

FACTS from EBRI

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Domestic Partner Benefits: Facts and Background

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■ What is a “domestic partnership” and what proof of the relationship is required?

- Domestic partner benefits are benefits that an employer chooses to offer to an employee's unmarried partner, whether of the same or opposite sex.
- An employer wishing to implement a domestic partner program needs to create a definition of what an eligible domestic partner is. The most common definitions contain four or five core elements: 1) The partners must have attained a minimum age, usually 18; 2) Neither person is related by blood closer than permitted by state law for marriage; 3) The partners must share a committed relationship; 4) The relationship must be exclusive; 5) The partners must be financially interdependent.
- An employer also must decide whether the domestic partner program is to cover same-sex couples only or include opposite-sex couples.
- Documentation of proof of a domestic partner relationship can take many forms. It is up to the employer to determine what is appropriate. Some employers are satisfied with the partners signing a written statement of their relationship. Some employers may require proof of some financial relationship, such as a joint lease or mortgage. Whatever documentation is required must be germane to the issue of validating a domestic partnership, or it could lead to claims of invasion of privacy.

■ What is included in domestic partner benefits and how many employers offer this benefit?

- Most employers that offer domestic partner benefits to their workers offer a range of only low-cost benefits, such as family/bereavement/sick leave, relocation benefits, access to employer facilities, and attendance at employer functions. However, most public attention involving domestic partner benefits involves employers that offer health insurance coverage to domestic partners.
- According to a 2007 survey by Hewitt Associates, 54 percent of surveyed firms offered coverage for domestic partners. Seventeen percent of firms offered domestic partner coverage to same-sex couples only; 1 percent of firms offered coverage to opposite-sex couples only; 32 percent of surveyed firms offered coverage for same or opposite-sex couples. According to a 2005 Hewitt Associates study, of those employers that offered domestic partner benefits, 83 percent offered the coverage to dependents of domestic partners. These numbers represent a significant increase since 2002, when 19 percent of surveyed firms offered domestic partner benefits.
- According to the Human Rights Campaign Fund, which describes itself as the largest national lesbian and gay political organization in the United States, as of May 16, 2008, 9,374 employers offered domestic partner benefits. Of that number, 8,653 are private-sector companies, with 270 of the Fortune 500 companies offering domestic partner benefits. A listing of firms that offer full health insurance coverage to domestic partners is posted by the Human Rights Campaign at www.hrc.org/

■ Why an employer offers domestic partner benefits:

- *Market competition and diversity*—The attraction to employees of a comprehensive benefits package that offers health and retirement coverage is well-documented. Given the typically diverse contemporary work force, some employers try to design their benefits package to appeal to that diversity and maintain a recruitment edge. According to a 2005 Hewitt Associates study, the number-one reason for offering domestic partner benefits was to attract and retain employees (cited by 71 percent of organizations offering benefits to same-sex couples and 69 percent to opposite-sex couples).
- *Fairness*—Many employers believe that by offering benefits to legally married partners of employees and not offering the same benefits to the partners of non-legally married employees discriminates on the basis of sexual orientation and/or marital status. Many employers have a formal policy against discrimination on the basis of sexual orientation, as the practice is illegal in some jurisdictions. The decision to offer domestic partner benefits communicates to employees that the employer is committed to its stated policy. According to a 2005 Hewitt Associates study, there was no statistical difference among organizations that

said offering domestic partner benefits to same-sex (65 percent) and opposite-sex (64 percent) couples was the fair/right thing to do.

■ **Costs of domestic partner benefits:**

- This is the primary concern for employers, especially with regard to health benefits, since extending coverage to more individuals increases the cost of health benefits. There are two components driving the cost issue: 1) How many new enrollees the plan can expect to receive; and 2) What risks are likely to be associated with those individuals. In 2005, Hewitt Associates found that in 88 percent of the organizations that offer domestic partner benefits, they comprise less than 2 percent of total benefit costs.
- In a 2005 study of domestic partner benefits, Hewitt Associates found that on average 1 percent of eligible employees offered domestic partner coverage in the health plan actually elected to take it. Many employers, in the planning stage, had anticipated an enrollment rate of 10 percent. In an earlier 1994 study, Hewitt found employers that allow only same-sex couples to enroll domestic partners in the health plan reported a lower enrollment rate, compared with those employers that allow opposite-sex couples to enroll. Overall, Hewitt found in 1994 that 67 percent of the couples electing domestic partner coverage were opposite-sex couples.
- Hewitt found, in 2000, that employers are no more at risk when adding domestic partners than when adding spouses. Experience has shown that the costs of domestic partner coverage are lower than anticipated. There are several reasons why: The employees eligible for domestic partner coverage tend to be young, and, as a result, healthy; enrollment in domestic partner coverage is low, primarily due to the fact that most domestic partners already have coverage through their own employers; any increased risk of AIDS among male same-sex couples appears to be offset by a decreased risk among female same-sex couples; and same-sex domestic partners have a very low risk of pregnancy.
- Most recent estimates (1996) of the lifetime costs of treating a person with HIV disease range from \$71,143 to \$424,763. By way of comparison, the cost of a kidney transplant can be as high as \$200,000, and the cost of premature infant care can run from \$50,000 to \$100,000.

■ **Qualification for benefit privileges under current federal law:**

Tax Treatment

- The U.S. Internal Revenue Service (IRS) has addressed the issue of domestic partner coverage in several private letter rulings. According to those rulings, employment-based health benefits for domestic partners or nonspouse cohabitants are excludable from taxable income only if the recipients are legal spouses or legal dependents. The IRS also states that the relationship must not violate local laws in order to qualify for tax-favored treatment. See below for a discussion of the 1996 Defense of Marriage Act.
- The IRS leaves the determination of marital status to state law.
 - ◆ *Tax-Favored Treatment*—There are 11 states plus the District of Columbia that recognize common law marriages^a and all states recognize common law marriages legally contracted in those jurisdictions that permit it. (http://topics.law.cornell.edu/wex/table_marriage) Couples in those jurisdictions that have a common law marriage do receive the tax favorable treatment in an employment-based plan for domestic partner coverage.
 - ◆ *No Tax-Favored Treatment*—See below for discussions of California's, Connecticut's and Massachusetts' recognition of same-sex marriages. Some cities (i.e., San Francisco and New York City) allow domestic partners to register their relationship with the city, but these registries do not provide legal status as marriage or common law marriage.
- The tax, for those who do not receive tax-favored status, is determined by assessing a fair market value for covering the domestic partner. This amount is then reported on the employee's W-2 form and is subjected to Social Security FICA and federal withholding taxes.
- Employees with domestic partners, including same-sex spouses, can get federal tax-free employer health benefits in two ways: (i) the partner qualifies as the employee's tax dependent for health plan purposes or (ii) the employee claims a federal tax exemption for the partner.

Sec. 125 Flexible Benefits and Spending Accounts

- Employee flexible benefit allowances that include extra money or credits toward providing coverage for a domestic partner are treated as taxable income.
- Flexible spending account benefits may not be provided to a domestic partner because such accounts can include only nontaxable income.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

- Under federal law, no requirement exists that a plan must extend COBRA rights to domestic partners who lose coverage due to what would otherwise be a qualifying event. An employer may choose to extend COBRA coverage to a domestic partner but is under no legal obligation to do so.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)

- Domestic partners may not be considered as dependents. However, an employer that provides health insurance to domestic partners may want to include them in the certification procedure for documenting the partnership and apply the other HIPAA requirements for consistency in administration.

Defense of Marriage Act of 1996 (DOMA)

- For purposes of federal tax law and benefits, DOMA established federal definitions of (a) "marriage" as a legal union only between one man and one woman as husband and wife; and (b) "spouse" as a person only of the opposite sex who is a husband or wife. Because of DOMA's provisions, if a state extends marriage to same-sex couples, same-sex partners would not be treated as spouses for federal tax and employee benefit purposes.
- Because marriages are granted through state law, DOMA also gives states the choice to recognize same-sex marriages legally performed in other states. The law does not specifically outlaw same-sex marriage, and states remain free to recognize same-sex marriage if they so choose. But by making one state's recognition of another state's legal acts optional in this instance, DOMA essentially creates an exception to the Full Faith and Credit Clause of the U.S. Constitution, thus raising constitutional questions concerning the validity of the law. Because Vermont created a parallel civil union rather than sanctioning same-sex marriage, the new law does not create an opportunity to challenge DOMA's constitutionality. Since the enactment of DOMA in 1996, the issue has not come before the U.S. Supreme Court for a decision.
- Among the states that ban same-sex marriage, 16 do so by law; eight do so by state constitution; and 18 states ban same-sex marriage and civil unions by state constitutions.
www.hrc.org/your_community/index.htm

■ State and local government actions affecting domestic partner benefits:

Benefits generally are regulated at the federal level by the Employee Retirement Income Security Act of 1974 (ERISA), and private employers that choose to offer domestic partner benefits must follow federal law (see section above). Most recent legal activity concerning domestic partner benefits has involved state and local governments acting in their capacity as employers, but subject to local political and legal circumstances. As a result, some jurisdictions have taken very different approaches to the issue, such as:

Connecticut Supreme Court, Elizabeth Kerrigan et al. vs. Commissioner of Public Health, et al.

- October 28, 2008, Connecticut became the third state to legalize same sex marriage in a 4-3 ruling by the state's Supreme Court. (www.jud.state.ct.us/external/supapp/Cases/AR0cr/CR289/289CR152.pdf)
- The state enacted a civil union law in 2005 that provides same-sex couples with some of the same rights and responsibilities under state law as marriage. Connecticut became the second state in the United States (following Vermont) to adopt civil unions, and the first to do so without judicial intervention.
- In the case *Kerrigan v Commissioner of Public Health*, eight same-sex couples argued that the state's civil union law was discriminatory and unconstitutional because it established a separate and therefore inherently unequal institution for a minority group. Citing equal protection under the law, the state Supreme Court agreed.

California Supreme Court, In re Marriage Cases

- May 15, 2008, the California Supreme Court ruled by 4-3 that marriages between people of the same sex are legal, thereby overturning an existing statutory ban on same-sex marriage. The ruling went into effect June 14, 2008. (www.courtinfo.ca.gov/opinions/documents/S147999.PDF)
- Proposition 8 "Limit on Marriage" would amend the California state constitution to define marriage as between one man and one woman. Fifty-two percent of the electorate voted in favor of Proposition 8 in November 4, 2008, general election. The California Supreme Court agreed to consider challenges to Proposition 8 in March 2009. (www.courtinfo.ca.gov/courts/supreme/highprofile/prop8.htm)

Supreme Judicial Court of Massachusetts, Hillary Goodridge & others vs. Department of Public Health & another

- The Massachusetts Supreme Judicial Court held Nov. 18, 2003, that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." The court stayed the entry of judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."
(<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=ma&vol=sjcslip/sicNov03c&invol=1>)
- The Massachusetts State Senate asked the court for an advisory opinion as to whether legalized civil unions would be sufficient for same-sex couples. The court ruled on Feb. 6, 2004, that they would not, saying, "Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. ... The history of our nation has demonstrated that separate is seldom, if ever, equal."
- The state court's decision providing state recognition of same-sex marriages went into effect on May 18, 2004. On March 29, 2004, the state legislature narrowly passed a state constitution amendment ballot measure that would overturn Goodridge. The amendment must be approved a second time in the 2005-2006 session of the legislature. On June 14, 2007, the effort to ban same-sex marriage by amending the state constitution was defeated.
- At this point it is unknown what impact the Massachusetts action might have on the federal Defense of Marriage Act, although it is speculated that a challenge arising out of a Massachusetts same-sex marriage (if one occurs) ultimately will test the legality of DOMA before the U.S. Supreme Court. In November 2004, the U.S. Supreme Court refused to hear a case trying to overturn the Massachusetts decision.

San Francisco City Marriages

- On Feb. 12, 2004, San Francisco Mayor Gavin Newsom ordered the city to begin approving same-sex marriages, and since then city clerks have conducted hundreds of same-sex marriage ceremonies. While state law and a voter-approved referendum passed in 2000 (Proposition 22) define marriage as a union of a man and a woman, Newsom maintains that the state constitution's broad equal protection clause pre-empts those laws. Legal challenges to the city's action currently are underway.

Vermont's Civil Union Law for Same-Sex Couples, Effective July 1, 2000

- On April 26, 2000, Vermont's governor signed into law H. 847 (Act 91) establishing a system of civil unions for same-sex couples, effective July 1, 2000. Couples entering into a civil union in Vermont will have the same state-guaranteed rights and privileges (and obligations) as married couples, even though they will not be considered "married" under state law.
- The highly controversial law stemmed from a unanimous ruling Dec. 20, 1999, by the state Supreme Court (*Stan Baker et al., vs. State of Vermont et al.*), which held that there was no state constitutional reason for "denying the legal benefits and protections of marriage to same-sex couples." The case could not be appealed to a federal court because the ruling was based on Vermont's constitution, so federal law did not apply.
- The Vermont Supreme Court did not give permission for legalizing same-sex marriages, but instead ordered the state legislature to come up with some method for implementing its decision. Because the legislature created a domestic partnership equivalent to marriage, employers are expected to be able to retain more design flexibility over their benefit plans, and ERISA will shield self-funded employers from being forced to cover "domestic partners" of Vermont employees.

Benefit Provision

- Because ERISA pre-empts state law provisions that relate to employee benefit plans, private employers will not be required to recognize civil unions as marriages for the purposes of employee benefit plan design. The exception to this is with regard to state family leave benefits and workers compensation benefits, which are not ERISA-covered programs.
- Insurers in Vermont are required to offer coverage to parties in civil unions and their dependents if they offer such coverage to spouses and dependents. It appears that employers are not required to purchase such policies for their employees. The insurance provisions of the law took effect on Jan. 1, 2001.

Who Is Eligible for a Civil Union and What Are the Rights and Benefits?

- Civil unions are available to two unrelated persons of the same sex who:
 - 1) Are at least 18 years old.
 - 2) Are competent to enter a contract.

- 3) Are not already married or in a civil union.
- 4) Have a guardian's written permission if they are under a guardianship.

There is no residency requirement, but to dissolve a civil union the parties must follow the same procedures required for divorce.

- Parties to a civil union have exactly the same rights and obligations as married couples and are subject to the state domestic relations laws regarding support, custody, property division, and dissolution of the relationship.

Reciprocal Beneficiary Relationships

- Related persons who cannot marry or enter into a civil union (i.e., siblings) can now enter into a "reciprocal beneficiary" relationship. This relationship will entitle them to more limited spousal-type rights than civil unions. Generally, these rights relate to health care decisions, hospital visits, and durable power of attorney for health care (Hawaii has had a similar reciprocal beneficiary law since 1997).
- Two states have enacted civil union laws which provide all the same rights and responsibilities as marriage: New Hampshire (www.gencourt.state.nh.us/legislation/2007/HB0437.html) and New Jersey. (www.njleg.state.nj.us/2006/Bills/A4000/3787_II.PDF)

San Francisco Nondiscrimination in Contracts-Benefits Ordinance, Effective Jan. 1, 1997

- The Air Transport Association of America successfully sued the City of San Francisco, claiming airlines do not have to comply with the city's ordinance because the airlines' benefit packages are governed by federal law, specifically ERISA, which pre-empts state and local laws with regard to employee benefits. In an April 10, 1998, ruling, the U.S. District Court for the Northern District of California upheld the San Francisco ordinance *except* with regard to airlines. In her ruling, Judge Claudia Wilkens stated that the city acts as a "market participant" in dealing with city contractors—other than airlines—and the law therefore does not violate the ERISA pre-emption provisions. However, in the city's dealing with airlines at the city-owned airport, the city acts as a regulator, and not a market participant, so therefore the ordinance is pre-empted by ERISA with regard to the airlines, the judge ruled. The ruling applies the "market participant" standard to situations where the city wields no more power than an ordinary consumer in its contracting relationships.
- In November 1999, Los Angeles and Seattle joined San Francisco in enacting an ordinance that requires private employers that contract with the cities to provide benefits to the domestic partners of workers.

State and local governments as employers

Because state and local laws tend to vary significantly, there can be sharply different approaches by state and local governments—acting as employers—in the benefits they offer to their workers. For example:

- Virginia—In April 2000, the Virginia Supreme Court, in a unanimous ruling, struck down Arlington County's domestic partner benefits ordinance, holding that the county had exceeded its authority under state law.
- Oregon—A 1998 state appellate court ruling (*Tanner v. Oregon Health Sciences University*), held that the Oregon Constitution requires all state and local government agencies to offer equal benefits to gay and married employees.

For more information, contact Ken McDonnell, (202) 775-6367, or see EBRI's Web site at www.cbri.org.

Sources: Melody A. Carlsen, "Domestic Partner Benefits: Employer Considerations," *Employee Benefit Practices*, International Foundation of Employee Benefit Plans (fourth quarter 1994); Hewitt Associates, *Domestic Partners and Employee Benefits: 1994*, Research Paper (Lincolnshire, IL: Hewitt Associates); Hewitt Associates, *Survey Findings: Domestic Partners 2000* (Lincolnshire, IL: Hewitt Associates, 2000); Hewitt Associates, *Survey Findings: Benefit Programs for Domestic Partner & Same-Sex Couples 2005* (Lincolnshire, IL: Hewitt Associates, 2005); Hewitt Associates, *SpecSummary: United States Salaried: 2007-2008* (Lincolnshire, IL: Hewitt Associates, 2007); Barry Newman, Paul Sullivan, RTS, and Michele Popper, *Domestic Partner Benefits: An Employer's Perspective* (Newburyport, MA: Alexander Consulting Group, June 1996); Washington Resource Group of William M. Mercer, Inc., "Vermont Enacts Civil Union Law for Same-Sex Couples," *GRIST Report* (May 15, 2000).

^a For a listing of states recognizing common law marriage, see *Common Law Marriage* at ExpertLaw. (www.expertlaw.com/library/family_law/common_law.html)

^b The United States Constitution ordinarily requires every state to accord "Full Faith and Credit" to the laws of its sister states. Thus, a common law marriage that is validly contracted in a state where such marriages are legal will be valid even in states where such marriages cannot be contracted and may be contrary to public policy. Note: Under current law, this applies to common law marriages only; not all states permit common law marriages; and DOMA defines marriage as between a man and woman (see the section on DOMA above for application to same-sex marriages). For a discussion of the legal issues involved in *Common Law Marriage*, see ExpertLaw. (www.expertlaw.com/library/family_law/common_law.html)