, named above, will be claimed as my dependent for federal income tax purposes in the current tax year.

____ I certify that my domestic partner, named above, will not be claimed as my dependent for federal income tax purposes in the current tax year.

The undersigned individuals hereby declare that their relationship satisfies each of the Criteria of Domestic Partnership and that all information provided above is true and correct.

Employee's Signature Date Domestic Partner's Signature Date

Endnotes

[1] See Human Rights Campaign, State of the Workplace 2005-2006 (June 29, 2006) <http://www.hrc.org/Template.cfm?Section=Work_Life>.

[2] 1 U.S.C. § 7 (2000).

[3] 28 U.S.C. § 1738C (2000).

[4] I.R.C. § 105(b) (2006).

[5] I.R.C. § 105(c)(1) & (2) (2006).

[6] I.R.C. § 106(a) (2006).

[7] 26 C.F.R. § 1.106-1 (2006).

[8] I.R.C. § 152(d)(1)(A), 152(d)(2)(H) (2006).

[9] I.R.C. § 152(d)(1)(C) (2006).

[10] I.R.C. § 105(b) (2006); Priv. Ltr. Rul. 200602006 (Jan. 13, 2006).

[11] I.R.C. § 152(f)(3) (2006).

[12] 539 U.S. 558 (2003).

[13] I.R.C. § 125(d)(1) (2006).

[14] I.R.C. § 125(a) (2006).

[15] Prop. Treas. Reg. § 1.25-2, Q/A-4(b); Priv. Ltr. Rul. 9603011 (Oct. 18, 1995).

[16] I.R.C. § 213(a) (2006).

[17] I.R.C. § 223(a) (2006).

[18] I.R.C. § 223(d)(2)(A) (2006).

[19] I.R.C. § 223(f)(2), 223(f)(4)(A) (2006).

[20] I.R.C. § 402(c)(9) (2006); 26 C.F.R. § 1.402(c)-2(A-12) (2006).

[21] Pension Protection Act of 2006 § 829 (2006).

[22] I.R.C. §§72(s)(3) (2006); 401(a)(9)(B)(iv) (2006).

[23] ERISA § 205 (2006).

[24] I.R.C. § 401(a)(11)(A)(i)-(ii) (2006).

[25] ERISA § 607(3)(A) (2006); see also I.R.C. § 4980B(g)(1)(A) (2006).

[26] Id.

[27] ERISA § 603(1) & (3) (2006).

[28] ERISA §§ 514(b)(2)(A), 731(a)(1) (2006).

[29] ERISA § 514(b)(2) & (4) (2006); See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-51 (1987).

[30] ERISA § 514(b)(2) & (4) (2006).

[31] ERISA § 514(b)(7) (2006).

[32] ERISA § 206(d)(3)(A) (2006).

[33] ERISA § 206(d)(3)(B)(ii)(I) (2006).

[34] ERISA § 502(a) (2006).

[35] Rovira v. A.T.&T., 817 F. Supp. 1062, 1069-70 (S.D.N.Y. 1993). ERISA defines a beneficiary as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." ERISA § 1002(8) (2006).

[36] Rovira, 817 F. Supp. at 1069-70 (holding that domestic partner did not have standing to sue for benefits under ERISA-covered pension plan because the plan limited beneficiaries to legal spouses, dependent children, and dependent relatives). Therefore, a domestic partner in Massachusetts suing under a plan that allows same sex spouses as beneficiaries would probably have standing.

[37] Goodridge v. Department of Public Health, 440 Mass. 309 (2003).

[38] Baker v. State, 744 A.2d 864 (Vt. 1999).

[39] 1999 Vt. Sess. Laws, Act No. 91, § 3, codified at 15 VT. STAT. ANN. § 1204(a) (2003).

[40] See http://www.leg.state.vt.us/docs/2000/bills/passed/h-847.htm.

[41] CONN. GEN. STAT. ANN. § 46b-38nn (West 2006).

[42] A.B. 205, 2003-04 Sess. (Cal. 2003).

[43] Knight v. Schwarzenegger, No. 03AS05284 (Super. Ct.

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Sacramento Cty., Sept. 8, 2004); See Knight v. Schwarzenegger, 128 Cal. App. 4th 14 (Cal. App. 2005) (denial of petition for a writ of mandate regarding whether statute providing that registered domestic partners had the same rights and obligations as spouses was an improper legislative mandate).

[44] HAW. REV. STATS. § 572C (2001); Hawaii was almost, however, the first state to recognize gay marriage, as the Supreme Court of Hawaii held in 1993 that the state's prohibition of marriage by same sex couples appeared to be sex discrimination and a denial of equal protection under the state constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). Before same sex marriage rights could issue from that decision, the legislature amended the Hawaii constitution to provide that "the legislature shall have the power to reserve marriage to opposite sex couples," and a state statute providing that a "valid marriage contract shall be only between a man and a woman."

[45] 22 M.R.S. § 2710 (2005).

[46] 2003 N.J. Sess. Law Serv. ch. 246, Assembly No. 3743.

[47] D.C. CODE § 32-702 (2006).

[48] MASS. GEN. LAWS ch. 207, §§11, 12; Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (Mass. 2006).

[49] See, e.g., Connecticut Att'y Gen. Op. (Aug. 2, 2004) (establishing that Massachusetts marriage licenses for same sex couples would be recognized in Connecticut as evidence of identity to change names on drivers' licenses and car registrations.); Rhode Island Att'y Gen. Op. (Oct. 19, 2004) (stating that same sex spouse married in Massachusetts would be eligible to receive spousal benefits under teacher's retirement system). Letter from Alan G. Hevesi, State Comptroller of New York (Oct. 8, 2004) (The New York State and Local Retirement System "will recognize a same sex Canadian marriage in the same manner as an opposite sex New York marriage, under the principle of comity."); Letter from Anthony W. Crowell, Office of the Mayor, on behalf of Mayor Michael R. Bloomberg, to Alan Van Capelle (Apr. 6, 2005) ("[I]t is the policy of the City of New York to recognize equally all marriages, whether between same- or opposite sex couples . . . lawfully entered into in jurisdictions other than New York State, for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law."); See also Langan v. St. Vincent's Hosp., 25 A.D.3d 90 (N.Y. 2005) ("New York's public policy does not preclude recognition of a same sex union entered into in a sister state.").

[50] See DOMA Watch, Current Legal Challenges/Recent Decisions (Oct. 4, 2006) <http://www.domawatch.org/currentchallenges.html>.

[51] Hernandez v. Robles, 2006 WL 1835429 (N.Y. 2006).

[52] See National Conference on State Legislatures, Defense of Marriage Acts (Dec. 2006) <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA>.

[53] The Connecticut General Assembly Office of Legislative Research has summarized the different laws and constitutional provisions in a report on state laws regarding same sex marriage as of April 2005. < http://www.cga.ct.gov/2005/rpt/2005-R-0374.htm>.

[54] NEB. CONST. art. I, § 29.

[55] Citizens for Equal Protection, Inc. v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005).

[56] Citizens for Equal Protection v. Bruning, 455 F.3d 855 (8th Cir. 2006).

[57] First Amendment Center, 8th Circuit Reinstates Nebraska Gay-Marriage Ban (July 17, 2006) <http://www.firstamendmentcenter.org/news.aspx?id=17166&SearchString=8th_circuit_reinstates>.

[58] See, e.g., Smelt v. County of Orange, 374 F.Supp.2d 861 (C.D. Cal. 2005) (distinguishing Bruning as addressing a broader marriage restriction than that in California law, and abstaining on ruling on the constitutionality of the California restriction pending resolution of proceedings at the state court level).

[59] CAL. INS. CODE § 10121.7(a) (West 2005); CAL. FAM. CODE § 297.5 (West 2005).

[60] HAW. REV. STAT. § 431:10A-601 (2004).

[61] N.J. STAT. ANN. §§ 17B:26-2.1x, 17B:27-46.1bb, 17B:27A-7.9.

[62] VT. STAT. ANN. tit. 8, § 4063a (2004).

[63] ME. REV. STAT. ANN. tit. 24-A, §§ 2741-A(2), 2832-A(2) (West 2004).

[64] See, e.g., MASS. GEN. LAWS. ANN. ch. 176D, § 3(7)(b).

[65] CONN. GEN. STAT. ANN. § 46b-38nn (West 2006).

[66] Connecticut Commissioner of Insurance Letter <http://

[67] 2005 Va. Acts ch. 871 (amending VA. CODE ANN. § 38.2-3525 as of Mar. 28, 2005).

[68] See Lambda Legal, In Your State (March 13, 2007) <http://www.lambdalegal.org/our-work/states/>.

[69] Assembly Bill 196 (effective Jan. 1, 2004).

[70] Theos McKinney and Michael Lotito, The California Employment Law Revolution, ACC Docket 23, no. 2 (Feb. 2005): 22-47.

[71] See Development in the Law, Statutory Protection for Gays and Lesbians in Private Employment, 109 HARV. L. REV. 1625, 1630 (1996).

[72] University of Alaska v. Tumeo, 933 P.2d 1147 (Alaska Sup. Ct. 1997).

[73] Tyma v. Montgomery County, 369 Md. 497 (Md. Ct. App. 2001).

[74] See Unmarried America, State Statutes Prohibiting Marital Status Discrimination in Employment <http://www.unmarriedamerica.org/ms-employment-laws.htm>.

[75] VA. CODE ANN. § 20-45.3.(2006).

[76] See supra Section III. B. 3.

[77] Treas. Reg. § 1.61-21(a)(3).

[78] Treas. Reg. § 1.61-21(a)(4).

[79] See Priv. Ltr. Rul. 9111018 (Dec. 14, 1990).

[80] Priv. Ltr. Rul. 200108010 (Feb. 23, 2001).

[81] Priv. Ltr. Rul. 200139001 (Jun 13, 2003).

[82] Priv. Ltr. Rul. 200339001 (June 13, 2003); see also Priv. Ltr. Rul. 9850011 (Sept. 10, 1998).

[83] Priv. Ltr. Rul. 9603011 (Jan. 19, 1996); Priv. Ltr. Rul. 200108010 (Nov. 17, 2000).

[84] Priv. Ltr. Rul. 200108010 (Feb. 23, 2001).

[85] Treas. Reg. § 1.61-21(b)(2) (2006).

[86] Id.

[87] See infra Part V.A.2.b.(1).

[88] Priv. Ltr. Rul. 9111018 (Dec. 14, 1990).

[89] Priv. Ltr. Rul. 9231062 (July 31, 1992).

[90] Priv. Ltr. Rul. 200108010 (Feb. 23, 2001).

[91] See Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Valuing and Taxing Employment Based Medical Benefits Provided to Domestic Partners and Same Sex Spouses, Employee Benefits and Executive Compensation Advisory (Aug. 2004) <http://www.mintz.com/images/dyn/publications/EBEC-Advisory-8-23-04.pdf>.

[92] Priv. Ltr. Rul. 200108010 (Feb. 23, 2001).

[93] See, e.g, Letter from Michael Kriner, Director of Pension and Benefits, N.C.R. Corp., to Neil Makin, Co-chair, League at NCR (Sept. 24, 2002) <http://www.leaguencr.com/Documents/Domestic%20Partner%20Letter.doc>.

[94] See Proskauer Rose Client Alert, Same Sex Marriage and Domestic Partnerships: Implications for Employers (Aug. 2004) <http://www.proskauer.com/news_publications/client_alerts/content/2004_08_11>.

[95] Priv. Ltr. Rul. 200108010 (Feb. 23, 2001).

[96] I.R.C. § 152 (1) – (3) (2006).

[97] See, e.g., Priv. Ltr. Rul. 200108010 (Feb. 23, 2001), Priv. Ltr. Rul. 200339001 (Sept. 26, 2003).

[98] Priv. Ltr. Rul. 200339001 (Sept. 26, 2003).

[99] See District of Columbia Department of Health, Vital Records Division <http://doh.dc.gov>.

[100] See "Certificate of Domestic Partnership" attached as "Exhibit A."

[101] Treas. Reg. § 54.4980B-5, Q&A 4(c).

[102] 26 C.F.R. § 1.501(c)(9)-3(a) (2006); Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001).

[103] Id.; see also, Priv. Ltr. Rul. 98-50-011 (Sept. 10, 1998) (holding that expenditures on domestic partner coverage were de minimis as long as they did not exceed 3% of total expenditures).

[104] See Dep't of Labor Adv. Op. Ltr 2001-05A (June 1, 2001).

[105] Id.

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[106] It should be noted, however, that employers need not cover spouses at all under applicable state and federal laws.

[107] Massachusetts Same-Gender Marriage: Results of the Human Resources Policy Survey Conducted by NEEBC and the Segal Company (Fall 2004) <http://www.nehra.com/articleresources/article.cfm?id=843&_categorytypeid=1>.

[108] See http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf.

[109] Cote-Whitacre v. Dep't of Pub. Health, 844 N.E.2d 623 (Mass. 2006).

[110] See, e.g., Rutgers Counsel of AAUP Chapters v. Rutgers State University, 298 N.J. Super. 442, 689 A.2d 828 (1997).

[111] Pension Protection Act of 2006 § 829 (2006).

[112] Pension Protection Act of 2006 § 826 (2006).