

Domestic Partner Benefits

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In 2006, for the first time, a majority of the nation's largest corporations provided health insurance for domestic partners of their employees.¹ Regardless of business size, the trend towards domestic partner benefits is increasing primarily as a means of attracting and retaining talented employees.² Domestic partner benefits generally include medical and dental insurance but may also include disability and life insurance, pension benefits, family and bereavement leave, education and tuition assistance, relocation and travel expenses, and inclusion of partners in company events.

Why an employer should consider offering domestic partner benefits.

Companies offer domestic partnership benefits for many reasons. Three of the most commonly cited reasons for offering domestic partnership benefits are:

1. *Equal pay for equal work.* For most gay employees, the portion of employee benefit plans that covers an employee's dependents is unavailable creating a disparity in compensation. By not making employee benefits available on equal terms, regardless of marital status or sexual orientation, a company that otherwise purports to be fair may be violating its own non-discrimination policy.
2. *Hiring and retention.* Domestic partner benefits can have a positive impact on hiring and retention. Employers increasingly look to domestic partnership benefits as a means to promote a diverse workforce. A benefit package that appeals to a diverse workforce gives employers an edge when it comes to recruiting. An employee's satisfaction, willingness to stay with the employer and inclination to recommend the employer to others are all strongly and positively related to the company's diversity policy.
3. *Improved employee productivity.* One purpose of a benefits program is to provide a safety net for employees and their families, thereby allowing them to better focus on work. Employee morale and productivity improve in environments where employees believe that the employer demonstrates that it values its employees. Domestic partner benefits offer an easy method for employers to adapt to the changing needs of their employees by simply expanding the eligibility for existing benefits programs.

Why an employer may chose not to offer domestic partner benefits.

1. *Cost.* High cost is a common argument employers have raised against offering domestic partner benefits. Despite this perception, studies have shown that the overall cost of adding domestic partnership benefits is quite low. A 2005 Hewitt Associates study revealed that a majority of employers experience a total benefits cost increase of less than 1 percent.³ Several studies have shown that enrollment rates tend to be in the 1 percent to 2 percent range.
2. *Fraud.* Another reason sometimes cited for not offering domestic partner benefits is the fear that employees will misrepresent their relationship to obtain benefits for individuals who are not their domestic partners. Many employers require employees to sign a legally binding statement attesting to the existence of the partnership. There is no evidence to suggest that domestic partners are any more likely to falsify a partnership than married couples.
3. *Adverse publicity.* Some companies have refused to implement domestic partner benefits for fear of adverse publicity. Experience has shown that media coverage is more likely to be positive than negative. Employers should stress that their corporate policies are designed to foster an atmosphere of fairness and professional respect, not to change personal values.
4. *Complexity.* Providing and administering domestic partner and same-sex spousal benefits is complex. Such benefits may be regulated by a combination of state and federal law that may expose employers to significant legal liability.

What is a Domestic Partner?

There are no uniform rules defining a domestic partner. A domestic partner may be defined by employer policy or state or local law. Some employers choose to establish their definitions in accordance with federal tax law's "dependent" provisions and others reference state or local law domestic partner registration systems. Commonly used plan requirements stipulate that domestic partners:

- Have lived together for a specified period (generally, at least six months)
- Share financial responsibilities
- Are not blood relatives
- Are at least 18 years of age
- Are mentally competent
- Intend that the domestic partnership be of unlimited duration
- Register as domestic partners if there is a local domestic partner registry
- Are not legally married to anyone or engaged in another domestic partnership
- Agree to inform the company if the domestic partnership terminates

Some plans require that affidavits⁴ affirming domestic partner status be submitted to plan administrators, and that an employee submit a "termination of domestic partnership" form if the partnership ends. When drafting plans, employers should define the term "spouse," if used in the plan, and clearly state what benefits are available to domestic partners and also consider whether the plan will extend eligibility to the dependents of domestic partners. Summary plan descriptions must clearly state whether or not domestic partners are covered by the plan and the scope of the benefits provided to same-sex domestic partners.⁵

What is a Same-Sex Spouse?

Currently, a same-sex couple can enter legally into marriage only in the state of Massachusetts. In this state, married, same-sex couples are entitled to the same protections and benefits that are afforded to married heterosexual couples. The Defense of Marriage Act of 1996 (DOMA) defines the term "marriage" to be between one man and one woman and "spouse" as an opposite-sex husband or wife for federal purposes. DOMA also provides that states do not have to recognize out-of-state, same-sex marriages. The Massachusetts definition of marriage controls those employee benefits subject only to Massachusetts state law.

Tax Implications

The IRS has ruled that a domestic partner is not a spouse for tax purposes. Employers are obligated to report and withhold taxes on the fair market value of the domestic partner's and the partner's children's coverage. This is not true for health insurance coverage for legal spouses. There is no clear rule on what constitutes fair market value; however, it is usually the amount the employer contributes to a health plan to cover the domestic partner, over and above the amount contributed for single and/or dependent coverage. This raises both the employee's taxable gross income and the employer's payroll taxes. Payroll deductions to cover a non-qualifying domestic partner and the partner's children must also be taken on an after-tax basis. Many employers account for this inequity by "grossing up" an employee's salary to cover the cost of additional taxes from the imputed income of domestic partner benefits. Employers should disclose the methodology used for imputing employee income to employees, so affected employees can make informed decisions about the cost of coverage and the tax consequences of providing their domestic partners or same-sex spouses with health coverage through their employer.

Domestic partner benefits may be considered non-taxable only if the domestic partner qualifies as a "dependent" under the definition of a "qualifying relative" pursuant to Internal Revenue Code (IRC) section 152. To qualify as a dependent, the domestic partner must have the same principal address as the employee/taxpayer for the year and be a member of the employee/taxpayer's household, and the domestic partner must receive more than half of his or her support for the year from the employee/taxpayer. Plans commonly ask the employee to certify that the domestic partner is the employee's tax dependent as of the

date the annual enrollment form is completed, and also that the employee expects that the domestic partner will continue to be the employee's tax dependent for the upcoming year.

If an employee's same-sex domestic partner qualifies as a dependent, amounts paid to the employee and his or her domestic partner through the health plan that are attributable to employee after-tax contributions and employer contributions are excluded from the employee's income. A domestic partner or the partner's child does not have to be claimed as a "dependent" on the employee's federal tax return in order to be eligible for tax-free health coverage. Furthermore, a domestic partner's child is unlikely to be the employee's dependent because in most cases, the child will be the qualifying child of another taxpayer, such as the domestic partner or the child's other parent.

While most same-sex spouses or domestic partners are not eligible to pay their portion of health insurance premiums with pre-tax dollars under federal law, certain states do exempt such benefits from state taxes. In Massachusetts, the value of employer-provided benefits that extend to same-sex spouses are not taxable and are not subject to withholding for state income tax purposes. Vermont and Connecticut also treat civil unions equally to marriage for state income tax purposes. California allows employees to pay their domestic partner's portion of health insurance premiums on a pre-state tax basis.

Flexible Spending Accounts

Money contributed on a pre-tax basis to an FSA can be used to pay health insurance premiums or medical expenses not covered by health insurance. Unless a domestic partner qualifies as a dependent under the IRS definition, premiums for domestic partner coverage cannot be offered on a pre-tax basis, and FSAs cannot be used to cover the medical expenses of a domestic partner even if the employer offers domestic partner health insurance benefits.

Health Savings Accounts

Because of DOMA, medical expenses incurred by or on behalf of domestic partners or their children are not eligible for tax-free reimbursement from an HSA unless the domestic partner qualifies as a dependent under IRC section 152. An employer's contributions to a domestic partner will likely be imputed as income to the employee. The contribution limits imposed on married individuals do not apply to domestic partners.

HIPAA

Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), employees are given special enrollment rights for their spouses and their spouse's dependents when they marry or when a spouse decides to enroll at a later time because they lose other health coverage. Because HIPAA is a federal law subject to DOMA, a same-sex spouse or domestic partner is not protected under HIPAA unless he or she qualifies as a dependent under IRC section 152.

COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1995 (COBRA) requires that a group health plan provide continuation coverage when certain triggering events cause an employee, the employee's spouse, and/or dependent child to lose coverage under the plan terms. COBRA triggering events may include termination of employment, divorce, and a dependent no longer qualifying as a dependent under the plan terms. Because DOMA defines the term "marriage" to be between one man and one woman and "spouse" as an opposite-sex husband or wife for federal purposes, a same-sex domestic partner will never qualify as the employee's spouse for COBRA purposes.

If a covered employee's employment terminates, he can elect COBRA coverage for himself but not for his domestic partner. His domestic partner has no COBRA rights; however, an employer may choose to extend those rights with the approval of their carrier or HMO. If the former employee elects and pays for COBRA coverage for himself in a timely way, he can add his domestic partner to the plan during an open enrollment period. The domestic partner's plan coverage will end when the former employee's COBRA coverage ends. If the domestic partner's children are covered as dependents under the plan, they will be qualified beneficiaries in connection with any COBRA qualifying event.

Many plans do offer such benefits to domestic partners on COBRA-like terms. Special attention should be given to whether the break-up of a same-sex domestic partnership will be treated as a qualifying event. Some same-sex partners in civil unions in Vermont and same-sex spouses in Massachusetts are expressly

eligible for benefits continuation under COBRA-like laws in those states, but these plans are generally limited to employees of small businesses.

FMLA

The Family and Medical Leave Act of 1993 (FMLA) is a federal policy designed to offer leave annually for certain family or medical reasons. Because of DOMA, a same-sex spouse or domestic partner would not be considered a spouse or family member for FMLA leave purposes even if they qualify under IRC section 152. Although many do, employers are not legally required to extend family and medical leave to an employee to care for a domestic partner or same-sex spouse. California, Hawaii, New Jersey, Vermont and the District of Columbia require employers to allow employees to make leave available for domestic partners.

Hardship Withdrawals and Account Balance Rollovers

The Pension Protection Act (PPA) enacted two provisions that are beneficial to employees who are currently in a domestic partnership relationship. Those provisions affect hardship withdrawals and account balance rollovers. Before passage of the PPA, an employee benefit plan could only allow a participant to receive a hardship withdrawal due to a financial hardship affecting the participant, the participant's spouse or the participant's dependent. The PPA allows hardship distributions for expenses related to medical, educational and funerals for a primary beneficiary under the plan. A primary beneficiary is defined as an individual who is named as a beneficiary under the plan, and has a right to all or a fraction of, the participant's account balance following the participant's death. The PPA also allows a non-spouse beneficiary to roll over the deceased participant's account balance to an inherited IRA, where previously a non-spouse beneficiary was required to withdraw the account balance in a lump sum or during a five-year period following the year of the date of the participant's death. A plan is not required to allow these provisions, and an allowance of hardship withdrawals and account balance rollovers requires an amendment to your plan.

Insurance

When domestic partner benefits were first offered, few insurance carriers wrote such policies. Those that did usually added a charge to cover any unexpected cost increase. Today, many insurance companies will cover domestic partners, and most have stopped adding a surcharge. For companies that are self-insured, adding domestic partner benefits is a relatively simple process since it does not require state regulatory approval. Fully-insured companies usually need to negotiate the specifics of the additional coverage with their insurer and get their plan approved by state insurance regulators. Health maintenance organizations are not under the auspices of insurance-regulating agencies and may choose on their own whether or not to write policies to cover these benefits. If an insurance provider cannot be located, employers may ask the domestic partner or employee to purchase the additional insurance and accept reimbursement for a portion of the premium cost.

Legal Considerations

The Employee Retirement Income Security Act of 1974 (ERISA), the IRC, and DOMA are federal laws that are all directly applicable to domestic partner and same-sex spousal benefits. ERISA governs voluntary, employer-sponsored private sector employee welfare and pension benefit plans. ERISA generally preempts state laws that relate to employee benefit plans but not state laws that regulate insurance. As such, state insurance law may require coverage of domestic partners in plans that are otherwise regulated by ERISA. A fully-insured health plan may be treated differently than a self-insured health plan. Public sector plans are generally exempt from ERISA. The IRC regulates employee benefits provided through public sector health and retirement plans. DOMA's definition of "marriage" and "spouse" affect employers who provide benefits to domestic partners and same-sex spouses. DOMA and similar laws at the state level do not prohibit private employers from providing domestic partner benefits to employees.

Employers whose operations reside within one state must ensure compliance with that state's same-sex partner recognition and benefit regulations. Employers subject to Massachusetts insurance regulations must cover same-sex spouses on the same terms that they cover opposite-sex spouses. Those employers with federally regulated health plans are not legally required to provide health benefits to state-recognized same-sex relationships.

Many cities have enacted equal benefit ordinances that require contractors with the government entity to extend benefits to same-sex domestic partners. These laws generally require that contractors that offer

health insurance and other employee benefits to employee's spouses must offer the same benefits to an employee's domestic partner.

In some cases, choosing not to extend domestic partner benefits may expose employers to potential lawsuits. State laws that ban discrimination on the basis of sexual orientation and marital status have been used to argue that employers are required to offer domestic partner benefits. These claims have been largely unsuccessful due to the rationale that unmarried heterosexual couples are also typically excluded.

Conclusion

Employers need to be aware of the complicated benefits, employment and tax issues that accompany domestic partner benefits. Before extending benefits to same-sex domestic partners, an employer should determine the status of the domestic partner rules in each state in which it operates. Understanding the needs and changing nature of your workforce will make it easier to decide whether to offer domestic partner and same-sex spousal benefits.

¹ Human Rights Campaign: The State of the Workplace 2005-2006. See www.hrc.org/workplace.

² "Benefit Programs for Domestic Partners & Same-Sex Spouses," Hewitt Associates, July, 2005.

³ "Benefit Programs for Domestic Partners & Same-Sex Spouses," Hewitt Associates, July, 2005.

⁴ See <http://www.uwsa.edu/hr/benefits/ins/uws50.pdf> or <http://www.wa.regence.com/docs/form/domesticPartnership.pdf> for sample affidavit language.

⁵ For sample domestic partner benefit policies see:

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

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