

**EMPLOYEE BENEFITS FOR
SAME-SEX MARRIED SPOUSES
AND DOMESTIC PARTNERS**

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I. INTRODUCTION

According to a June 2005 report by the Human Rights Campaign, a national advocacy group, over 40% of Fortune 500 companies provided domestic partner benefits to their employees as of the end of 2004. See www.hrc.org. There are many business reasons why employers, both large and small, provide domestic partner benefits to their employees -- including the need to stay competitive in recruiting and retaining quality employees, generating goodwill with customers and vendors, and generating goodwill within an employer's total workforce.

Yet the issue of employer-provided benefits for same-sex spouses and non-married domestic partners remains a politically-charged one, which is fraught with legal complexity. A myriad of federal and state constitutional and legislative rules potentially impact whether an employer is legally free to choose to provide such benefits, as well as whether it is legally free to choose not to do so. The answer to the legal question depends, initially, on the nature of the employer-provided benefit. It will also depend on whether an employer's benefit regime is regulated by federal statutory and case law under ERISA or state law, or in the case of certain ERISA-regulated employee benefits that are provided through insurance arrangements, both federal and state law. It may also depend on the applicability of numerous provisions of the U.S. Constitution, some of which may apply only to some forms of employer (e.g., religious organizations or institutions affiliated with religious organizations). If all that complexity were not enough, even in those instances in which it is reasonably clear that an employer can choose to provide benefits to domestic partners and same-sex spouses of employees unsettled tax issues arise for the employer and employee.

This Outline attempts to identify many of the intersecting issues that affect the legal analysis of employer-provided same-sex spouse and dependent partner benefits. It primarily is designed to serve as a tool to identify legal issues, and to describe the current state of the law respecting resolution of those issues.

II. APPLICABLE LAW

A. FEDERAL LAW

1. IRC

a. Rules governing taxation of welfare benefits (including definition of "Dependent")

Under certain conditions, employer-provided health insurance for a domestic partner or same-sex spouse may be excluded from gross income. Generally, an employee does not include as gross income the cost of employer provided insurance, IRC § 106(a), or employer reimbursement for medical expenses, IRC § 105(b). This exclusion extends to health insurance coverage or reimbursement for medical expenses for spouses and dependents. IRC § 105(b); 26 C.F.R. § 1.106-1. Because a domestic partner or same-sex spouse is not a spouse under the IRC, health benefits for a domestic partner or same-sex spouse are excludible from gross income only if he or she qualifies as a dependent under IRC § 152. To qualify as a dependent with respect to health insurance, at least half of the domestic partner's support must be provided by the employee, and the domestic partner's income cannot exceed the "exemption amount" set by § 151(d) (\$2,000 or less). IRC §§ 151(d), 152(d)(1)(B)-(C), 152(d)(2)(H); 26 C.F.R. § 1.106-1. However, for reimbursements for medical expenses to be excludible only the half-support test must be met. IRC § 105(b). Regardless, if the same-sex relationship is illegal under local law (e.g., an anti-sodomy statute), the domestic partner can not be considered a dependent. IRC § 152(f)(3) (formerly § 152(b)(5)). (However, in light of Lawrence v. Texas, 539 U.S. 558 (2003), it is unclear whether this provision is enforceable with respect to a local law that prohibits consensual sodomy.) If the domestic partner or same-sex spouse cannot qualify as a dependent for federal

tax law purposes, the employee must include the fair market value of the employer's contributions in his or her gross income.

Domestic partners and same-sex spouses are not entitled to continuation coverage under COBRA. Only qualified beneficiaries are entitled to continuation coverage, and a qualified beneficiary can only be either an opposite-sex spouse or a dependent child. IRC § 4980B(g)(1)(A).

Health savings accounts may be used to pay medical expenses of domestic partners and same-sex spouses only where the partner is a dependent under § 152 (i.e., more than half of the partner's support is provided by the employee and the partner's income is below the exemption amount). IRC § 223(d)(2)(A).

Cafeteria plans may only be used to cover medical expenses or health insurance for dependent domestic partners and same-sex spouses. IRC § 125(d)(2)(D), (f).

b. Rules governing taxation of pension benefits

An opposite-sex spouse is allowed to roll over eligible distributions from the employee's pension plan, while a same-sex spouse or domestic partner must pay tax on any distribution received. IRC § 402(c)(9); 26 C.F.R. § 1.402(c)-2(A-12).

If an opposite-sex spouse dies, benefits can be paid on a schedule as if the spouse were the employee without tax penalty. IRC §§ 72(s)(3); 401(a)(9)(B)(iv). This tax advantage is offered to same-sex spouses or domestic partners.

A qualified plan under 401(a) must offer opposite-sex spouses Qualified Preretirement Survivor Annuities and must give joint ownership of Qualified Joint and Survivor Annuity to an opposite-sex spouse. IRC 401(a)(11)(A)(i)-(ii). This requirement does not apply to a same-sex spouse.

2. ERISA

a. ERISA grants "spouses" a variety of rights

Opposite-sex spouses are entitled to continuation of group health coverage in the event of the death of the employee or divorce. ERISA §§ 603(1), 603(3), 607(3)(A).

Opposite-sex spouses must be given survivorship rights (QJSAs and QPSAs) in pension plans. ERISA § 205.

Same-sex spouses and domestic partners must be explicitly listed as beneficiaries under the terms of the plan in order to have standing to sue a plan under ERISA. *Rovira v. A.T.&T.*, 817 F. Supp. 1062, 1069-70 (S.D.N.Y. 1993). A plan may restrict the class of beneficiaries to opposite-sex spouses and dependent children or relatives. *Id.*

b. ERISA contains express provisions broadly preempting state law

State insurance law is "saved" from ERISA preemption. ERISA §§ 514(b)(2)(A), 731(a)(1). ERISA contains a broad preemption provision, generally preempting any form of state law, including state constitutional law and any other forms of "State action" that "relate to any employee benefit plan" regulated by ERISA. ERISA § 514(b)(2), (b)(4). See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 48-51 (1987). ERISA does, however, provide an exception for state law that regulates "insurance, banking, or securities," or is a "generally applicable criminal law." ERISA § 514(b)(2), (b)(4). As such, because state insurance laws are not preempted by ERISA's otherwise applicable and broad preemption provision, state insurance law may require coverage of domestic partners in plans that otherwise are regulated by ERISA.

ERISA does not preempt Qualified Domestic Relations Orders, although it is unclear whether a QDRO can be issued for a same-sex divorce (see below). ERISA § 514(b)(7).

3. Federal DOMA

a. DOMA defines "marriage" and "spouse" for purposes of federal law

Several sources of federal law, including provisions of the U.S. Constitution, impact the validity of state laws that govern marriage. The first is a federal statute enacted in 1996 called the Defense of Marriage Act ("DOMA") which contains two operative sections. The first section of DOMA defines marriage as between one man and one woman for purposes of federal law: "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word '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 a wife." Pub. L. 104-199, sec 1, 110 Stat. 2419 (Sep. 21, 1996) codified at 1 U.S.C. §7 (1997). Accordingly, when the terms "marriage" or "spouse" are used in the Employee Retirement Income Security Act ("ERISA"), the Internal Revenue Code, or any other federal statute or rule, DOMA definitions prohibiting the recognition of same-sex marriages apply. Prior to DOMA, Congress had been willing to let the states define marriage as it relates to federal programs.

b. DOMA allows states to choose whether to recognize or deny recognition to same-sex marriages performed in other states

DOMA also provides that no state will be required to give full faith and credit to, i.e. legally recognize, a same-sex marriage performed in another state. Under Section 2 of DOMA, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Pub. L. 104-199, sec 2, 110 Stat. 2419 (Sep. 21, 1996) codified at 28 U.S.C. §1738C (1997). Thus, DOMA grants states the option of recognizing same-sex marriages by relieving them of the obligation to do so. As will be discussed below, while DOMA applies, on its face, only to federal benefits, both its interpretation of the Full Faith and Credit Clause of the U.S. Constitution and the mandatory definitions of "marriage" and "spouse" for purposes of federal law implicate issues of state law and federalism.

4. U.S. Constitution

a. Full Faith and Credit Clause

A major source of federal law pertaining to same-sex marriages and domestic partnerships is Article IV, Section 1 of the Constitution, otherwise known as the Full Faith and Credit Clause ("FFCC"). Article IV, Section 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Specifically, the FFCC serves as a means of preserving rights granted or affirmed through public records and judicial proceedings. By offering such validity to other states' records and proceedings, the FFCC prevents re-litigation of already adjudicated issues. See Anita Y. Woudenberg, "Giving DOMA Some Credit: The Validity of Applying the Defense of Marriage Acts to Civil Unions under the Full Faith and Credit Clause," 38 *Val. U. L. Rev.* 1509, 1515 (2004). The Supreme Court has never ruled explicitly on the constitutional dimensions of the recognition of marriages – which, as "licenses" rather than "judgments," do not receive the broadest protection under the Full Faith and Credit Clause. See Scott Ruskay-Kidd, "The Defense of Marriage Act and the Overextension of Congressional Authority," 97 *Colum. L.*

Rev. 1435, 1440 (1997). The Court has also not spoken on the issue of whether the FFCC grants Congress a procedural or substantive role in determining the application of the FFCC. Thus, Congress' power to limit the FFCC in substantive areas such as marriage, or civil unions, remains uncertain. See Anita Y. Woudenberg, "Giving DOMA Some Credit: The Validity of Applying Defense of Marriage Acts to Civil Unions under the Full Faith and Credit Clause," 38 *Val. U. L. Rev.* 1509, 1523 (2004).

b. Supremacy Clause

Another source of federal law that implicates same-sex marriages and domestic partnerships is the Supremacy Clause of the U.S. Constitution, which states that "The Laws of the United States...shall be the supreme Law of the Land...any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Constitution, art. VI, cl. 2. Normally, by virtue of the Supremacy Clause, Congress exercises unfettered power to define the scope and terms of federal law. However, some commentators have argued that when a federal statute, such as ERISA or the federal DOMA, conflicts with areas of law that are traditionally reserved to the exercise of state power, the federal statute does not so easily pre-empt, and a more stringent version of the pre-emption doctrine applies. These commentators further contend that family law constitutes a traditional exercise of state power, and therefore application of state family law must pose a high degree of harm to and conflict with the "organic" purpose or structure of the federal statute before state family law should be overridden. See Scott Ruskay-Kidd, "The Defense of Marriage Act and the Overextension of Congressional Authority," 97 *Colum. L. Rev.* 1435, 1477 (1997).

c. Freedom of Religion Clause

Another major source of federal law implicated in this debate is the Freedom of Religion clause of the First Amendment. The clause states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Constitution, amend. I. The meaning of the clause is interpreted differently by both sides in the gay rights debate. Opponents of gay marriage often argue that state support of same-sex unions breaches freedom of religion and conscience. On the other hand, advocates of gay marriage counter that marriage is a civil institution as well as a religious one, and because the church and state are separate institutions, same-sex couples have a right to marriage that is sanctioned by the government. To complicate matters further, a law banning employment discrimination on the basis of sexual orientation can raise constitutional problems if it is applied to the employment decisions of a religious or quasi-religious organization. See Development in the Law, "Statutory Protection for Gays and Lesbians in Private Employment," 109 *Harv. L. Rev.* 1625, 1638-44 (1996).

d. Due Process & Equal Protection

Finally, substantive due process and equal protection issues arise under the Equal Protection clause contained in the 14th Amendment, making the clauses another source of federal law implicated in the same-sex marriage debate. Proponents of equal marriage rights for same-sex couples argue that a legal denial of state provided rights or benefits directly contradicts the 14th Amendment which provides for equal protection and substantive due process under the law. In Lawrence, the Supreme Court held that intimate consensual sexual conduct was part of the liberty protected by substantive due process under the 14th Amendment. See Lawrence v. Texas, 539 U.S. 558 (2003). Many proponents of same-sex marriage believe that Lawrence paves the way for a subsequent decision invalidating state laws prohibiting same-sex marriage. This also raises the possibility of an Equal Protection challenge to federal DOMA. See Note, "Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage," 117 *Harv. L. Rev.* 2684, 2687-88 (2004).

B. State Law

1. Rules Governing Same-Sex Marriage Or Civil Unions

a. State laws -- constitutional or statutory -- permitting same-sex marriage or civil unions

A small minority of states have gone against the trend of restricting or eliminating rights of same-sex couples through legislation. Vermont and Connecticut permit civil unions, Hawaii and Vermont provide reciprocal beneficiary relationships, and California, Maine, and New Jersey provide state domestic partnership registries.

In response to a mandate from the state's highest court, (see Baker v. State, 744 A.2d 864 (Vt. 1999)), the Vermont legislature passed the Vermont Civil Union law, which went into effect on July 1, 2000. The law provides gay and lesbian couples with many of the same advantages of same-sex marriages. The law states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other sources of civil law, as are granted to spouses in a marriage." 1999 Vt. Sess. Laws, Act No. 91, § 3, codified at 15 V. S. A. § 1204(a). A few of these rights and responsibilities relating to employment law are: the ability to utilize prohibitions against discrimination based upon marital status; the availability of group insurance for state employees; and the availability of family leave benefits. See <http://www.leg.state.vt.us/docs/2000/bills/passed/h-847.htm>.

In April 2005, the Connecticut legislature passed a civil union law giving couples who enter into civil unions all of the same rights and responsibilities as spouses under state law. On April 6, 2005, the Connecticut Senate passed Substitute Bill 963 creating civil unions. Similar to Vermont's civil union law and California's Domestic Partner Registration Act, Section 14 of the Bill states that: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage." The Connecticut House also passed the Bill on April 13, 2005, but added an amendment that defines "marriage as the union of a man and a woman." The Connecticut Senate passed the bill as amended and the bill was signed into law on April 20, 2005, making Connecticut the second state to create civil unions.

Hawaii's Reciprocal Beneficiaries law provides some marriage-like benefits. Haw. Rev. Stats. § 572C (2001). Any two state residents can register as reciprocal beneficiaries, as long as they are over 18 and are not permitted to marry. Couples who sign up gain some of the rights and benefits granted by the state to married couples, including hospital visitation rights, the ability to sue for wrongful death, and property and inheritance rights.

Maine recently enacted a domestic partnership law offering some limited benefits to registered partners, mostly related to disability and end-of-life issues. Most other marital rights are not included. 22 M.R.S. § 2710 (2005).

New Jersey's domestic partner law applies to same-sex couples and to opposite-sex couples in which one partner is 62 or older. The benefits provided include equality with married couples in medical decision-making and the choice of filing joint state tax returns. However, the law does not provide for inheritance rights, the right to petition for spousal support if the relationship ends, or automatic parental rights. In addition, while the law requires health insurance providers (i.e., health insurance companies) that offer dependent coverage to offer such coverage to registered documents partners, it does not require private employers to provide dependent health coverage to an employee's domestic partner. 2003 N.J. Sess. Law Serv. Ch. 246, Assembly No. 3743.

In California, the updated domestic partner law gives broad new rights and places extensive new responsibilities on registered partners. As of January 1, 2005, the California Domestic Partner Registration Act, which was originally enacted in 1999, became almost the equivalent of

Vermont's civil union laws in terms of the rights and benefits bestowed upon partners of civil unions. A.B. 205, 2003-04 Sess. (Cal. 2003). Similar to the Vermont law, it states that: Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of state law, as are granted to and imposed upon spouses.

It remains to be seen what effect the laws in California, Connecticut, Hawaii, Maine, New Jersey, and Vermont will have on other states. Couples who are not Vermont residents are allowed to register their civil unions in Vermont, but it is doubtful that other states will recognize their status (except in states where the law, or case law, explicitly states or indicates that civil unions and domestic partnerships will be recognized). Similarly, domestic partners registered in California will most likely have trouble having their partnerships recognized anywhere except in the other states that recognize same-sex partnerships.

State constitutions may also contain clauses granting same-sex couples the right to same-sex marriage or civil unions. In Goodridge, the Supreme Judicial Court of Massachusetts held that same-sex couples have a right to marry under the state constitution's principles of individual liberty and equality. Goodridge v. Department of Public Health, 440 Mass. 309 (2003). A majority of the court issued an advisory opinion shortly afterwards making it clear that only full marriage rights would comply with the decision. In Baker, the Supreme Court of Vermont held that same-sex couples have a right under the state constitution to the same benefits and protections as different-sex couples who marry. Baker v. State, 744 A.2d 864 (Vt. 1999). In Baehr v. Lewin, the Supreme Court of Hawaii held that the state's prohibition of marriage by same-sex couples appeared to be sex discrimination and a denial of equal protection under the state constitution. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). However, before same-sex marriage rights could issue from that decision, the Hawaii constitution was amended to add a provision providing that "the legislature shall have the power to reserve marriage to opposite-sex couples," and a state statute providing that a "valid marriage contract shall be only between a man and a woman."

b. State laws -- constitutional or statutory -- expressly prohibiting same-sex marriage or civil unions

A far greater number of states expressly prohibit same-sex marriage or civil unions. The National Conference on State Legislatures tracks statutory and constitutional prohibitions on a regular basis. The chart below, taken from the NCSL website, is current as of April 2005. See <http://www.ncsl.org/programs/cyf/samesex.htm#DOMA>.

States with Statutes Defining Marriage as between a man and a woman	States with Constitutional Language Defining Marriage as between a man and a woman	States with Neither
Alabama Alaska Arizona Arkansas California Colorado Delaware Florida Georgia Hawaii Idaho	Alaska Arkansas Georgia Hawaii Kansas Kentucky Louisiana Michigan Mississippi Missouri Montana	Connecticut Massachusetts New Jersey New Mexico New York Rhode Island Wisconsin

Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Michigan Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire North Carolina North Dakota Ohio Oklahoma Pennsylvania South Carolina South Dakota Tennessee Texas Utah Vermont Virginia Washington West Virginia Wyoming	Nebraska Nevada North Dakota Ohio Oklahoma Oregon (Const. only, no statute) Utah	
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Following the passage of federal DOMA, 39 states enacted laws to prohibit same-sex marriages or deny same-sex couples rights available to married couples. Each state includes at least one of three different provisions proscribing same-sex marriage statutorily or constitutionally. These provisions are (1) specifically defining marriage as a legal union between a man and a woman, (2) denying recognition of same-sex marriages solemnized in other states, and (3) making same-sex marriage a violation of public policy. Three states, Vermont, Maryland, and Wyoming, already had similar laws concerning same-sex marriage before the federal DOMA was enacted. (Source: Connecticut General Assembly Office of Legislative Research: State Laws Regarding Same-Sex Marriage: <http://www.cga.ct.gov/2005/rpt/2005-R-0374.htm>).

The Connecticut General Assembly Office of Legislative Research has summarized the different laws and constitutional provisions in a report on state laws regarding same-sex marriage, *available at* <http://www.cga.ct.gov/2005/rpt/2005-R-0374.htm>. 17 states have constitutional amendments defining marriage as a legal union between one man and one woman. 12 states, Arkansas, Georgia, Kentucky, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah had voters approve these amendments in 2004. Kansas passed a constitutional amendment on April 5, 2005. Four states, Alaska, Hawaii, Nebraska, and Nevada, had previously amended the state constitution to legally define marriage. Louisiana passed an amendment defining marriage in 2004, but the Louisiana Supreme Court determined the amendment was unconstitutional due to a procedural error.

Eleven states have laws that define marriage as a legal union between a man and woman, deny recognition of same-sex marriages solemnized in other states, and make same-sex marriage a violation of public policy. These states are Alabama, Arkansas, Georgia, Idaho, Kansas, Louisiana, Michigan, Missouri, Montana, Ohio, and Tennessee. 12 states define marriage as a union between a man and woman and deny recognition of same-sex marriages solemnized in

other states. These states are Alaska, Colorado, Florida, Indiana, Kentucky, Mississippi, Nebraska, North Carolina, Oklahoma, South Dakota, Utah, and West Virginia.

Five states deny recognition of same-sex marriages solemnized in other states. These states are Arizona, Delaware, Illinois, Maine, and Virginia. Three states deny recognition of same-sex marriages solemnized in other states and make such marriages a violation of public policy. These states are Pennsylvania, Texas, and South Carolina.

Eleven states only define marriage as a legal union between a man and woman. These states are California, Hawaii, Iowa, Maryland, Minnesota, Nevada, North Dakota, Oregon, Vermont, Washington, and Wyoming. New Hampshire does not follow any of the above criteria dealing with same-sex marriages, but it prohibits a man from marrying another man and a woman from marrying another woman (N. H. Rev. Stat. Ann. § 457: 1).

2. State Anti-Discrimination Laws

a. Anti-discrimination laws based on sexual orientation

The situation is further complicated with state laws that forbid discrimination on the basis of sexual orientation or marital status. An increasing number of states have enacted statutes regulating employment discrimination on the basis of sexual orientation. Seventeen states (including D.C.) currently have laws that prohibit employment discrimination on the basis of sexual orientation. See <http://www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map>.

Some legal scholars argue that state anti-discrimination laws send internally conflicting signals about the states' public policies toward gay rights. See Development in the Law, "Statutory Protection for Gays and Lesbians in Private Employment," 109 Harv. L. Rev. 1625, 1630 (1996). Connecticut and Minnesota compound this problem by including language to the effect that nothing in their statutes authorizes the recognition of same-sex marriages. The vague language and marriage exceptions may provide an "escape hatch" for courts that do not want to read bans on sexual orientation employment discrimination broadly.

b. Anti-discrimination laws based on marital status

Other anti-discrimination laws forbid employers from discriminating based on marital status. According to Unmarried America, an advocacy organization, 21 states have statutes prohibiting marital status discrimination in employment. See <http://www.unmarriedamerica.org/ms-employment-laws.htm>.

These laws typically forbid an employer from tying job benefits to marriage, a practice that typically will result in gay and lesbian employees failing to receive such benefits. Whether these anti-discrimination laws would themselves require employers to provide benefits to all employees, regardless of marital status, is a matter open to interpretation, although ERISA's broad preemption provision would suggest that efforts to construe such state-based laws in a manner to broadly mandate ERISA-regulated benefits would be unsuccessful. See Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983).

3. State Insurance Laws

a. Laws expressly authorizing domestic partner coverage

California – Group health plans must offer the same benefits to registered domestic partners as are offered to spouses. Cal. Ins. Code § 10121.7(a) (West 2005); Cal. Fam. Code § 297.5 (West 2005).

Connecticut – New civil unions (available Oct. 1, 2005) require group health coverage of parties to civil union. 2005 Conn. Legis. Serv. P.A. No. 05-10 § 14 (West); Conn. Gen. Stat. Ann. § 38a-541 (West 2004).

Hawaii – Requires availability of “reciprocal beneficiary family coverage” to cover domestic partners whenever family coverage is available. Haw. Rev. Stat. § 431:10A-601 (2004).

Maine – Health insurance contracts must offer domestic partner benefits. Me. Rev. Stat. Ann. tit. 24-A, §§ 2741-A (2), 2832-A(2) (West 2004).

Maryland – Permits, but does not require, coverage of domestic partners. Catherine Brennan, Banning Discrimination Based on Sexual Orientation, 35 Md. B.J. May/June 2002, at 50, 52.

New Jersey – Individual and group health insurance that offers dependent coverage must cover domestic partners. N.J. Stat. Ann. §§ 17B:26-2.1x, 17B:27-46.1bb, 17B:27A-7.9.

Vermont – Parties to a civil union are entitled to the same coverage offered to married spouses. Vt. Stat. Ann. tit. 8, § 4063a (2004).

Virginia – Allows extension of coverage to “Any other class of persons as may mutually be agreed upon by the insurer and the group policyholder.” 2005 Va. Acts ch. 871 (amending Va. Code Ann. § 38.2-3525 as of March 28, 2005).

b. Laws expressly forbidding insurers from issuing policies that cover same-sex domestic partners, regardless of status as dependent for federal income tax purposes

There do not appear to be any state insurance laws that expressly forbids insurers to cover same-sex domestic partners. Virginia had such a law, but it was amended March 2005, effective July 1, 2005. 2005 Va. Acts ch. 871 (amending Va. Code Ann. § 38.2-3525 as of March 28, 2005).

III. VOLUNTARILY PROVIDING WELFARE BENEFITS TO SAME SEX SPOUSES & DOMESTIC PARTNERS

A. How Much Freedom Do Employers Have To Provide such Benefits?

1. Introduction

There are few restrictions on employers voluntarily choosing to provide welfare benefits to same-sex spouses and domestic partners. However, while federal law does not prevent companies from voluntarily providing such benefits, it does not give companies or employees the tax advantages that opposite-sex spouses receive, and in some cases, like health savings accounts, there are actually tax penalties associated. The tax computations for the employer are themselves complicated when providing benefits to same-sex spouses and domestic partners of employees who do not qualify as legal dependents. For example, there is no approved method for computing the amount of income to impute to account for health insurance provided to a non-

tax dependent domestic partner. Further, same-sex spouses and domestic partners have none of the federal rights of opposite-sex spouses with respect to welfare benefits (e.g., extension of coverage or unpaid leave in the event of a sick partner) unless those rights are expressly and voluntarily granted by the company or plan.

2. Voluntarily Providing Group Health Benefits

a. Tax Issues for non-dependent Domestic Partners

Providing group health benefits to domestic partners does not affect the tax status of other participants in the plan. Priv. Ltr. Rul. 2003-39-001 (Jun. 13, 2003).

(1) Taxable income to employee. Code section 106(a).

The employee must include in gross income the excess of the fair market value of the group medical coverage provided by the employer less the amount paid by the employee for that coverage. Priv. Ltr. Rul. 98-50-011 (Dec. 11, 1998) (group health insurance); Priv. Ltr. Rul. 97-17-018 (Jan. 22, 1997) (group term life insurance).

The employee must also include as wages the additional FICA attributable to the coverage that the employer pays on the employee's behalf. Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001).

(2) Tax withholding, FICA, FUTA obligations for employer. PLR 2001-08-010

The amount includible in gross income is considered wages and is subject to employer withholding and FICA and FUTA taxes. Priv. Ltr. Rul. 98-50-011 (Dec. 11, 1998); Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001).

If the employer or plan pays the additional FICA that is due from the employee as a result of the imputed income for the coverage, the employee's income must be "grossed up" by that amount under Rev. Proc. 81-48, 1981-2 C.B. 623. See Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001).

(3) Issues in calculating the value of employee's imputed taxable income. PLR 96-03-011

The IRS has not approved any particular method of computing imputed income, and asserts that because computation of fair market value is an issue of fact it cannot approve any particular employer's method in advance. Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001). There are several approaches employers typically use to compute fair market value, see Valuing and Taxing Employment Based Medical Benefits Provided to Domestic Partners and Same-Sex Spouses, Benefits Advisory (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., Boston, MA), Aug. 2004, at 6, <http://www.mintz.com/images/dyn/publications/EBEC-Advisory-8-23-04.pdf>, including:

a. COBRA rate – use the plan's individual COBRA rate (minus the 2% allocated to overhead and administration) as a proxy for fair market value. This was used by the fund in PLR 2001-08-010, and the IRS did not disapprove of the method. Id. This seems to be a legally conservative and easily computed position.

b. Subtract the cost of single employee coverage premium from the cost of family coverage and impute the difference – this is used by some employers. See, e.g., Letter from Michael Kriner, Director of Pension and Benefits, N.C.R. Corp., to Neil Makin, Co-chair, League@NCR 2 (Sep. 24, 2002), <http://www.league-ncr.com/Documents/Domestic%20Partner%20Letter.doc>. Variations on this theme also are used. If the plan provides a separate premium for employee plus spouse coverage, some companies subtract the cost of single employee coverage from the

cost of employee plus spouse coverage. A further complication is assessing how to allocate the amount that the employee pays for his or her and dependent coverage. For example, assume employer X has a premium for single coverage of \$400/month and a premium of \$900/month for employee and spouse coverage. Assume further, that the employee is required to pay \$75/month toward single coverage \$200/month toward employee and spouse coverage. Under this method, the amount that would be imputed to the employee would be \$375 [$900 - 200 - (400 - 75) = \375]. This method may be problematic, however, because the fair market value of a fringe benefit is supposed to be the value that the employee would pay in an arm's length transaction, and is not determined by the employer's cost. See generally, 26 C.F.R. § 1.61-21(b)(2).

3. COBRA Issue

a. No federal law requirement for COBRA continuation coverage.

Domestic partners and same-sex spouses are not entitled to continuation coverage under COBRA. IRC § 4980B(g)(1)(A); ERISA §§ 603(1), 603(3), 607(3)(A).

b. Optional voluntary provision of COBRA by employers is generally authorized, except perhaps where prohibited by state law.

If a prohibition is contained in the state insurance law, it would then probably be "saved" from preemption. ERISA §§ 514(b)(2)(A). However, if the prohibition was created by a more general state statute or was inferred by a court based on a state DOMA-like amendment, the result is unclear. Such a prohibition would "relate" to ERISA plans. Therefore, it would probably be preempted under ERISA § 514. See Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48-51 (1987); Aetna Health Inc. v Davilla, 124 Sup. Ct. 2488 (2004).

4. Other Welfare Benefits

a. No domestic partner benefits in cafeteria plans.

Non-dependent domestic partner benefits may not be provided through a cafeteria plan, because taxable benefits are not allowed under a cafeteria plan. Prop. Treas. Reg. § 1.125-2, Q/A-4(b); PLR 96-03-011. Further, a civil union, same-sex marriage, or domestic partner registration would not qualify as an event allowing a change in election. T.D. 8878, 2000-1 C.B. 857 (2000); 26 C.F.R. § 1.125-4. It also seems that a change in law that enabled coverage of a non-dependent domestic partner would not be a "status event" with respect to a cafeteria plan. T.D. 8878.

b. No non-tax dependent domestic partner benefits under a Health Savings Account, unless employee is willing to pay income and excise taxes.

"Qualified medical expenses" with respect to a Health Savings Account do not include medical expenses of a non-dependent domestic partner. IRC § 223(d)(2)(A). Therefore, any amount paid from an HSA to cover medical expenses of a non-dependent domestic partner would be included in the gross income of the employee and would be subject to an additional 10% excise tax. IRC §§ 223(f)(2), 223(f)(4)(A).

c. Family Medical Leave Act

A domestic partner or same-sex spouse does not qualify as a "spouse" under the FMLA. 29 U.S.C. § 2611(13) (2004). Therefore, an employee is not entitled to unpaid leave or any other

accommodations under the Family and Medical Leave Act to care for his or her domestic partner. 29 U.S.C. § 2612(a)(1)(C).

5. Other Issues

a. Tax status of VEBAs.

As long as spending on health coverage for non-dependent domestic partners is no more than a de minimis amount, the VEBA's exempt status will not be affected. 26 C.F.R. § 1.501(c)(9)-3(a); Priv. Ltr. Rul. 2001-08-010 (Feb. 23, 2001). A maximum cost for such coverage, including employment taxes, of between 2.88% and 3.31% of total expenditures has been held by the Service to be de minimis. *Id.*; *see also*, Priv. Ltr. Rul. 98-50-011 (Sep. 10, 1998) (holding that expenditures on domestic partner coverage were de minimis as long as they did not exceed 3% of total expenditures).

b. ERISA prohibited transaction issue -- If plan assets are used to gross-up employee for share of imputed income taxes, or to pay employer's share of FICA/FUTA, etc., is it a prohibited transaction?

Use of plan assets to pay the employer's share of FICA and FUTA taxes on the imputed income does not violate ERISA §§ 406(a)(1)(C)-(D), ERISA §§ 403(c)(1), 404(a)(1) and would not be an improper expenditure of plan assets or give rise to a prohibited transaction. *See*, Dep't of Labor Adv. Op. Ltr 2001-05A (June 1, 2001). In addition, paying the employee's share of FICA and grossing-up the employee's imputed income accordingly do not violate ERISA, provided the payments are clearly labeled as plan benefits in the plan document. *Id.*

IV. RECOGNITION OF SAME-SEX MARRIAGE OR CIVIL UNIONS: ARE EMPLOYERS LEGALLY REQUIRED TO TREAT SAME-SEX MARRIED SPOUSES OR CIVIL UNION PARTNERS AS SPOUSES FOR WELFARE BENEFIT PURPOSES?

A. Impact of State Law

1. Does the State require employers to recognize, for welfare benefits purposes, same-sex married spouse or civil union partner

Whether an individual is entitled to spousal benefits depends on a number of factors, including where the employee was married and resides, the type of employee benefit plan involved, whether the employee benefit plan is covered by ERISA, the manner in which "spouse" is defined by the plan, and the application of the provisions of DOMA. *See* article from Stephen Miller, Society for Human Resource Management, available at http://www.shrm.org/rewards/news_published/CMS_011767.asp.

Legal challenges have been brought by employees challenging the denial of benefits to their domestic partners. Such claims have generally fallen into two categories: (1) legal challenges based upon the equal protection clause of state constitutions; and (2) legal challenges based upon discrimination claims under state statutes. *See* Thomas H. Barnard & Timothy J. Downing, "Emerging Law on Sexual Orientation and Employment," 29 *U. Mem. L. Rev.* 555, 573 (1999).

a. Goodridge v. Department of Public Health, 440 Mass. 309 (2003).

Given that courts have been reluctant to hold that the domestic partners of homosexual employees are equivalent to "spouses" for benefit purposes, gay and lesbian employees have begun to attack the underlying state marriage laws that prohibit same-sex marriage. If homosexuals are allowed to legally marry, then their "domestic partners" become "spouses", who will be eligible for benefits under existing plan language. *See* James P. Baker, "Equal Benefits for

Equal Work? The Law of Domestic Partner Benefits," 14 *Lab. Law.* 23 (1998).

In the groundbreaking Goodridge decision, the Massachusetts Supreme Court ruled that same-sex couples have the legal right to marry in the state. Goodridge v. Department of Public Health, 798 N.E. 2d 941 (2003). The court held that the exclusion of same-sex couples from civil marriages violated the state constitution's equal protection clause, as well as the liberty to choose whether and whom to marry. Although the state has begun to issue marriage licenses to same-sex couples in accordance with the ruling, a constitutional amendment is pending to reverse that decision by defining marriage as the union of one man and one woman, while permitting civil unions for same-sex couples. The Massachusetts constitutional amendment, if approved, would become effective no earlier than 2006. Since Goodridge, there has been an abundance of activity at both the state and national level, mostly in the form of state constitutional amendments, directed at preventing other decisions. See Phyllis G. Bossin, "Symposium: The Legislative Backlash To Advances In Rights For Same-sex Couples: Same-sex Unions: The New Civil Rights Struggle or An Assault On Traditional Marriage?" 40 *Tulsa L. Rev.* 381, 381 (2005).

Massachusetts employers have the option of discontinuing domestic partner benefits altogether since marriage is now an option, keeping domestic partner benefits for same-sex partners only, or extending domestic partner benefits to both same-sex and opposite-sex partners. For purposes of insured benefits provided under state law at least, Massachusetts employers must extend spousal benefits to cover the same-sex spouses of their employees. But for Massachusetts employers providing self-insured health plans, for which the insurance exception to ERISA preemption does not apply, such employers probably do not need to provide coverage to same-sex spouses if they choose not to do so, but such a choice should be clearly identified in the applicable plan documents. The Goodridge decision probably should be read more broadly to require that references to "spouse" under Massachusetts laws and in insurance policies covering Massachusetts residents must now be interpreted to include same-sex spouses. (For more information on the application of Goodridge to Massachusetts's employers, see "Same-Sex Marriages in Massachusetts," Goodwin Procter Client Alert (April 6, 2004), available at <http://www.goodwinprocter.com/pubindex.asp>).

Employers in states that have enacted local DOMA-type statutes may probably rely on these laws, along with federal DOMA, to avoid recognition of same-sex marriages performed in Massachusetts for all employee benefits purposes.

The situation is less clear for employers in states such as New York that have not enacted local DOMA-type statutes and have indicated that they will recognize same-sex marriages legally performed in Massachusetts (or elsewhere). New York State Attorney General Eliot Spitzer, in an informal opinion, has indicated that New York same-sex couples who had legally marry elsewhere must be given all the rights and protection of marriage. See http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf. Thus, depending on the scope of New York insurance law, there may be a good argument that New York employers who provide insured coverage to spouses must include same-sex couples who are New York residents and lawfully marry elsewhere. But see discussion below regarding issue of whether Massachusetts non-residents may be married in the Commonwealth of Massachusetts.

b. Civil union laws (Vermont, Connecticut).

A related question concerns the spousal benefits claims of employees who have obtained civil unions in states that provide and recognize them (i.e. Vermont and Connecticut). States that recognize civil unions do not necessarily treat civil union partners as spouses for the purpose of state insurance policies and spousal benefits. The civil union spouse of an employee of the State of Connecticut, a Connecticut county or a Connecticut municipality, will be entitled to the same health insurance rights and benefits provided to married employees. The picture is more complicated for Connecticut's private sector employees. Private sector employers may not be

required to extend health insurance coverage to civil union spouses, as most private employer health plans are covered by ERISA. No official regulation or policy statement has been issued by the state's Office of Legislative Research or by the state's Insurance Department.

Vermont's policy concerning spousal benefits for civil union couples has been clarified through an official regulation. Under Regulation 2000-01-IH Civil Unions, issued by the Vermont Department of Banking, Insurance, Securities & Health Care Administration: Division of Health Care Administration, "insurers shall make insurance policies and contracts that are currently available to married couples, spouses, and their families available to civil union couples, parties to a civil union, and their families." However, the rule further states that insurers are not required to provide a benefit available to a married person to a party to a civil union, or amend an insurance policy or contract of a party to a civil union when application of federal law prohibits such action or limits the benefit to married persons. Thus, because of ERISA, Act 91 (Vermont's Civil Union Law) does not state requirements pertaining to a private employer's enrollment of a party to a civil union in an ERISA employee welfare benefit plan. State governmental employers are not subject to ERISA and, therefore, are required to provide health benefits to the dependents of a party to a civil union if the public employer provides health benefits to the dependents of married persons. See http://www.bishca.state.vt.us/RegsBulls/insregs/REG_I-2000-1.PDF for full text of Vermont's regulation.

c. State anti-discrimination in employment laws

As previously discussed, seventeen states (including D.C.) currently have laws that prohibit employment discrimination on the basis of marital status or sexual orientation. Gay and lesbian employees from these states have argued that benefit plans that only provide coverage to the spouses of heterosexual employees, and not to their domestic partners, base a portion of the employees' total compensation on their marital status, or on their sexual orientation, and thus violate the state anti-discrimination provisions. Courts generally have rejected this argument because many of the state antidiscrimination statutes contain language specifically exempting benefit plans from the reach of the statute. See, e.g., Rutgers Council of AAUP Chapters v. Rutgers State University, 298 N.J. Super. 442, 689 A.2d 828 (1997). Moreover, as an initial matter, and for private sector employers regulated by ERISA, even if such state laws were to be construed to prohibit an employer from excluding same-sex domestic partners from receiving benefits, there is the significant issue of whether ERISA would preempt such statutes.

Courts that have considered the issue have generally agreed that a ban on sexual orientation discrimination does not require an employer to provide benefits to a homosexual employee's lifetime partner in situations in which the employer does so for a heterosexual employee's spouse. See Development in the Law, "Statutory Protection for Gays and Lesbians in Private Employment," 109 *Harv. L. Rev.* 1625, 1634 (1996). As aforementioned, one form of the argument is that when employers deny benefits to domestic partners while providing benefits to spouses, they treat gay and lesbian employees differently from heterosexuals and, thus, violate gays' and lesbians' rights to equal protection under the state constitution. Courts have generally rejected this line of argument, the leading case being Hinman. See Hinman v. Department of Personnel Administration, 167 Cal.App.3d 516, 213 Cal.Rptr. 410 (1985). In Hinman, the California Court of Appeals held that the same-sex partner of a state employee was not entitled to dependent coverage under the State Employees' Dental Care Act. In denying the coverage, the Department of Personnel Administration relied on the definition of "family member" as provided for in the Public Employees' Medical and Dental Care Act. Hinman argued that the denial of benefits unlawfully discriminated against homosexual employees who do not have the legal option to marry. The court ruled that the denial of benefits was not discriminatory because the Department's policy had not classified Hinman on the basis of sexual orientation – i.e. no differences existed between dental benefits given to unmarried homosexual and unmarried heterosexual state employees. Thus, the lack of coverage of state employees' same-sex partners under the state governmental dental plan did not violate state Executive Order B-54-79,

barring sexual orientation discrimination in state employment. In addition, Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App., 1992) also held that an employer can limit dependent health insurance coverage without violating marital status, sexual orientation, or other gender-based provisions of the Wisconsin Fair Employment Act. Like in Hinman, the Phillips court reasoned that the disparity in treatment was the result of marital status and not sexual orientation.

Courts have also rejected the second form of the equal protection argument, which states that even assuming that the correct equal protection comparison is between married and unmarried employees, the denial of benefits to domestic partners may violate the equal protection rights of both homosexual and heterosexual unmarried employees, because there is no rational relationship between the classification upon which benefits are conferred – marital status – and a legitimate government interest. In Rutgers Counsel, the Superior Court of New Jersey unanimously rejected a plaintiff's claim of unlawful discrimination and held that a denial of domestic partner benefits is rationally related to a government's interest in efficient administration. See 298 N.J. Super. 442, 689 A.2d 828 (1997). The court emphasized that "a policy of extending health benefits to employees' spouses rather than domestic partners furthers the governmental goal of creating a workable administrative scheme that can be applied in a uniform and objective manner." The denial did not constitute sexual orientation or marital status discrimination under the state Law Against Discrimination ("LAD"), since the LAD contained an exception providing that nothing contained in the act should be construed to interfere with the operation of the terms or conditions and administration of any bona fide retirement, pension, employee benefit or insurance plan or program, including any state or locally administered public retirement system. There is one notable exception to courts having rejected this type of equal protection argument. The court in Tanner v. Oregon Health Sciences University, 157 Or. App. 502, 971 P.2d 435 (1998), held that a state university's denial of insurance benefits to its gay and lesbian employees' domestic partners violated the privileges and immunities clause of the Oregon Constitution (Or. Const. art. 1, § 20). Article I, section 20 of the Oregon Constitution forbids inequality of privileges and immunities to any citizen or class of citizen. The court also determined that Oregon's statute precluding discrimination in the workplace, which applies to all employers, prohibited discrimination on the basis of sexual orientation, but that the employer's denial of benefits to same-sex domestic partners in the specific instance was not discriminatory because it fell within the exception for a "bona fide employee benefit plan," and not a "subterfuge" for discrimination. While only public employers are affected by Tanner's constitutional holding, the case is of significance as a matter of equal protection law, as the holding can be extended beyond the employment discrimination context.

For employers operating in states without a mini-DOMA, and particularly those states prohibiting discrimination on the basis of marital status and/or sexual orientation, there is no clear answer as to whether such an out-of-state employer is legally required to recognize same-sex spouses married in Massachusetts. On March 3, 2004, New York State Attorney General Elliot Spitzer issued an informal opinion indicating that, although current New York law does not permit same-sex marriages, under New York state court precedent, same-sex marriages lawfully entered in other jurisdictions should be recognized for purposes of New York law. See http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf. It should be noted that even in states with mini-DOMAs, a few states leave some leeway in their prohibitive language which arguably allows for recognition of same-sex marriages obtained in Massachusetts. For example, Vermont has a very mild DOMA, with no extraterritorial implications, stating: "Marriage is the legally recognized union of one man and one woman." 15 Vt.Stat. Ann. § 8. The mini-DOMA must also read in conjunction with the state's comprehensive civil union statute (15 Vt. Stat. Ann. §§ 1201-1207).

There are additional legal issues that complicate matters. First, Massachusetts has a law from 1913 that prohibits non-residents from marrying in Massachusetts if they are prohibited from marrying in their home state. Relying upon the law, Massachusetts' governor has questioned the legal status of same-sex couples who marry in Massachusetts but reside in other states. The

Gay and Lesbian Advocates and Defenders (“GLAD”) apparently believes that these marriages are valid, and are currently challenging the 1913 law in the Massachusetts courts. In fact, a suit was brought by 13 city and town clerks challenging Massachusetts’ denial of marriage licenses to non-residents. See, Cote-Whitacre v. Dept. of Public Health, 2004 WL 2075557 (Mass. 2004), which was filed in conjunction with Johnstone et al v. Reilly, Civil Action No. 04-2655-G (2004). These cases have been consolidated. A lower court denied the couples’ request for immediate relief in August 2004. The Supreme Judicial Court decided on January 29, 2005 to hear GLAD’s appeal directly. The state’s briefs are due to be filed on or after May 6, 2005, and it is expected that the court will hear oral arguments in the fall of 2005. See http://www.glad.org/News_Room/press91-3-11-05.html.

2. Does State law expressly prohibit employers from recognizing same-sex spouses or civil union partners and providing them benefits?

a. State mini-DOMAs that prohibit same-sex marriage and/or prohibit recognition of same sex marriages performed in other states

Forty-two states currently have their own statutory Defense of Marriage Acts. Three of those states have statutory language that pre-dates federal DOMA (enacted before 1996) defining marriage as between a man and a woman. 18 states have defined marriage in their constitutions. The National Conference of State Legislatures tracks state DOMAs on a regular basis. See <http://www.ncsl.org/programs/cyf/samesex.htm>.

State DOMAs, such as Vermont’s law (described above) can be limited in their expression of public policy and territorial scope. On the other end of the spectrum are laws such as Virginia’s DOMA, which explicitly provides: “A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.” Va. Code Ann. Sec. 20-45.2. Further, the Affirmation of Marriage Act provides: “A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership, contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.” Va. Code Ann. Sec. 20-45.3.

Other examples of state mini-DOMAs include Arizona’s law which provides that “marriage between persons of the same sex is void and prohibited” (A.R.S. §25-101), California statute which states that “only marriage between a man and a woman is valid or recognized in California” (Cal Fam. Code §308.5), and Washington’s Code which defines marriage as “a civil contract between a male and a female” (RCW 26.04.010). On their face, these mini-DOMA laws would not appear to prohibit an employer from voluntarily providing coverage to same-sex spouses or civil unions if it chooses to do so. Moreover, it would appear that ERISA’s preemption would apply to preempt application of state mini-DOMAs in order to prohibit employers from extending coverage to same-sex spouses or civil unions.

B. Impact of Federal Law

1. Even if otherwise applicable state law requires, for benefits purposes, recognition of same-sex spouses or domestic partners federal law will likely trump.

a. Federal DOMA

The interaction of federal DOMA, state mini-DOMAs, and state laws recognizing same-sex marriages or civil unions has not been tested in the courts. Laws that are inconsistent with the

terms of ERISA-governed plans are likely to be pre-empted by ERISA and/or the federal DOMA. Even if otherwise applicable state law requires recognition of same-sex marriages or civil unions, federal law will likely trump the state law. However, as employers may voluntarily provide more generous benefits than required by federal law, they can typically extend federal benefits to same-sex spouses. But for non-ERISA plans, the legal requirements are most uncertain in states where the definition of “spouse” or “marriage” is in dispute.

V. EMPLOYER PROVISION OF PENSION BENEFITS TO DOMESTIC PARTNERS

A. No benefits to same-sex or civil union spouses

1. Spouses have certain rights under ERISA and the Code for benefits

a. QJSA

Domestic partners and same-sex spouses are not entitled to receive payments under a Qualified Joint and Survivor Annuity if the participant should die. IRC 417(b).

b. QPSA

Domestic partners and same-sex spouses are not entitled to receive payments under a Qualified Preretirement Survivor Annuity if the participant should die. IRC 417(c).

c. Spousal consent for certain forms of payment/loans to employees

Opposite-sex spouses must consent in order for a participant to waive a QJSA or QPSA, before pension assets may be used as security for a loan, or before distributions of a QJSA or QPSA. Domestic partners and same-sex spouses have no such rights. IRC 417(a)(2), (a)(4), (e).

d. Anti-alienation rules

Pension benefits generally may not be assigned or alienated; the exception to this rule is for a “qualified domestic relations order” (“QDRO”). ERISA § 206(d)(3)(A), IRC §401(a)(13)(B). However, if same-sex spouses or registered domestic partners divorce, it appears that pension benefits may not validly be assigned from the employee to the other partner. See Priv. Ltr. Rul. 2005-24-017 and 2005-24-016 (Mar. 17, 2005) (ruling that a government plan that treats a domestic relations order between registered domestic partners as a QDRO is not in compliance with IRC § 457(b)). The Service’s position in this Private Letter Ruling seems to be that a domestic relations order between registered domestic partners does not constitute a QDRO, and, therefore, the otherwise applicable rules against alienation indeed apply.

2. Federal DOMA does not recognize same-sex married spouses, or civil union spouses, as such.

B. Survivorship Rules for Pension Benefits

In contrast to the inflexible rules for QJSA and QPSA above, participants are given broader licensure with regards to selecting beneficiaries for survivor pension benefits. A plan document will either adopt a beneficiary designation option that allows a participant to select a beneficiary by completing a form or will designate a beneficiary scheme, with the spouse as the first default recipient and generally the estate as the final default recipient. Thus, for an unmarried participant whose pension benefits are distributed to his or her estate, such benefits will be distributed in accordance with the participant’s will (or if there is no will, the laws of descent and distribution).

In instances where a plan permits the participant to designate a beneficiary for the participant's survivor pension benefits, an unmarried participant is free to designate his or her beneficiary, and, as such, this would allow domestic partners to designate one another as the beneficiary of the survivor's pension benefits (provided, of course, that the participant properly completes the beneficiary designation form).

VI. OTHER OPEN QUESTIONS

A. Constitutionality of Federal DOMA

A number of commentators and gay rights advocates have challenged the constitutionality of DOMA, asserting that a federal law that limits the recognition of same-sex marriages outside the state of their celebration is constitutionally infirm. They argue that federalism issues are implicated by DOMA's definitions of "marriage" and "spouse". DOMA has the potential to conflict with state law because DOMA defines marriage in federal terms and prohibits same-sex couples from receiving federal benefits which they may have otherwise been entitled to if their domiciliary state recognized such a union. They further assert that when a federal statute conflicts with state family law, the federal statute should not so easily pre-empt state law in an area historically reserved to the states, and a more stringent version of the pre-emption doctrine should apply.

These critics also contend that Congress' authority to legislate an interpretation of the FFCC is also uncertain. They believe that DOMA is unconstitutional because Congress has only the power to dictate what the "Effect" of acts like marriage might be – not whether such acts have any effect at all. In addition to stating that "full faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State," the FFCC also includes an enabling clause: "And the Congress may by General Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The resolution of this issue is further complicated because while the FFCC requires each state to give full effect to other states' "public Acts, Records or Judicial Proceedings," a limited exception exists to prevent a violation of a state's strongly held public policy. Some argue that this exception permits states not to recognize same-sex marriages, notwithstanding the effect of any federal legislation. Thus, DOMA may be viewed as purporting to give states the right to refuse recognition of same-sex marriages celebrated in foreign jurisdictions, or simply legislating existing FFCC jurisprudence. *See* Melissa A. Provost, "Disregarding the Constitution in the Name of Defending Marriage: The Unconstitutionality of the Defense of Marriage Act," 8 *Seton Hall Const. L.J.* 157, 182 (1997).

Finally, even if Congress can render states' marriage acts ineffective in other states, DOMA's critics contend there may be a limit to that power, stemming from other Constitutional Clauses guaranteeing Equal Protection and Due Process. DOMA may be struck down as a violation of substantive due process, given the ruling in Lawrence v. Texas striking down Texas' criminal sodomy statute, or as an equal protection violation, given the Court's opinion in Romer v. Evans striking down an amendment to Colorado's constitution banning governmental bodies within the state from granting any legal protection to homosexuals. *See* Joanna L. Grossman, "Symposium on Goodridge v. Department of Public Health: Fear and Loathing in Massachusetts: Same-sex Marriage and Some Lessons from the History of Marriage and Divorce," 14 *B.U. Pub. Int. L.J.* 87, 109. This is a separate issue from the complicated question of whether a marriage is a "public Act" within the meaning of the FFCC, and, if so, whether there might be a public policy exception to Full Faith and Credit that enables states to refuse recognition to same-sex marriages even without Congress' express permission.

None of the challenges to strike down DOMA has ever been successful. The first lawsuit challenging DOMA was filed in federal court in July 2004 by two women seeking federal and out-of-state recognition of their recently celebrated Massachusetts marriage. The plaintiffs sued to

declare the state of Florida's DOMA and the federal DOMA unconstitutional as violative of the Full Faith and Credit, Due Process, Equal Protection, Privileges and Immunities, and Commerce Clauses of the Constitution. The court rejected the plaintiffs' argument that DOMA exceeds Congress's power under the FFCC, finding that "Congress' actions are an appropriate exercise of its power to regulate conflicts between the laws of two different States, in this case, conflicts over the validity of same-sex marriages." The court also ruled that the federal DOMA is non-discriminatory because it treats men and women equally. In addition, the court noted that the plaintiffs' view of the Full Faith and Credit Clause of the U.S. Constitution would, if adopted, "create a license for a single State to create national policy." See Wilson v. Ake, 354 F. Supp. 1298 (M.D. Fla. 2005).

On June 16, 2005 a federal district court in California upheld DOMA, marking the second time this year a court has ruled that DOMA does not violate the U.S. Constitution. In Smelt v. Orange County, 2005 WL 1429918, the district court ruled against two homosexual men who had argued that DOMA violates the Equal Protection and Due Process clauses. . The court upheld Section 3 of the federal DOMA, which defines marriage as the union of one man and one woman. The opinion concluded that although Section 3 is not a sex based classification, it does classify on the basis of "sexual orientation." However, the court held that Section 3 is constitutional because it passes the "rational basis" test. The ruling will be appealed to the 9th Circuit Court of Appeals. Technically, the court upheld only the section of DOMA that deals with the federal recognition of "gay marriage" because the court also held that the two men lacked legal standing to challenge the section giving states discretion on the issue because they did not have a valid marriage license.

Other cases that have upheld DOMA, at least indirectly, include Taylor v. Sullivan and In re Kandu. In Taylor, the U.S. District Court granted the defendants' motion to dismiss, holding that plaintiffs failed to state a claim upon which it could have granted declaratory relief because the parties' differences of opinion on the constitutionality of the marriage laws were insufficient to create an actual controversy. Taylor v. Sullivan, 18 Fla. L. Weekly Fed. D. 125 (2004). In Kandu, the U.S. Bankruptcy Court for the Western District of Washington held that the Kandus were not entitled to joint debtor status because DOMA constitutionally prohibits federal recognition of same-sex marriages. Thus, principles of comity governing recognition of foreign marriages would not require the court to allow a same-sex couple married in Canada to file a joint bankruptcy petition as spouses. In re Kandu, 315 B.R. 123, 148 (Bankr. W.D. Wash. 2004).

VII. SUGGESTED EMPLOYER ACTIONS

There are several steps and issues that employers need to consider when evaluating or re-evaluating their domestic partner policies, including questions of what benefits to offer and to whom (e.g., all unmarried couples, or just unmarried same-sex couples) and the cost and administrative issues associated with providing such benefits. These decisions are individual business and plan-design decisions that are beyond the scope of this outline. However, highlighted below are issues relating to plan documents and employer practices in the context of same-sex domestic partner benefits.

A. Plan Document Clarity & Consistency

1. Clear Definitions of "Spouse" and the Applicable Eligibility Rules

Quite often, plan documents do not define the term "spouse," or simply define spouse by reference to state law (i.e., any spouse who is legally married), a practice which could create unnecessary ambiguity, or result in a plan contract commitment that is inconsistent with the employer's actual intent. This is particularly so given that same-sex marriages and domestic partner relationships are now expressly recognized by some states and expressly prohibited by others. As such, it is probably advisable to clearly define the term spouse in the

plan document, and the summary plan description, and the employer should make its intentions as to the issue of same-sex coverage known. Moreover, if an employer decides to offer benefits to its employees' same-sex domestic partners, it should consider how it will determine when such a partnership has been formed or terminated, what benefits will be provided and what benefits will be provided to the children of the non-employee domestic partner who have not been adopted by the employee. These decisions should be clearly set forth in the relevant plan documents.

B. Good Administrative Practices

Before extending benefits to same-sex domestic partners, an employer should determine the status of domestic partner rules in each of states in which the employer operates. As noted above, employers should consider adopting a clear definition of spouse, or if spouse is already defined, employers should then review such definition to determine if any clarifications or revisions are warranted in light of the current legal landscape in this area of employee benefits. The employer should scrutinize its plan documents, summary plan descriptions, enrollment materials, designation forms and employee communications to ensure that they accurately and clearly reflect the employer's intent, and they are not debatable or subject to differing interpretation. Moreover, employers who provide domestic partner benefits should create detailed procedures respecting whether the covered domestic partner is a dependent of the employee for federal tax purposes. Finally, an employer should disclose the methodology it uses for imputing employee income in connection with non-dependent domestic partner benefits, so as to enable its employees to 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.