

## Same-Sex Domestic Partner Benefits – Current Legal and Plan Drafting Issues

*David N. Levine and Robert A. Imes<sup>1</sup>*

Recent events around the country have brought same-sex domestic partnerships to the forefront of many states' and localities' legislative agendas. Wrapped up with this focus on same-sex domestic partnership issues are the federal, state, and local laws that govern many of the employee benefits provided by employers to their employees.

With the legal landscape constantly changing, plan sponsors are frequently asking what, if any, steps they should take to address same-sex domestic partner employee benefits.

**Background.** Same-sex domestic partnership employee benefits are governed by several different sets of laws which can create complexity in designing and implementing same-sex domestic partner employee benefits.

*State and Local Laws - Marital Status.* No state has adopted laws specifically providing that a same-sex couple may marry.<sup>2</sup> However, existing state constitutions may be interpreted to provide this right. *See In re Opinions of the Justices to the Senate*, 802 N.E. 2d 565 (Mass. 2004); *Goodrich v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003). For example, earlier this year, San Francisco, California, and Portland, Oregon, began issuing same-sex marriage licenses. Their decision to issue same-sex marriage licenses was based, in part, on their conclusions the denial of licenses to same-sex couples violated their state constitutions' equal protection provisions.

At the state level, thirty-nine states have adopted laws expressly forbidding same-sex marriage and/or refusing to recognize such marriages performed in other states. However, some states, such as California, Hawaii, New Jersey, and Vermont, have adopted state laws recognizing "civil unions" or the equivalent that provide some, if not all, of the rights granted to married couples in these states. *See* Cal. Fam. Code, div. 2.5; Haw. Rev. Stat. ch. 572C; N.J. Stat. Ann., tit. 21, ch. 8A; Vt. Stat. Ann., tit. 15, ch. 23.

*State and Local Laws - Nondiscrimination and State Mandates.* Some states and localities have laws prohibiting workplace discrimination on the basis of sexual orientation. *See, e.g.,* N.M. Stat. Ann. sec. 28-1-7; N.Y. Exec. Law sec. 291; Wis. Stat. Ann. sec.

---

<sup>1</sup> David N. Levine and Robert A. Imes are attorneys at Groom Law Group, Chartered, a Washington, D.C. law firm specializing in employee benefits. The authors wish to thank their colleagues at Groom Law Group for their advice and assistance with this article.

<sup>2</sup> Belgium, Holland, and some Canadian provinces recognize same-sex marriages.

111.36; Denver, Colo., Code of Ordinances, sec. 28-93. It is possible that legal challenges could be brought arguing that these laws require that same-sex domestic partners be afforded the same employee benefits as married couples.

Nonetheless, if these or similar laws were to be interpreted this way, they are likely preempted insofar as they purport to regulate ERISA plans. In addition, some localities have specific mandates that may require domestic employers either domiciled or conducting business with the locality to provide domestic partner benefits. *See, e.g.*, San Francisco Admin. Code, sec. 12B.1; Portland, Me., Code of Ordinances, sec. 13.6-21. It is less clear whether ERISA would preempt these laws. Of course, employers would be bound by state or local laws governing non-ERISA benefits such as those extending family leave in cases of a domestic partner's illness. *See, e.g.*, Cal. Fam. Code sec. 297.5; Cal. Gov't Code sec. 12945.2.

*Federal Laws - ERISA and the Internal Revenue Code.* Neither ERISA nor the Internal Revenue Code specifically define the term "spouse," but both provide certain tax-benefits to spouses, such as spousal-survivorship rights, spousal COBRA rights, and spousal rollover rights.

*Federal Law - Defense of Marriage Act.* In 1996, Congress enacted the Defense of Marriage Act. This law made two changes to federal law. First, the Defense of Marriage Act provides that no state, territory, possession, or Indian tribe is required to recognize another state, territory, possession, or Indian tribe's recognition of a same-sex relationship as a marriage.<sup>3</sup> 28 U.S.C. sec. 1738C. Second, the Defense of Marriage Act provides that for purposes of all federal laws, "marriage" means only a 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 wife. 1 U.S.C. sec. 7.

*Federal Law - Title VII and the Equal Pay Act.* Title VII prohibits sex discrimination in the terms, conditions, or privileges of employment. 42 U.S.C. sec. 2000e *et seq.* The Equal Pay Act prohibits employers from discriminating against employees in terms of pay due to their sex.<sup>4</sup> 29 U.S.C. sec. 206(d). Two federal courts have held that offering benefits to same-sex domestic partners, but not opposite-sex domestic partners does not violate Title VII or the Equal Pay Act. *See Foray v. Bell Atlantic*, 56 F. Supp. 2d

---

<sup>3</sup> Some commentators have questioned whether this provision violates the federal Constitution's full faith and credit clause. With Massachusetts being the first state recognizing same-sex marriage, this question is likely to be litigated.

<sup>4</sup> The courts have not interpreted Title VII to cover discriminatory employment practices based on sexual orientation. *See, e.g., Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *De Santis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327, 329-30 (9th Cir. 1979).

327, 329-30 (S.D.N.Y. 1999); *Cleaves v. City of Chicago*, 68 F. Supp. 2d 964, 967 (N.D. Ill. 1999).

**Plan Documents.** ERISA Sec. 402(a)(1) requires that an employee benefit plan be established and maintained pursuant to a written instrument. Because of this requirement, there are several plan drafting issues that should be addressed when addressing same-sex domestic partner benefits.

*Definition of Spouse.* Many plan documents fail to define the term "spouse." Other plan documents define "spouse" with a brief reference to local law. In either case, this lack of precision is likely to raise administrative issues as the definition of "spouse" under state law is further refined. In states where a same-sex domestic partner is recognized as a "spouse" under state law, the failure to define the term "spouse" may inadvertently expose the plan to claims that same-sex domestic partners are entitled to plan benefits. This concern would be especially acute in situations where certain ancillary benefits, such as a death benefit, is payable only to a spouse.

*Definition of Domestic Partner.* Plans generally define "domestic partner" in two ways.

First, some plans reference state or local law domestic partner registration systems. A problem with this approach is that such registration systems are non-existent in many localities.

Second, some plans provide their own definition of "domestic partner" either as a stand-alone, or in conjunction with references to local registration systems. Commonly used plan requirements include that domestic partners: (1) have reached the age of majority; (2) are competent to make contracts; (3) are not married already or engaged in another domestic partnership; (4) intend that the domestic partnership be of unlimited duration; (5) reside with the other domestic partner; and/or (6) share financial responsibilities, as evidenced by jointly-owned property, or will or pension beneficiary designations. Plans often require that affidavits affirming domestic partner status be submitted to plan administrators.

Plan sponsors should also consider how they will determine whether a domestic partnership has been terminated. Some plan documents incorporate the standards created under state or local law registration systems. *See, e.g.*, Cal. Fam. Code sec. 299; Haw. Rev. Stat. sec. 572C-7; N.J. Stat. Ann. sec. 26:8a-5; Vt. Stat. Ann., tit. 15, sec. 1206. Other plans establish their own domestic partnership termination procedures. Where a plan uses its own definition of domestic partner, a person's status as such generally ends when the person no longer meets the definition of a domestic partner.

There are benefits and drawbacks to both approaches. Because local requirements vary from jurisdiction to jurisdiction, it may be cumbersome and costly for a plan with employees located in multiple jurisdictions to apply these varying local requirements. On the other hand, it may be difficult for plan terms to precisely address the circumstances when a domestic partnership terminates and, as such, the local requirements may provide more certainty. Regardless of which approach a plan adopts, it is advisable that the plan make clear to participants and beneficiaries that they are responsible for informing the plan administrator promptly when domestic partnerships end and that the plan will take action to recover benefits wrongfully paid after the end of the relationship.

Lastly, plan sponsors should consider whether their choice of law provisions will result in the incorporation of a definition of "domestic partner" that is consistent with their plan's intended definition of "domestic partner."

*Benefits Provided.* If an employer decides to offer benefits to its employees' same-sex domestic partners, it should carefully consider which benefits it wishes to make available. For example, the employer may wish to extend medical and dental benefits, but not dependent life insurance benefits. This review should also consider the extent to which the children of a domestic partner, who have not been adopted by the employee, will be treated as "dependents" for plan purposes.

*Summary Plan Description.* The Department of Labor's summary plan description requirements generally require that each ERISA-governed plan provide a summary of material plan provisions affecting participant benefits under the plan. DOL Reg. sec. 2520.102-3. Several cases have held that if an SPD mistakenly describes plan benefits in a manner inconsistent with the plan document, the terms of the SPD will control. *See, e.g., Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 110 (2d Cir. 2003); *Helwig v. Kelsey-Hayes Co.*, 93 F.3d 243, 248-50 (6th Cir. 1996). As such, with the intense scrutiny of domestic partner benefits, it is important that each plan's SPD clearly state (1) whether or not same-sex domestic partners are covered by the plan and (2) the scope of the benefits provided to same-sex domestic partners.

*Effect of Company Nondiscrimination Policies.* Many companies, including over 75% of Fortune 500 companies, have policies pledging workplace nondiscrimination on the basis of sexual orientation. Employees may claim that these policies give them a right to benefits for their same-sex domestic partners. However, in *Rovira v. AT&T*, the court ruled that a company's nondiscrimination policy did not give a same-sex partner the right to a death benefit payable to a spouse. 817 F. Supp. 1062, 1071 (S.D.N.Y. 1993). The court noted that the employer's nondiscrimination policy specifically disclaimed that it created any contractual rights. Furthermore, the court noted that ERISA fiduciaries have a duty to act in accordance with governing plan documents, and the AT&T policy did not purport to be or modify a plan document.

**Internal Revenue Code Issues.** Until the Defense of Marriage Act, the IRS' position was that marital status was determined under state law. See Revenue Ruling 58-66, 1958-1 C.B. 60 (Jan. 1, 1958); Priv. Ltr. Rul. 200339001 (Jun. 13, 2003). However, the Defense of Marriage Act, does not address the treatment of same-sex domestic partner benefits under certain Code provisions.

*Definition of Dependent.* Even though the Defense of Marriage Act prevents the Code from being interpreted to define a same-sex domestic partner as a spouse, it is possible for a same-sex domestic partner to qualify as a dependent under Code Sec. 152 and thus qualify for dependent benefits under an employer's benefit plans. In order to satisfy this requirement, the same-sex domestic partner must (1) have a principal place of abode in the home of the taxpayer and be a member of the taxpayer's household and (2) received over half of his or her support from his or her same-sex domestic partner. This second requirement often causes a same-sex domestic partner to fail to qualify as a dependent.

*Qualified Plan Requirements.* Many plan sponsors have adopted model language implementing certain IRS requirements. For example, many plan sponsors have adopted the IRS' model language implementing the Code's rollover distribution rules. This model language, however, refers to a "spouse" without providing a definition. See, e.g., Revenue Procedure 2001-57 I.R.B. 2001-38, 279 (Aug. 31, 2001) (referring to a "surviving spouse"). Although no formal guidance has been issued on this topic, it is likely, due to the Defense of Marriage Act, that a plan sponsor need not amend these plan provisions to address the changing state laws on same-sex domestic partner benefits.

*Cafeteria Plans.* A cafeteria plan may provide that plan participants may change their cafeteria plan elections (including revoking a prior election) during a period of coverage if there is a "change in status event." A change in "legal marital status" is a "change in status event." See Treasury Regulation sec. 1.125-4(c)(2)(i). However, because of the Defense of Marriage Act, a same-sex marriage or civil union will not qualify as a "change in status event." See also Treasury Decision 8878, I.R.B. 2000-15, 857 (Apr. 10, 2000) (preamble briefly addressing domestic partnership issues raised in comments on proposed regulations).

*Health Care Benefits.* When an employer provides same-sex domestic partner health care benefits (including, based on informal guidance, a "health reimbursement account"),<sup>5</sup> the distinction between whether a same-sex domestic partner is a dependent or not under Code sec. 152 takes on additional significance. If an employee's same-sex domestic partner is a dependent, amounts paid to the employee and his or her domestic partner through the

---

<sup>5</sup> Breyfogle and Keller, *Defined Contribution Health Plans: Analysis of Recent IRS Guidance and the Legal Issues that Remain*. Pension and Benefits Week. September 3, 2002.

health plan that are attributable to employee after-tax contributions and employer contributions are excluded from the employee's income under Code secs. 104 and 105.

If an employee's same-sex domestic partner does not qualify as a dependent under Code sec. 152, the fair market value of benefits paid on behalf of the same-sex domestic partner (other than amounts attributable to employee after-tax contributions) are includible in the employee's income and subject to FICA and FUTA taxes. See Priv. Ltr. Ruls. 9850011 (Sep. 10, 1998) and 200108010 (Nov. 17, 2000). There is limited authority on point as to how "fair market value" is determined. In certain cases, the IRS has refused to rule on the calculation of "fair market value." See Priv. Ltr. Rul. 9109060 (Dec. 6, 1990). However, where the IRS has issued guidance on this issue, it has concluded that the fair market value of domestic partner coverage is equal the fair market value of the group coverage provided to the domestic partner. See Priv. Ltr. Rul. 9111018 (Dec. 14, 1990) (revoking the portion of Priv. Ltr. Rul. 9034048 (May 29, 1990) concluding that that the fair market value of domestic partner coverage is equal to an arms-length cost that an employee would pay based on individual (not group) policy rates).

In late 2003, Congress created a new form of health care funding arrangement – the health savings account. "Qualified medical expenses" payable from a health savings account include amounts spent for medical care for the covered individual, his or her spouse, and any dependent under Code sec. 152. Code sec. 223(d)(2)(A). As such, unless a same-sex domestic partner is a dependent under Code sec. 152, the Defense of Marriage Act would appear to restrict the ability to use HSA funds to pay same-sex domestic partner medical benefits on a pre-tax basis.

*Funding of Same-Sex Domestic Partner Benefits By Use of Voluntary Employees' Beneficiary Associations.* Many welfare plan benefits are funded through a voluntary employees' beneficiary association (VEBA) described in Code sec. 501(c)(9). In general, a VEBA must provide life, sick, accident, or other benefits to its members, their dependents, or their designated beneficiaries. If the same-sex domestic partner is a "dependent" under Code sec. 152(a), the VEBA may pay benefits to the same-sex domestic partner. If, however, the same-sex domestic partner is not a dependent, only a de minimis amount of same-sex domestic partner benefits may be paid by the VEBA. See Treas. Reg. 1.501(c)(9)-3(a). The IRS has issued several rulings confirming that domestic partner benefits may qualify as "de minimis" and, accordingly, will not disqualify a VEBA that pays benefits. See Priv. Ltr. Ruls. 9850011 (Sep. 10, 1998) and 200108010 (Nov. 17, 2000) (domestic partner coverage expenditures equal to approximately 3% of a VEBA's annual expenditures are de minimis).

*Life Insurance Benefits.* Some employers have expanded their term-life insurance benefits to include coverage for same-sex domestic partners. As is the case with employer-provided term life insurance, the value of the insurance provided for domestic partners must be included in the employee's gross income. See Priv. Ltr. Rul. 9717018 (Jan. 22, 1997).

**ERISA Issues.** Although ERISA, generally speaking, does not require plans to offer any coverage to any dependents, if a plan does offer coverage, ERISA's fiduciary, continuation of coverage, portability, and preemption rules may come into play.

*ERISA Fiduciary Duties.* The Department of Labor has opined that a multiemployer welfare fund's payment of FUTA taxes and the employer portion of FICA taxes attributable to the benefits paid on behalf of a same-sex domestic partner does not violate ERISA's exclusive benefit and prohibited transaction rules. DOL Adv. Op. 2001-05A (June 1, 2001). The Department of Labor added that these expenses must be clearly identified as benefits in the governing plan document, and that they would not constitute reasonable administrative plan expenses.

*COBRA.* Continued health plan coverage under COBRA must be offered to "qualified beneficiaries," which include spouses and dependent children. Code sec. 4890B; ERISA secs. 601, 607. The Defense of Marriage Act prevents same-sex domestic partners from being seen as spouses under COBRA. Furthermore, because COBRA's mandate is limited to dependent children, not dependents generally, domestic partners cannot fall under that prong of the definition.<sup>6</sup> However, if a plan offers coverage to the children of a domestic partner, it may be possible that these children would be viewed as dependent children for purposes of COBRA.

Nonetheless, many plans do offer such benefits to domestic partners on COBRA-like terms. Plans may wish to give special attention to whether they will treat the break-up of a same-sex domestic partnership as a qualifying event, given that the date of the event likely may not be as clear-cut as the date of legal separation or divorce in the case of a marriage.

*HIPAA Portability.* HIPAA's special enrollment rules raise several potential concerns. IRC sec. 9801; ERISA sec. 702. HIPAA creates a special enrollment period when an individual marries if a plan offers coverage to participants' spouses. Under the Defense of Marriage Act, same-sex domestic partners do not qualify for this protection. Notably, many plans that offer domestic partner coverage do not permit domestic partners to enroll immediately after the partnership is created. Rather, they require that the domestic

---

<sup>6</sup> COBRA states that qualified beneficiaries must be provided identical coverage to that provided to persons from whom a COBRA qualifying event has not occurred. Code sec. 4980B; ERISA sec. 602. While it may be possible to argue that identical coverage means the opportunity to enroll the same classes of dependents, such as domestic partners, COBRA's enumeration of certain dependent classes as "qualified beneficiaries" undercuts this argument.

For insured plans, it is possible that state insurance law could require COBRA-like (and HIPAA-like) provisions be included in the plan's insurance contract.

partnership be in existence for a period of time (often 6 months or one year) before permitting the domestic partner to enroll.

In addition, HIPAA allows "dependents" to have a special enrollment period when they lose other health coverage. "Dependents" in this context is not limited to spouses or dependent children. As such, plans might be required to provide a special enrollment period for domestic partners who previously certified they were declining coverage due to the existence of other coverage and who subsequently lose that other coverage.

*ERISA Preemption.* ERISA section 514(a) provides that title I of ERISA supercedes all state laws insofar as they "relate to" an ERISA plan. It is likely that state or local government laws that prohibit discrimination on the basis of sexual orientation or marital status and that purport to apply to an ERISA plan would be preempted. *See Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (state law forcing beneficiary choices "related to" an ERISA plan and was preempted); *Shaw v. Delta Airlines*, 463 U.S. 85, 96 (1983) (state law prohibiting discrimination on the basis of pregnancy and purporting to dictate the terms of ERISA disability plan was preempted).

Some municipalities, including Seattle and Los Angeles, have enacted ordinances requiring city contractors to provide their employees' domestic partners with the same health benefits provided to their employees' spouses. In addition, California recently enacted a law requiring state contractors with contracts valued over \$100,000 to provide benefits to domestic partners on the same basis as to spouses. Cal. Pub. Contract Code sec. 10295.3.

The courts have taken different views as to whether such laws "relate to" ERISA plans. In *Catholic Charities of Me., Inc. v. City of Portland*, the court held that a Portland ordinance was preempted because it imposed local benefit structures and administrative practices on an ERISA plan. 2004 WL 231778 (D.Me. Feb. 6, 2004). On the other hand, in *Air Transport Ass'n of Am. v. City & Co. of San Francisco*, the court ruled that a San Francisco ordinance was preempted as it applied to airlines contracting with the municipal airport, because the city was acting as a "regulator" in that context, but not preempted as applied to other city contractors because in their circumstances the city acted merely as an ordinary "market participant." 992 F.Supp. 1149, 1179-80 (N.D. Cal. 1999).

*Saved State Insurance Laws.* Even if a state law "relates to" an ERISA plan, state laws regulating insurance are saved from preemption. In determining whether a state law is saved, courts consider whether (1) the law is specifically directed towards entities within the insurance industry, and (2) the state law substantially affects the "risk pooling arrangement" between the insurer and the insured. *Ky. Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003). Notwithstanding ERISA's savings clause, the Supreme Court has made clear that state laws of general applicability that relate to plans are not saved



insurance laws even though they may impact the benefits provided under an insurance policy. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-51 (1987).

A number of states have begun to require that domestic partner coverage be available under group policies.<sup>7</sup> See, e.g., Cal. Health & Safety Code sec. 1374.58, Cal. Ins. Code sec. 10121.7; Haw. Rev. Stat. Ann. sec. 431:10A<sup>8</sup>; N.J. Stat. Ann. sec. 17B:27-1bb (group insurance), 17B:27A-7.9 (HMOs); Vt. Stat. Ann. sec. 4063a.<sup>9</sup> Cf. Me. Rev. Stat. Ann. sec. 2832-A (insurer required to offer domestic partner coverage at the employer's, not the participant's, option). Because these laws are directed at insurers, and they affect the bargain between the insurer and insureds (i.e., the classes of eligible beneficiaries), they are likely saved from preemption.

**Conclusion.** Over 40% of Fortune 500 companies make same-sex domestic partner benefits available to their employees. With the recent political, legislative, and judicial attention placed on same-sex domestic partnerships, it is likely that many employers will want or need to address the issue of same-sex domestic partner benefits in the near future. However, it is essential that companies implementing same-sex domestic partner benefits step carefully through the legal minefield when doing so – for failure to do so may lead to significant unintended consequences and costs that a company may not intend to incur.

---

<sup>7</sup> On the other hand, Virginia has interpreted its insurance laws as forbidding domestic partner coverage.

<sup>8</sup> The Hawaii mandate only applies to insurance policies, not HMO coverage. In settling an ERISA preemption lawsuit, the Hawaii Attorney General issued a letter dated December 2, 1997, explaining that the mandate imposed duties on insurers, not employers, and that employers could not be forced to bear the additional costs of reciprocal beneficiary coverage.

<sup>9</sup> However, Vermont Insurance Order 1-1-2001 (Jan. 1, 2001) notes that state law cannot control eligibility for enrollment in an ERISA plan.