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## **DOMESTIC PARTNERSHIP BENEFITS: EQUAL PAY FOR EQUAL WORK**

**By Mary L. Bonauto, Esq.**

What do American Express, Apple Computer, Blue Cross/Blue Shield of New Hampshire, the City of Baltimore, the University of Maine System, Walt Disney, Levi Strauss, Coors Beer and the State of Vermont have in common? They are all part of a growing list of private companies and public entities which have extended domestic partnership benefits to their employees.<sup>1</sup> These companies, colleges, universities, cities and towns have all discovered that providing these benefits for their employees is a pro-family policy that recognizes equal pay for equal work, has low costs, and is the right thing to do.

### Why Employers Should Consider Providing Domestic Partner Benefits

Even though some same-sex couple can now access partner benefits through marriage, civil unions or state-registered domestic partnerships, even in those places where this access is granted, there are many reasons why a same-sex couple may not wish to access benefits this way. Marriage-based benefits also exclude non-gay couples who have chosen not to marry for personal, religious or financial reasons. Benefits are a significant form of compensation to employees and inequality in access can mean a considerable financial hardship for employees.<sup>2</sup> It is therefore an issue of equal pay for equal work; an issue of fairness in the workplace.

In addition to eliminating discrimination in access to benefits, the availability of domestic partnership benefits can also be important in attracting and retaining qualified employees. All else being equal, the quality of a benefits package can be the deciding factor in whether a particular employee will chose to work for one employer over another, or stay with an employer over the long term.<sup>3</sup>

### Who Should Be Eligible For Benefits

It is not difficult to develop a set of eligibility criteria for benefits in lieu of marital status. Most domestic partner plans share common parameters: (1) the employee and partner must be unmarried adults and competent to contract; (2) they must not be related by blood in a way that would bar marriage; and (3) they

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<sup>1</sup> For a current list see the Human Rights Campaign publication, *The State of the Workplace for Gay, Lesbian, Bisexual and Transgender Americans*, at [http://www.hrc.org/documents/State\\_of\\_the\\_Workplace.pdf](http://www.hrc.org/documents/State_of_the_Workplace.pdf).

<sup>2</sup> So-called "fringe benefits," including health coverage, can account for as much as thirty percent of an employee's compensation. Melody A. Carlsen, Domestic Partner Benefits: Employer Considerations, *Employee Benefits Practices*, 3 (Intntl. Found. Employee Benefit Plans, 4th Qtr. 1994); U.S. Chamber Research Center, Employee Benefits at 18, Table 6 (U. S. Chamber of Commerce Research Center, 1992 Edition).

<sup>3</sup> See Stanford University Committee on Faculty and Staff Benefits, Report of the Subcommittee on Domestic Partners' Benefits (June, 1992) pp. 12-38. This is by far the most comprehensive examination of the philosophical and practical underpinnings of employee benefits plans. It analyzes family benefits as an efficient compensation strategy, as a means of maximizing available tax benefits for employees, as a means of providing health coverage of the otherwise uninsured, as needs-based compensation and as a subsidy to families.

must be in a close and committed relationship with one another.<sup>4</sup> In addition, some plans require employees to reside together or intend to do so and to have some degree of financial interdependence.<sup>5</sup> Virtually all plans require the employee to notify them in writing if the partnership terminates.

These requirements are traditionally put in the form of an affidavit to which both partners attest. Some employers also require employees to sign a statement which warns of the legal consequences of providing false information, including dismissal of the employee and reimbursements for benefits paid.<sup>6</sup>

The other principal question is whether an employer may offer benefits to same-sex couples only, or must also offer benefits to unmarried heterosexual partners. According to leading authorities like the Stanford Report (see note 2), it is good practice to provide benefits to both same and different sex couples. The most common reasons why some employers choose to include only same-sex couples are that (1) these individuals cannot choose to marry while heterosexual couples can and (2) lower costs.<sup>7</sup>

#### What Benefits Should An Employer Offer

The short answer to this question is that the same benefits that are available to the spouse of a married employee should be extended to the domestic partnership. Certainly, the most important benefit is health insurance. Other benefits that can be included are death and bereavement leave, and the voluntary inclusion of domestic partners in the provisions of the Family and Medical Leave Act so that employees may take leave to care for their domestic partners and the children of their partners. Similarly, employers are not required to extend domestic partnership benefits under COBRA but some companies have devised plans that provide continuation of coverage for domestic partners upon the termination or the death of the employee. It is worth noting that some of these benefits cost employers next to nothing.

#### Concerns About Cost Are Easily Answered

The data accumulated for over 10 years by employers across the country shows that fears about domestic partnership benefits being too expensive are largely unfounded. The Wall Street Journal long ago reported, "the added benefits turn out to be surprisingly cheap."<sup>8</sup> Hewitt and Associates concluded in its 1994 Domestic Partners and Employee Benefits Report that "[generally speaking, and contrary to warnings and predictions by insurers and others, extending coverage to domestic partners has not resulted in statistically significant differences in cost."<sup>9</sup> The Stanford Report projected that for employers with a same-sex only

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<sup>4</sup> Osborne, The New Beneficiaries, Plan Sponsor 34, 36 (Nov. 1994).

<sup>5</sup> See Glaser & Wolf, Facing Domestic Partner Issues, Business & Health 53 (Feb. 1994); Laarman, Employer Health Coverage for Domestic Partners--Identifying the Issues, Employee Rel. L. J. (Mar. 22, 1993).

<sup>6</sup> However, many industry analysts confirm that "this type of abuse. . . has not been reported among employers providing the benefit." See "Domestic Partner Benefits: Employer Considerations", Employee Benefit Practices (4th. Qtr. 1994) at 4-5; Laarman at 3 (employers have reported no cases of abuse).

<sup>7</sup> People are invited to call Gay & Lesbian Advocates & Defenders (800-455-GLAD or 617-426-1350) for a technical legal analysis and case updates.

<sup>8</sup> David Jefferson, "Gay Employees Win Benefits for Partners at More Corporations," Wall Street Journal, Mar. 18, 1994, at 1. See also, Barge, More Firms Offer Benefits to Gay Couples, ABA Journal at 34 (June 1995)

<sup>9</sup> Hewitt and Associates is an international firm of consultants and actuaries which works with employee benefit and compensation programs. Hewitt and Associates, Domestic Partners and Employee Benefits 1994 at 7 (1994).

**This document contains legal information, not legal advice. For legal advice about a specific situation you must consult an attorney.**

*Founded in 1978, Gay & Lesbian Advocates & Defenders (GLAD) is New England's leading legal rights organization for lesbians, gay men, bisexuals and people living with HIV. GLAD's mission is to achieve full equality for all individuals in these groups, primarily through impact litigation and education.*

plan only 0.3 to 0.7% of employees would enroll while for unmarried heterosexual couples that comparable projected enrollment figure is 0.5 to 2.5%. At these levels, cost increases range from 0.5 to 1.5%.<sup>10</sup>

Adverse selection, or the fear that employees would choose to enroll their unhealthy friends as domestic partners, "has not been a problem."<sup>11</sup> Similarly, some employers are concerned that their costs will increase because by enrolling same-gender gay couples, they may face increased claims for HIV-related care, and that this increase will adversely affect the cost of their entire plan. This fear is unfounded and based on misinformation. AIDS and HIV do not solely affect gay or unmarried people. While gay men may be a higher risk of HIV infection, male couples do not incur costs for pregnancy and childbirth, which are commonly high. Similarly, lesbians, who tend to place their partners on plans four times more frequently than gay male employees, have a lower risk of HIV infection than either gay men or heterosexuals.<sup>12</sup>

The participation rate for domestic partner plans tends to be very low. Frequently, the partners of unmarried employees have insurance through their own employers. Sometimes, too, gay and lesbian employees do not want to make their relationships known to others for fear of discrimination or to maintain personal privacy. Perhaps most significantly, pursuant to Internal Revenue Service Rulings, health insurance coverage provided to the unmarried partner of an employee is considered taxable income, which can be a significant expense to the employee. This is discussed further below.<sup>13</sup>

#### The Tax Consequences of Domestic Partnership Benefits

Unless the employee's partner qualifies as a legal dependent for health insurance purposes, the employee will be taxed on the amount by which the fair market value of the health coverage exceeds the amount, if any, paid by the employee with after-tax dollars for the cost of the coverage.<sup>14</sup> The IRS has spelled out the details of this policy in private letter rulings which should be carefully reviewed by all employers considering implementing a domestic partnership plan. In order to avoid any misunderstandings with employees, most employers include a statement about tax consequences in the affidavit which the employee is asked to sign. In addition, some employers give employees an additional handout relating to tax consequences at the time the employee enrolls in the domestic partnership plan.

*Revised March 2008*

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<sup>10</sup> Stanford Report at 43, 52.

<sup>11</sup> Hewitt and Assoc. at 5. See also Lee Badgett, "Equal Pay for Equal Work", 80 Academe 26, 30 (May-June 1994).

<sup>12</sup> Employee Benefit Practices at 4.

<sup>13</sup> See Laarman at 6. In contrast, health insurance coverage for spouses of employees is not treated as taxable income to the employee. See for example IRS Private Letter Ruling 9603011 (January 1996).

<sup>14</sup> For a discussion of the taxation on domestic partner benefits see the publication, *Unequal Taxes on Equal Benefits*, done by the Williams Institute at [http://www.americanprogress.org/issues/2007/12/pdf/domestic\\_partners.pdf](http://www.americanprogress.org/issues/2007/12/pdf/domestic_partners.pdf)

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