

BENEFITS FOR ALL: ***Can Employers Equalize Coverage for Domestic Partners?***

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Employers have traditionally offered benefits, such as health insurance, to the spouses and legal dependants of their employees. In 1982, though, the first employer to break ranks and offer domestic partner benefits to its lesbian and gay employees was a New York City weekly publication called the *Village Voice*. Today, the Human Rights Campaign (a nonprofit organization devoted to working for lesbian, gay, bisexual, and transgender equal rights) claims that the number of colleges, governments, and private corporations that offer domestic partner benefits stands at more than 2,500. In an effort to promote equality in the workplace, more and more employers are choosing to offer benefits to domestic partners. However, these efforts to bring more equality to the workplace are not without consequence. Before adopting policies that afford domestic partners the same benefits that are afforded spouses, employers must carefully consider the benefits and risks to such an approach.¹

I. ADVANTAGES TO OFFERING DOMESTIC PARTNER BENEFITS

The advantages to offering certain benefits to domestic partners can be difficult to quantify, but that does not mean that there are no advantages. First and foremost, depending on the company's industry and market, offering domestic partner benefits may be necessary for enhancing the company's public image. For example, Gap, Inc. is widely regarded as a progressive company. Choosing to provide domestic benefits is consistent with the corporate image that it promotes. On the other hand, Wal-Mart Stores, Inc. promotes a much different corporate image, which is reflected in its benefits packages.

Employers may use domestic partner benefits as a tool to attracting the best qualified employees. National unemployment rates have been running at historic lows since the 1990s. With unemployment at approximately 4 percent for much of the last decade, employers are looking for ways to gain a hiring edge on their competitors. Also, domestic partner benefits could potentially improve a company's retention rate. Not offering such benefits could cause the employer to lose highly qualified employees to another company with more progressive policies. In addition to losing that employee's contributions, the costs of turnover can be surprisingly high. Some studies have put the cost of recruiting a new employee as high as \$75,000 due to costs associated with advertising, interviewing, training, testing, relocation expenses, lost productivity, and recruitment incentives.

It has been argued that increased employee productivity can be another windfall from offering domestic partner benefits. Workplace advocates argue that a domestic partner benefits program will help alleviate personal stress experienced by gay, lesbian, or

¹ This Article is not intended to offer an opinion on whether any particular employer should or should not offer domestic partner benefits. Rather, the Article is intended to provide an objective analysis of the pros and cons for any employer who is considering affording certain benefits to its employees' domestic partners.

unmarried employees that keeps them from fully focusing on their work. One workplace advocate has employed a formula to measure the dollar amount of increased productivity created by offering fair domestic partner benefits. The formula assumes the proportion of gay and lesbian employees in any workplace to be approximately 5 percent and further assumes a 10 percent increase in productivity in those employees associated with offering domestic partner benefits. (Using these figures, a company with a workforce of 1,000 employees would have approximately 50 gay and lesbian employees. If the average salary is \$40,000, the average loss in productivity per gay and lesbian employee would be \$4,000. Thus, the total annual loss to the company in productivity would be \$200,000.)

Finally, from a legal standpoint, offering domestic partner benefits may be helpful to defending or even staving off employment-related lawsuits. While it is unlikely an employee could win a discrimination suit under the current state of the law, benefit inequities could invite claims by gay and lesbian employees that would have to be defended at company expense. Equal benefits policies could even assist the employer in defending against other non-benefits-related claims. For example, whenever a charge of discrimination (for example, race, age, or gender discrimination) is filed with the Equal Employment Opportunity Commission (EEOC), during the investigation the EEOC will request the charged employer's policies. The resulting perception of fairness that could result from offering domestic partner benefits can only help an employer facing such a charge of discrimination.

II. LEGAL IMPLICATIONS OF OFFERING DOMESTIC PARTNER BENEFITS

All these potential advantages, though, do not come without costs. Employers who want to diversify their workforces and distinguish themselves from competitors by offering the same benefits to all employees are discovering that it can be difficult, expensive, and even impossible to equalize coverage under current legal standards. The following is a list of the various benefits that employers may try to extend to domestic partners, along with an analysis of the feasibility and risks of doing so:

A. Medical Insurance

Whenever a company offers medical insurance to an employee, it is common for that employee's spouse to be covered under the policy. Companies certainly may offer the same opportunities to domestic partners; however, it will cost the company more to insure a domestic partner than it will to insure a spouse. The Internal Revenue Service (IRS) has ruled domestic partners cannot be considered spouses for tax purposes. Employers are obligated to report and withhold taxes on the fair market value of the domestic partner coverage. Conversely, health insurance coverage for legal spouses is not considered taxable income. The fair market value of the domestic partner coverage is usually the amount the employer contributes to the health plan to cover the domestic partner, over and above the amount contributed for single and/or dependent coverage. Domestic partner benefits may be considered non-taxable only if the domestic partner meets the IRS definition of a "dependent." Internal Revenue Code (IRC) Section 152 defines a dependant as someone who resides in the employee's household and who receives at least half of their support from the employee.

B. Cafeteria Plans

Many employers allow their employees to make pre-tax contributions to “flexible spending accounts.” The money contributed to these accounts—known officially as IRC Section 125 cafeteria plans—can go to medical expenses not covered by health insurance, such as prescription eyeglasses, medicines, and psychological counseling. Employees covered by cafeteria plans are also allowed to use pre-tax dollars to pay their health insurance premiums. However, unless a domestic partner qualifies as a dependant under the IRS definition, premiums for domestic partner coverage cannot be offered on a pre-tax basis. And unless a domestic partner qualifies as a dependent, his or her out-of-pocket medical expenses cannot be paid out of a flexible spending account. Some employers choose to offset this taxation difference by “grossing up,” which means paying the difference. Choosing this option, though, can be rather expensive for an employer.

C. Pension Benefits

When an employee or former employee dies, his or her surviving spouse generally automatically receives any benefit provided for under the employee’s pension plan, including both traditional pensions and retirement plans like 401(k)s and IRAs. If an employer wants to offer the same type of pension benefit to gay or lesbian domestic partners, the federal Defense of Marriage Act of 1996 (DOMA) stands in the way. Because DOMA states that “marriage” can only be between a man and a woman, it would prohibit employers from defining a spouse as somebody who is not of the opposite sex. Therefore, even if an employer would like to extend surviving spouse pension benefits to gay or lesbian domestic partners, a same-sex person cannot inherit as a spouse. If the employee is not married, it may be possible to name a domestic partner as an heir by filling out the proper forms. But if the employee does not act affirmatively to obtain such pension benefits, the domestic partner cannot inherit. Furthermore, even if a domestic partner is named as a heir, that partner will be unable to roll over pension benefits into his or her own IRA or retirement plan on a tax-deferred basis like a spouse could elect to do.

D. Family and Medical Leave

The Family and Medical Leave Act (FMLA) requires certain employers to grant an employee up to 12 weeks of unpaid leave in a rolling 12-month period to recuperate from illness or care for an ailing spouse, child, parent, newborn, or newly adopted child. Employees are not protected by the FMLA when caring for domestic partners. However, a number of employers have chosen to adopt unpaid leave policies to close this gap in FMLA coverage. A company certainly can voluntarily allow an employee to take up to 12 weeks to care for a seriously ill domestic partner. That leave cannot be counted by the employer as FMLA leave, though. The problem occurs when that same employee gets sick during the same 12-month period. The employer is then placed in a bind because the employee is now entitled to an additional 12 weeks of unpaid FMLA leave. There is no way an employer can protect itself against such “stacking” of unpaid leave.

E. Other Legal Considerations

There are other legal considerations that an employer should consider before adopting a policy granting or denying domestic partner benefits. First, the employer should consider all ordinances in the cities or counties in which it does business. For example, several California cities, including Berkeley, Los Angeles, Oakland, and San Francisco, have adopted an Equal Benefits Ordinance that requires all companies with city contracts to extend domestic partner benefits to their employees who reside in the city or who work on contracts for the city. Second, as mentioned earlier, choosing not to extend domestic partner benefits may expose employers to potential lawsuits. State laws that ban sexual orientation and marital status discrimination have been used to argue that employers are required to offer domestic partner benefits. These claims have largely been unsuccessful; however, in 1998, the Oregon Appeals Court did rule that municipalities were in violation of the state constitution by not offering domestic partner benefits. See *Tanner v. Oregon Health Sciences Univ.*, 971 P.2d 435 (Or. Ct. App. 1998). Although that ruling applies only to government employees, it could be a harbinger of things to come in other jurisdictions.