Chapter 40

Domestic Partner Benefits

Introduction

Domestic partner benefits are benefits that an employer voluntarily 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 first to identify what constitutes a domestic partner. The most common definitions contain some or all of the following core elements (Hewitt Associates, 2000):

- The partners must have attained a minimum age, usually 18.
- Neither person is related by blood closer than permitted by state law for marriage.
- The partners must share a committed relationship.
- The relationship must be exclusive.
- The partners must be financially interdependent.
- The partners must have resided together a minimum period of time.
- The relationship must be registered as a domestic partnership with a government agency.

An employer also must decide whether the domestic partner program is to cover same-sex couples only or include opposite-sex couples. Documentary proof of a domestic partner relationship can take many forms; it is up to the employer to determine the appropriate one. Some employers are satisfied with the partners signing a written statement of their relationship. Others may require proof of a financial relationship such as a joint lease or mortgage or copies of tax returns showing financial interdependence. 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.

Benefits Offered

Most employers that offer domestic partner benefits 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, public attention has focused on employers who 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 (Hewitt Associates, 2007). 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 (Hewitt Associates, 2005).

According to the Human Rights Campaign Fund, which claims to be the largest national lesbian and gay political organization in the United States, as of August 14, 2008, 9,374 employers had been identified as offering domestic partner benefits.[1]

Reasons for Offering Domestic Partner Benefits

Many employers believe that offering benefits to legally married partners of employees and not offering the same benefits to the partners of non-legally married partners of employees discriminates on the basis of sexual orientation and/or marital status. Sixty-four percent of employers had a formal policy against discrimination on the basis of sexual orientation in 2000, according to Hewitt Associates (Hewitt Associates, 2000). The decision to offer domestic partner benefits communicates to employees that the employer is committed to its stated policy.

Many employers also offer domestic partner benefits in order to recruit and retain workers. The relatively high value that employees place on employment-based comprehensive health benefits is well documented (Christensen, 2002). In a tight labor market, designing a benefits package that appeals to a diverse work force enables an employer to maintain a recruitment edge and demonstrates that the employer values diversity. Employee morale and productivity have been found to improve in work environments where individuals believe the employer demonstrates that it values its employees. 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) (Hewitt Associates, 2005).

[1] A listing of firms that offer full health insurance coverage to domestic partners is posted by the Human Rights Campaign at www.hrc.org/worknet/dp/index.asp

Costs of Domestic Partner Benefits

Cost is the primary concern for employers, since extending coverage to more individuals increases the cost of health benefits. Two components drive the cost issue:

- How many new enrollees the plan can expect to receive; and
- What risks are likely to be associated with these individuals?

In a 2000 study of domestic partner benefits, Hewitt Associates found that 90 percent of employers that offer domestic partner benefits reported that less than 3 percent of all employees offered the coverage actually elected to take it, and 58 percent reported less than 1 percent acceptance (Hewitt Associates, 2000). In the planning stage, many employers had anticipated an enrollment rate of 10 percent. Employers that allow only same-sex couples to enroll domestic partners in the health plan reported a lower enrollment rate, compared with those that allow opposite-sex couples to enroll. Hewitt found that employers are no more at financial 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 for this: The employees eligible for domestic partner coverage tend to be young, and, as a result, healthier; enrollment in domestic partner coverage is low, primarily because 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 near-zero 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. In 2005, Hewitt Associates found that 88 percent of employers that offer domestic partner benefits reported that they amount to less than 2 percent of total benefit costs (Hewitt Associates, 2005).

Domestic Partner Benefits and Federal Law

The 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. The IRS leaves the determination of marital status to state law. Currently, three

states recognize same-sex marriages: California, Connecticut, and Massachusetts. 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.

With regard to opposite-sex couples, there are 11 states plus the District of Columbia that recognize common law marriages and all states recognize common law marriages legally contracted in those jurisdictions that permit them (see http://topics.law.cornell.edu/wex/table_marriage for more information). Opposite-sex couples in those jurisdictions that recognize common-law marriage do receive the tax-favored treatment for spousal coverage in an employment-based plan. However, an employer that contributes to the cost of health benefits for domestic partners must report the premium (or premium equivalent for self-insured plans) of the employer-provided portion as imputed income on the employee's W-2 form.

Sec. 125 Flexible Benefits and Spending Accounts—Employee flexible allowances that include extra money or credits toward providing coverage for a domestic partner are treated as taxable income, and employee contributions for domestic partner coverage cannot be taken on a pretax basis. Flexible spending account benefits may not be provided to a domestic partner because, generally, they do not qualify as employees' dependents under the tax code.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)—A domestic partner may not make an independent election for COBRA coverage. This is because COBRA specifies that only covered employees, their spouses and children are considered "qualified beneficiaries." A domestic partner may be part of an employee's election if the plan provisions extend continuation coverage to domestic partners for some or all COBRA events.

Health Insurance Portability and Accountability Act of 1996 (HIPAA)—Domestic partners may not be dependents and therefore technically are not covered by some portions of HIPAA. However, an employer that provides health insurance to domestic partners will need to include them in the certification procedure and health nondiscrimination provisions of HIPAA, if they are covered by the plan. Employers may want to 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.

State and Local Governments and Domestic Partner Benefits

Benefits generally are regulated at the federal level through the Employee Retirement Income Security Act of 1974 (ERISA), and private employers that choose to offer domestic partner benefits must follow federal law. 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.

Connecticut Supreme Court, Elizabeth Kerrigan et al. vs. Commissioner of Public Health et al.—On October 10, 2008, the Connecticut Supreme Court in a 4–3 ruling found that failing to give same-sex couples the full rights, responsibilities, and name of marriage was against the equal protection clauses of the state constitution and ordered that same-sex marriage be legalized. The ruling is to take effect October 28, 2008. www.jud.state.ct.us/external/supapp/Cases/AROcr/CR289/289CR152.pdf

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. See www.courtinfo.ca.gov/opinions/documents/S147999.pdf for the decision.

The "Limit on Marriage" (Proposition 8) proposed constitutional amendment is an initiative to put before the voters of California in November 2008 an amendment to the state constitution that would ban same-sex marriage, thereby overturning the state Supreme Court's decision. Gov. Arnold Schwarzenegger is opposed to the proposed constitutional amendment. On November 4, 2008, California voters voted in favor of Proposition 8.

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/sjcNov03c&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 constitutional amendment ballot measure that would overturn Goodridge. The amendment had to 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:

- Are at least 18 years old.
- Are competent to enter a contract.
- Are not already married or in a civil union.
- 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).

The following states have enacted civil union laws which provide all the same rights and responsibilities as marriage:

- Connecticut (www.jud.ct.gov/lawlib/Notebooks/Pathfinders/CivilUnions.htm). See above on Connecticut and same sex marriage.
- New Hampshire (www.gencourt.state.nh.us/legislation/2007/HB0437.html).
- New Jersey (www.njleg.state.nj.us/2006/Bills/A4000/3787_I1.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.

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Additional Information

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HRC WorkNet is a national source of information on workplace policies and laws surrounding sexual orientation and gender identity.
www.hrc.org/worknet/dp/index.asp

San Francisco's City Ordinance on Equal Benefits for Domestic Partners and Spouses: www.sfgov.org/site/sfhumanrights_index.asp?id=4584