

## **Discrimination Against Gay and Lesbian Working Families<sup>i</sup>**

The income a person earns at a job is not the only way he or she supports a family. Many additional protections can become available to families because of an individual family member's employment. This includes bread and butter protections like pension and social security survivor benefits but also safety nets like worker's compensation or line of duty benefits when a worker is injured or killed on the job. The overwhelming majority of those benefits are available only to family members related by birth, marriage or adoption, thereby excluding gay and lesbian couples. The following examples are all protections automatically denied to committed same-sex couples.

### **Bereavement and Family Medical Leave**

- A gay or lesbian employee is *not* entitled to protections under the Maine version of the Family Medical Leave Act (FMLA) allowing an employee to take limited time off from work to care for a sick spouse or to welcome a new child into the family.<sup>ii</sup> This leaves gay and lesbian workers to make the impossible choice between keeping their jobs and attending to their families' needs. **A pending bill (L.D. 375) would change this under state law – allowing qualified workers up to ten weeks of unpaid leave!** Even with this change, the federal law, allowing up to 12 weeks off every 12 months, would continue to exclude same-sex couples.<sup>iii</sup>
- In most workplaces, a gay or lesbian employee will *not* be able to take bereavement leave for the death of his or her partner or a member of the partner's family. Two important exceptions are state employees and the state university system.<sup>iv</sup>
- Maine's Family Care law does not allow a gay or lesbian employee to use accrued sick, vacation and comp time to care for a same-sex partner.<sup>v</sup>

## Workplace Protections Related To Death, Illness Or Injury

- Unlike other aggrieved survivors, a surviving same-sex partner is *not* entitled to “line of duty” benefits -- a one-time award of \$50,000 that is paid to the spouse of a deceased firefighter, police officer or emergency medical service personnel.<sup>vi</sup>
- A surviving gay or lesbian partner is *not* entitled to the tuition waiver at state educational institutions that is available to a surviving spouse of deceased firefighter, police officer or emergency medical service personnel.<sup>vii</sup>
- The gay or lesbian surviving partner of a deceased state law enforcement officer is *not* entitled to receive ongoing payments of one-half of the deceased public safety officer’s retirement benefits for his or her life as are married spouses.<sup>viii</sup>
- If an employee suffers a job-related injury or death, the employee’s same-sex partner is *not* entitled to any protections under the worker’s compensation system, either as a spouse or next-of-kin, regardless of whether the partner was dependent on the injured worker for support.<sup>ix</sup> Spouses are usually presumed to be dependent on the working spouse.<sup>x</sup>
- Unlike their married co-workers, a surviving same-sex partner of an injured worker is *not* provided with 80% of the employee’s average weekly wage upon the employee’s death and for 500 weeks thereafter.<sup>xi</sup>
- Unlike a spouse, a surviving partner has *no* right to bring a damages action against the deceased partner’s employer when that partner was killed instantly at work due to the negligence of the employer.<sup>xii</sup>
- Unlike their married peers who work for the state or municipal governments, same-sex partners of those employees may *not* receive a payment of accidental death benefits (ranging from two-thirds to the entire amount of annual compensation) when a worker dies as a result of an injury arising out of and in the course of the job. Additionally, government employees receiving regular service retirement benefits whose same-sex partners have died do not have the benefit of redesignating a new same-sex partner as a beneficiary, while straight employees do for their new spouses.<sup>xiii</sup>

## Protections Regarding Retirement

- Unlike married workers, a gay or lesbian employee does *not* have the automatic option available under defined benefit pension plans to select a “joint and survivor annuity,” which choice means that in exchange for the retiree taking a smaller amount during his or her life, the surviving partner may still receive pension benefits after the retired worker has died. This means the surviving partner in a same-sex relationship may face financial catastrophe when the spouse dies and the pension payments stop.
- A same-sex partner does *not* have the automatic right to consent or to withhold consent to the working partner’s selection of a pension payout in a form other than the joint and survivor annuity. For married spouses, this consent is required by the federal Employee Retirement Income Security Act (ERISA).<sup>xiv</sup> Under the state retirement systems, spouses are entitled to notice that the worker intends to select an option other than the joint and survivor annuity.<sup>xv</sup>
- When a married couple separates, the divorce court attempts to divide their property and assets equitably between them. Federal laws permit certain defined benefit and defined contribution plans to be divided by using an IRS-authorized Qualified Domestic Relations Orders (QDRO)<sup>xvi</sup> without triggering tax consequences upon the division. Because there is *no* legal authority to divide these accounts when a same-sex couple separates, either the assets cannot be divided or income taxes and penalties are paid.
- Under both of the major state service retirement plans, a worker can designate a joint and survivor annuity for the benefit of anyone. However, legal spouses still have several advantages with regard to the different benefits provided under the state retirement system.
  - Spouses receive notice if the worker chooses not to designate them as the beneficiary of service retirement benefits. Same-sex partners do not.<sup>xvii</sup>
  - A worker who is currently contributing to the retirement system or who is receiving disability retirement benefits can leave two separate monthly survivor benefits – one for the surviving spouse and one for the dependent children – in case of death before retirement . By contrast, a same-sex partner designated as a beneficiary must choose between survivor benefits for herself or the dependent children.<sup>xviii</sup>
  - The former same-sex partner of a worker does not enjoy the same security of remaining the designated beneficiary that an ex-spouse enjoys.<sup>xix</sup>

- Workers with 20 years of service in the retirement system for a participating local districts, such as a municipality, may have access to special and additional survivor benefits—but only for the worker’s spouse, children or parents.<sup>xx</sup>

## Social Security Protections

- Retirement: Under social security law, when a covered worker retires, his or her same-sex partner *cannot* receive any spousal benefit, even though ordinarily such benefits would be available to the insured worker’s spouse in order to supplement his or her own lower benefit, or to provide a retirement benefit in the event the spouse did not have a sufficient earnings record to qualify for benefits on his or her own.<sup>xxi</sup> Although the worker has likely paid into the system for many years, sufficient to qualify for a benefit for his or her spouse, the benefit will be denied to his or her same-sex partner.
- Death: A surviving same-sex partner *cannot* claim the one-time death benefit of \$255 provided by social security for a surviving spouse.<sup>xxii</sup> Moreover, the surviving same-sex partner of a covered worker is *never* eligible for Widow or Widower benefits, even if all the other requirements for collecting those benefits have been met.<sup>xxiii</sup> Even though the covered worker, just like his or her married colleagues, has paid into the social security system, which specifically provides benefits for surviving spouses, same-sex partners cannot access those benefits.
- Disability: A covered worker who becomes disabled and unable to work cannot access benefits for his or her same-sex partner even though the system is specifically designed to provide a benefit for the spouses of covered workers receiving disability.<sup>xxiv</sup>
- Children: The surviving same-sex partner of a covered worker cannot receive Mother’s and Father’s Insurance benefits to help supplement support where the child has lost one parent (the covered worker) and is in the care of the same-sex partner. Even if the child is under 16 and receiving a child’s insurance benefit, which would ordinarily trigger a benefit to the surviving parent, the surviving same-sex partner/parent cannot access Mother’s and Father’s Insurance benefits.<sup>xxv</sup>
- Divorce: When a covered worker dies, social security will provide benefits for a surviving divorced parent, where there was a child in common, and also for a surviving divorced spouse who does not have his or her own sufficient earnings record. Same-sex partners can never access these benefits. Similarly, when a covered worker retires, a divorced spouse who has either a low or no earnings record can receive a benefit through his or her former spouse so long as the prior relationship

lasted at least 10 years. Regardless of the number of years in the relationship, same-sex partners cannot access these benefits.<sup>xxvi</sup>

### Access to Insurance

- Unlike spouses who are covered by the federal COBRA law, surviving same-sex partners have *no* ability to continue to receive insurance coverage under a deceased spouse health insurance plan for up to 36 months.<sup>xxvii</sup>
- Unlike the spouse of a worker who is covered by insurance and then laid off, a gay or lesbian worker's partner is *not* automatically entitled under COBRA to continued coverage for up to 18 months.<sup>xxviii</sup>
- When an employer provides health insurance benefits to a gay or lesbian employee for his or her "domestic partner," those benefits are *not* tax free as with married spouses, but instead are taxable compensation to the employee under both state and federal law.<sup>xxix</sup> Also, the employer must pay social security and unemployment taxes on the value of the benefit.<sup>xxx</sup>
- Unlike a married couple, a same-sex partner is *not* considered a member of his or her partner's family for purposes of obtaining a life insurance policy for two or more members of a family.<sup>xxxi</sup>

### Other Work-Based Legal Protections

- A same-sex spouse or surviving same-sex spouse of a veteran will *not* be allowed the preference usually available for civil service employment.<sup>xxxii</sup>
- Conflict of interest and disclosure rules do *not* apply to same-sex spouses of executive branch employees, legislators or lobbyists.<sup>xxxiii</sup>

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i EqualityMaine thanks the attorneys and legal staff at GLAD for research and preparation of this document and at Bernstein Shur for review of it.

ii 26 M.R.S.A. § 843.

iii 29 U.S. C. §§ 2611 (13) (definition); 2612 (1) (eligibility for benefits).

iv These benefits are provided under collective bargaining agreements.

v 26 M.R.S.A. § 636.

vi 25 M.R.S.A. § 1612.

vii 20-A M.R.S.A. § 12551 et seq.

viii See 5 M.R.S.A. § 17852 (4) - (6) (includes law enforcement officers for the Bureau of State Police, Department of Inland Fisheries and Wildlife, and Department of Marine Resources).

ix 39-A M.R.S.A. § 102 (8) (A) & (B) (definitions of "dependent").

x *Id.*

- xi 39-A M.R.S.A. § 215 (1).
- xii 39-A M.R.S.A. § 903.
- xiii 5 M.R.S.A §§ 17804 (5-F), 17805.
- xiv 29 U.S.C. § 1055.
- xv 5 M.R.S.A. § 17804 (7) (State Employee and Teacher system); 5 M.R.S.A. § 18404 (7) (Participating Local Districts system).
- xvi 26 U.S.C. § 414(p). *See also* 5 M.R.S.A. § 17059 (permitting QDRO for state retirement funds).
- xvii 5 M.R.S.A. § 17804 (7) (State Employee and Teacher system); 5 M.R.S.A. § 18404 (7) (Participating Local Districts system).
- xviii 5 M.R.S.A. §§ 17952 (1)(B), 17953 (2), (4) & (5-A) (State Employee and Teacher system); 5 M.R.S.A. §§ 18552 (1)(B) & 18553 (2), (4) & (5-A) (Participating Local Districts system). Notable also is that the spouse and children may receive cost of living adjustments but there is no such provision for beneficiaries who are non-spouses. 5 M.R.S.A. § 17953 (3)(D) (State Employee and Teacher system); 5 M.R.S.A. § 18553 (3)(D) (Participating Local Districts system).
- xix 5 M.R.S.A. §§ 17804 (5-F) (allowing one-time change of the designated beneficiary, other than a spouse or ex-spouse, prior to the death of that prior designated beneficiary), 17805-A (requiring originally designated former spouse's consent before naming new beneficiary).
- xx 5 M.R.S.A. § 18556 (5) (A) & (B) (allowing participating local districts to offer regular service retirement benefits through a joint survivor annuity option).
- xxi 42 U.S.C. § 402 (b), (c).
- xxii 42 U.S.C. § 402 (i).
- xxiii 42 U.S.C. § 402 (e), (f).
- xxiv 42 U.S.C. § 402 (b), (c).
- xxv 42 U.S.C. § 402 (g).
- xxvi 42 U.S.C. § 402 (b), (c), (e), (f).
- xxvii 29 U.S.C. §§ 1161-1163, 1167.
- xxviii *Id.*
- xxix The only exception is if the partner qualifies as a tax dependent.
- xxx 26 U.S.C. §105(b).
- xxxi 24-A M.R.S.A. § 2408.
- xxxii 5 M.R.S.A. § 7054.
- xxxiii *See, e.g.*, 3 M.R.S.A. §§ 312-A(7-A), 317 (lobbyists); 1 M.R.S.A. §§ 1012(6), 1014 (legislators), 5 M.R.S.A. §§ 18-19 (executive branch employees).