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Same-Sex Marriage: The Long Road to Equality

When the California Supreme Court heard oral argument in *Perry v. Brown* on September 6, it seemed like déjà vu all over again. For the third time in four years, the court was considering the continuing fight for equality being waged by



Inside



[Inside: Guest Editor's Column](#)
Since Massachusetts became the first state to legalize marriages of same-sex couples in May, 2004, same-sex unions have remained a hotly divided topic throughout the United States. As seen in the articles and charts, although there has

Spotlight

[Interview with Gordon Erspamer – Part II](#)
Gordon "Gordy" Erspamer, Senior Counsel with Morrison Foerster, has been fighting tirelessly for veterans' rights. Gordy's most recent victory, in front of the 9th Circuit Court of Appeals earlier this year, provides hope to veterans suffering from post-traumatic stress disorder. Describing problems at the VA as

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 **FEED FABRIK**

Taxation of Same-Sex Employee Benefits: A Primer

By Rita A. Holder

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Rita A. Holder

The law of taxation of employee benefits for same-sex couples is complicated. The foremost reason is that the body of law surrounding employee benefits for same-sex couples actually involves an enormous jumble of rules and regulations. The most influential are: the Employee Retirement Income Security Act of 1974¹²(ERISA), the Internal Revenue Code¹³, the Defense of Marriage Act¹⁴ (DOMA), the Consolidated Omnibus Budget Reconciliation Act of 1985¹⁵(COBRA), and the Health and Insurance Portability and Accountability Act of 1996¹⁶ (HIPAA). This article will take a closer look at the law and taxation of employee benefits.

¹²<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

¹³http://www.law.cornell.edu/uscode/usc_sup_01_26.html

¹⁴<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

¹⁵<http://www.dol.gov/dol/topic/health-plans/cobra.htm>

¹⁶<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

Overview of Employee Benefit Plan Regulation “Employee benefits” is an umbrella covering any non-cash compensation provided to workers as a condition of their employment. [1]¹⁷ Employees generally look to their jobs for health care and retirement benefits. Companies are not required to offer these benefits, so why do they?

TYPES OF BENEFITS BY FUNCTION [PDF]¹⁸

Surprisingly, employers’ reasons are largely altruistic:

- Providing employees’ economic security by insuring against illness, death and disability
- Raising workforce retirement living standards
- Competing for recruits who look to health and retirement benefits as an important consideration when deciding where to work
- Securing the income and welfare of employees and their families
- Encouraging employee savings[2]¹⁹

ERISA²⁰ section 514 preempts all states’ laws that relate to any employee benefit plan with certain enumerated exceptions. The most important exceptions are state insurance, banking or securities laws, criminal laws, and domestic relations orders that meet ERISA’s requirements. In actual practice, ERISA offers an almost complete preemption of most retirement plans. For employees participating in health and welfare plans, ERISA usually provides a regulatory floor; states can provide more protection of employees’ procedural rights, but not less.

Under ERISA²¹, jurisdiction over employee benefit plans is divided between the Internal Revenue Service (IRS), the Department of Labor (DOL) and the Pension Benefit Guaranty Corporation (PBGC). The responsibility of the IRS centers on plans covered by Internal Revenue Code (IRC) section 401(a), and includes pension, 401(k) profit sharing, and stock-bonus plans.

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¹⁸<http://cclawyer.cccba.org/wp-content/uploads/2011/09/Types-of-Benefits-Chart-2.pdf> ↔

¹⁹#_ftn2

²⁰<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

²¹<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

The DOL is generally responsible for health and welfare plans and other plans that are not designed to provide retirement benefits or the deferral of income.

History of Benefits for Same-Sex Couples Employee benefit programs have existed in the United States since colonial times. According to the Employee Benefit Research Institute²² (EBRI), the first recorded employee benefits included the Plymouth Colony settlers' military retirement plan in 1636; Gallatin Glassworks' profit-sharing arrangement initiated in 1797; American Express Company's pension plan in 1875; Montgomery Ward's group health, life, and accident insurance program in 1910; and Social Security retirement payments in 1935. Today, nearly two-thirds of Americans are covered under employer-sponsored benefit programs. [3]²³

In comparison, the history of employee benefits for same-sex couples is brief. In 1982, the *Village Voice*²⁴, a New York weekly newspaper, became the first U. S. company to offer health benefits to same-sex partners of its employees. The City of Berkeley was the first town to do so, in 1984. In 1995, Vermont became the first state to extend same-sex benefits to its public employees. In 1997, the State of Hawaii was the first state to offer domestic partnership benefits to all same-sex couples.

The movement toward same-sex benefits in the workplace has arisen, in part, from a growing awareness that equal work should mean equal pay, including employment benefits. For many employees, those benefits can amount to 25% to 40% of a worker's total compensation. As of 2011, a majority of *Fortune* magazine's 500 largest publicly traded companies provide health insurance benefits to same-sex partners of employees.[4]²⁵

The Defense of Marriage Act²⁶ (DOMA), 28 U. S. C. A. §1738C (1996) was a touchstone for gay rights activism in employee benefits. It defines "marriage" as a legal union between a man and a woman and a "spouse" as a person of the opposite sex who is a husband or wife. The law directly

²²<http://www.ebri.org/>

²³#_ftn3

²⁴<http://www.villagevoice.com/>

²⁵#_ftn4

²⁶<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR:>

applies to COBRA²⁷, HIPAA²⁸, and ERISA²⁹. However DOMA does not prohibit an employer from extending coverage and benefits to same-sex spouses or domestic partners (whether same-sex or opposite-sex).

In California, same-sex couples are categorized as a type of domestic partnership. When large U. S. companies first offered domestic partnership benefits, many offered benefits only to same-sex couples. The majority of plans now cover same-sex as well as opposite-sex couples.[5]³⁰

Domestic partner workplace benefits can be offered at the discretion of the employer. There are generally two procedures in employer health plan documents for approving employee eligibility for domestic partner benefits. One is an individually designed employer approval process (i.e. using customized applications or e-forms); the easier way is to use state or local domestic partnership registration as proof of eligibility.

Domestic Partnership Registration Domestic partnership registration provides a legal status that varies according to state or municipal government codes. In California, domestic partners can register as same-sex or opposite-sex duos. Family Code section 297³¹ identifies a domestic partnership where the following are met:

- Both persons have a common residence;
- Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity;
- Both persons are not related by blood in a way that would prevent them from being married to each other in this state;
- Both persons are at least 18 years of age;
- Both persons are members of the same sex, OR one or both of the persons of opposite sex are over the age of 62 and meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U. S.

²⁷<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

²⁸<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

²⁹<http://www.dol.gov/dol/topic/health-plans/erisa.htm>

³⁰#_ftn5

³¹<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=fam↔&group=00001-01000&file=297-297.5>

C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U. S. C. Section 1381 for aged individuals;

- Both persons are capable of consenting to the domestic partnership; and
- Both persons consent to the jurisdiction of the Superior Courts of California for the purpose of dissolution, nullity or legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, the state.

Another option for covering a same-sex partner in a health plan is eligibility via same-sex marriage. However California plan sponsors may face a dilemma when same-sex domestic partners marry. Since California law and many health and welfare plan documents require that both persons in the domestic partnership not be married, does this invalidate the participants' eligibility for domestic partner benefits once they marry? Plan amendments are certainly in order to correct this gap.

Impacts on HIPAA and COBRA Rights Under federal law, HIPAA³² ensures the privacy rights of all persons enrolled in group health plans with respect to their identifiable health information, whether electronic, written, or oral. As long as an opposite-sex or same-sex partner is validly enrolled in a covered plan, these protections will still apply.

Under COBRA³³'s special enrollment rights, employees may enroll their spouses and dependents in a group health plan upon a loss of eligibility for other coverage and upon acquiring a new dependent. But when an employee in a same-sex relationship loses or leaves a job, federal law does not guarantee the opportunity to pay for continued coverage for a domestic partner (or a partner's children), even if the employer-sponsored plan originally covered that partner (or the partner's children). This is true even though the former employee pays the premium for this temporary coverage. To remedy this situation, some companies have decided to "mirror" federal law by providing COBRA-like special enrollment (as well as COBRA-like

³²<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3103.ENR>:

³³<http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>:

continuation coverage rights) to domestic partners. Clients that sponsor health and welfare plans may want to amend their plan documents to grant the same rights to domestic partnerships and communicate the new policy accordingly.

Clients' Plan Documents May Need Review Clients that sponsor health and welfare plans may be advised to review their plan documents and Summary Plan Descriptions (SPDs) to determine whether changes are in order to ensure the language reflects intent. Plan sponsors can also be assisted in evaluating their enrollment forms and processes.

Most enrollment forms do not require employees to indicate the gender of their spouses. However, because the Defense of Marriage Act recognizes only spouses of the opposite sex, same-sex spouses and domestic partners are not treated the same as opposite-sex spouses under federal taxation rules. As discussed in the following section, same-sex domestic partners are not authorized to pay for benefits with pre-tax dollars, as can the opposite-sex married couples. Therefore, if an employee enrolls a same-sex partner as a "spouse" and the plan sponsor treats the same-sex partner as a spouse for federal tax purposes (rather than a tax-dependent domestic partner), the employee and the plan (i.e. the employer) may be subject to federal withholding and tax penalties for failure to follow the terms of the plan.^[6]³⁴

Taxation of Domestic Partner Benefits Under Internal Revenue Code (IRC) section 162(a)(1) and Treasury Regulation section 1.162-10(a) employers may deduct contributions to, or payments under, an employee accident or health plan, including contributions to the cost of accident or health insurance.

TYPES OF BENEFITS BY TAX TREATMENT [PDF]³⁵

Similarly, an employee's own pretax contributions made towards the purchase of group health plan coverage are excluded from income under IRC section 106. ^[7]³⁶ Likewise, section 106 excludes from an employee's income all contributions made by the employer, on behalf of the employee

³⁴#_ftn6
³⁵<http://cclawyer.cccba.org/wp-content/uploads/2011/09/Taxation-of-Benefits-Chart-2.pdf> ↩
³⁶#_ftn7

and their dependents, for health insurance premiums.[8]³⁷ A corollary provision, IRC section 105(b) excludes from the employee's income all reimbursements of expenses for medical care.

Non-dependent same-sex partners and spouses (and their dependents) are generally treated differently under federal law. [9]³⁸ However, to the extent that employer-provided coverage for an employee's domestic partner is included in the employee's gross income, the benefits payable to the domestic partner are still treated as employee-paid and are excluded from income under IRC section 104(a)(3). Registered domestic partners or same-sex spouses whose marriage is recognized under state law may not file federal tax returns using a married filing jointly or married filing separately status. They may only file as head of household if they otherwise qualify. [10]³⁹

According to the IRS, a registered domestic partner can be a dependent of his or her partner (and thereby exclude premium costs from income) if the requirements of IRC sections 151 and 152 are met. [11]⁴⁰ Dependent children and dependent elders of the domestic partnership will most likely qualify. However, it is unlikely that the registered domestic partners themselves will satisfy the gross income requirement of IRC section 152(d)(1)(B) and the support requirement of section 152(d)(1)(C).

To satisfy the gross income requirement, an individual's gross income must be less than the exemption amount (\$3,650 for 2010). Because registered domestic partners each report half the combined community income earned by both partners, it is unlikely that a registered domestic partner will have gross income that is less than the exemption amount.

To satisfy the support requirement, the person seeking the dependency deduction must provide more than half of an individual's support for the year. If the non-employee partner's (Partner A) support comes entirely from community funds, that partner is considered to have provided half of his or her own support and cannot be claimed as a dependent by another. However, if the employee partner (Partner B) pays more than half of the support of Partner A by contributing separate funds, Partner A may be a dependent

³⁷#_ftn8

³⁸#_ftn9

³⁹#_ftn10

⁴⁰#_ftn11

of Partner B for purposes of section 151, provided the other requirements of sections 151 and 152 are satisfied.

If the value of the employer-provided coverage is excludable from the employee's income because the domestic partner qualifies as the employee's spouse or dependent, benefits payable to the domestic partner are excluded from income under IRC section 105. A registered domestic partner can be a dependent of the employee partner for purposes of the exclusion in section 105(b) for reimbursements of expenses for medical care only if the support requirement is satisfied. Unlike section 152(d), section 105(b) does not require that Partner A's gross income be less than the exemption amount in order for Partner A to qualify as a dependent.

The employee partner must report imputed income equal to the estimated value of the employer's financial contribution towards health insurance coverage for non-dependent same-sex partners. The non-employee partner's coverage must be paid for with post-tax dollars, thereby limiting the use of Flexible Spending Accounts (FSAs), Health Reimbursement Accounts (HRAs) and Health Savings Accounts (HSAs).

Employers are also impacted. Because the imputed income increases the employee's overall taxable income, it also increases the employer's payroll taxes — Social Security (FICA) and unemployment insurance tax (FUTA) — which employers pay based on employees' taxable incomes. Employers also face additional administrative burdens of annually tracking the dependent status of covered same-sex partners and spouses and maintaining separate payroll functions for income tax withholding and payroll taxes.

California and the Ninth Circuit Lead California continues to be a leader in the protection of the rights of same-sex couples. Under a new law signed by California Gov. Jerry Brown on September 7, 2011, private businesses that want to do contract work for the state need not apply if they don't offer health benefits to their employees' same-sex partners. The most controversial of the law's requirements is that it offers no exemptions for religious organizations.. For further details see SB 117⁴¹, sponsored by state Sen. Christine Kehoe, D-San Diego.

⁴¹[http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number= ↵
sb_117&sess=1112](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=↵sb_117&sess=1112)

On the same day, September 7, 2011, the 9th Circuit ruled in *Diaz v. Brewer*⁴²[12]⁴³ that an Arizona law that eliminated health insurance coverage for same-sex partners of public employees violated the U. S. Constitution's Equal Protection Clause. A 2009 Arizona law eliminated health insurance coverage for same-sex partners of public employees. The 9th Circuit upheld a lower court injunction that has blocked the law from taking effect. A three-judge panel of the 9th Circuit concluded that, while the state is not obligated to provide health-care benefits, it cannot deny them to a specific group of employees. The court stated in its opinion:

When a state chooses to provide such benefits, it may not do so in an arbitrary or discriminatory manner that adversely affects particular groups that may be unpopular.

The 9th Circuit concluded the law unfairly impacted gay and lesbians because, unlike straight couples, they are not able to legally marry under Arizona law.

Conclusion The controversy around same-sex benefits continues. In 2011, Gallop and two other polling organizations revealed results indicating a majority trend in public opinion about same-sex marriage in the United States, concluding that “public support for the freedom to marry has increased, at an accelerating rate, with most polls showing that a majority of Americans now support full marriage rights for all Americans.”[13]⁴⁴ Hopefully this heralds ongoing societal tolerance for same-sex couples. However, since the evolution of tax policy has historically lagged public opinion by years, [14]⁴⁵ we will likely have to wait some time for these changes in attitude to be reflected in the U. S. tax code.

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⁴²http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000011733 ↔

⁴³#_ftn12

⁴⁴#_ftn13

⁴⁵#_ftn14

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Rita is a life-long California native. Raised in Marin County, she developed her passion for the outdoors at an early age. Rita and her husband, Richard, have four children and four grandchildren. Their home is nestled next to the Lime Ridge Open Space in Concord.

[1] The U. S. Bureau of Labor Statistics' National Compensation Survey: Glossary of Employee Benefit Terms has an exhaustive list of employee benefits at <http://www.bls.gov/ncs/ebs/glossary20082009.htm> – other

[2] Society for Human Resource Management. (2010, Second Quarter). *Motivation in Today's Workplace: The Link to Performance*. Retrieved September 17, 2011, from <http://www.shrm.org/Research/Articles/Articles/Documents/10-0235%20Research%20Quarterly-Q2-FNL.pdf>

[3] Employee Benefits Research Institute. (2011, March). Chapter 1: Introduction. *EBRI Databook on Employee Benefits*. Retrieved September 15, 2011 from <http://www.ebri.org/publications/books/index.cfm?fa=databook>

[4] Human Rights Campaign. (2011). Domestic Partner Benefits. *HRC Articles*. Retrieved September 17, 2011, from http://www.hrc.org/issues/domestic_partner_benefits.htm

[5] Demian, editor. (2010, March 6).. Domestic Partnership Benefits. Philosophy and Provider Lists. *Partners Task Force for Gay & Lesbian Couples* Retrieved September 18, 2011, from <http://www.buddybuddy.com/d-p-1.html>

[6] ERISA section 402(a), 29 U. S. C. section 1102

[7] Internal Revenue Service. (2011, September). Information about provisions now in effect.

Affordable Care Act Tax Provisions. Retrieved September 20, 2011, from <http://www.irs.gov/newsroom/article/0,,id=220809,00.html?portlet=6>
The Affordable Care Act was enacted on March 23, 2010. It contains some tax provisions that became effective in 2010 or 2011, and more that will be implemented during the next several years.

[8] Internal Revenue Service. (2011). Publication 15-B Employer's Tax Guide to Fringe Benefits For use in 2011. Retrieved September 17, 2011, from <http://www.irs.gov/publications/p15b/ix01.html>

[9] Internal Revenue Service. (2011, September 16). Q&A #2. *Questions and Answers for Registered Domestic Partners in Community Property States and Same-Sex Spouses in California*. Publication 555. Retrieved September 18, 2011, from <http://www.irs.gov/newsroom/article/0,,id=245869,00.html>

[10] See Q&A #3 in Publication 555, cited in footnote 9.

[11] See Q&A #4 and #5 in Publication 555, cited in footnote 9.

[12] 9th Cir. (2011). No. 10–16797.

[13] Benenson, J. (2011, June). The Rapid Increase in Support for Marriage Changes Political Equation: Emerging Majority Supports the Freedom to Marry. *Benenson Strategy Group*, and van Lohuizen, Jan. *Voter Consumer Research*. Retrieved September 18, 2011, from http://freemarry.3cdn.net/5ae85613318ade1b2e_8dm6bnq72.pdf

[14] Yang, S. (2009, September 10). A Chronology Of Federal Income Tax Policy: 1947-2009. *CAEPR Working Paper No. 2007-021*. Available at SSRN: <http://ssrn.com/abstract=1020679>