Benefits Issues Affecting Employees in Same-Sex Domestic Partnerships or Same-Sex Marriages

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I. Overview.

Employee benefits historically have been, and continue to be, one of the most-cited concerns for proponents of state domestic partnership legislation and same-sex marriage. Yet the complex relationship between state and federal law in the employee benefits area creates special challenges for both voluntary and mandatory recognition of same-sex relationships by private employer benefit plans. This paper will introduce the relevant federal and some state statutory schemes and discuss issues that arise where benefits are mandatory, permitted, or prohibited for private employer plans under one or more of these schemes. Although focusing primarily on private employer plans, the paper concludes by highlighting some issues specific to public employer plans.

II. Relevant Federal Statutes.

A. ERISA.

1. Plans Regulated by ERISA.

The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 et seq. ("ERISA") governs most employee benefits provided by private employers and unions. Specifically, ERISA governs two distinct kinds of plans: “employee pension benefit plans” and “employee welfare benefit plans.” The term “employee pension benefit plan” or “pension plan” includes any plan that provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of employment or beyond. ERISA § 3(2), 29 U.S.C. § 1002(2). The term “employee welfare benefit plan” or “welfare plan” includes any plan that provides, “through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c)” of the LMRA. ERISA § 3(1), 29 U.S.C. § 1002(1).

As discussed below, the distinction between pension benefits and welfare benefits is significant in the LGBT benefits context because pension plans are subject to special rules protecting spousal benefits, and because welfare plan benefits carry tax consequences for same-sex couples.

ERISA does not govern plans that provide benefits not enumerated in its definitional sections, including moving expenses, bereavement leave, family medical leave, maternity and paternity leave, merchandise discounts, memberships, membership discounts, and travel benefits. See Air Transport Ass’n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1174 (N.D. Cal. 1998), aff’d in part and remanded in part on other grounds, 266 F.3d 1064 (9th Cir. 2001).
ERISA also does not govern benefits provided by federal, state, or local governments (“government plans”), or by churches or associations or conventions of churches (“church plans”). ERISA § 4(b), 29 U.S.C. § 1003(b). However, church plans may elect ERISA coverage as to their pension plans, ERISA § 4(b)(2), 29 U.S.C. § 1003(b)(2), and one court has found that they may do so as to their welfare plans as well. See Catholic Charities of Maine, Inc. v. City of Portland, 304 F. Supp. 2d 77 (D. Me. 2004).

2. ERISA Preemption.

ERISA supersedes “any and all state laws” that relate to employee benefit plans, except state laws that regulate insurance, banking, or securities. ERISA § 514, 29 U.S.C. § 1144. Thus, state and local governments cannot directly mandate the provision of ERISA-governed benefits, including benefits for same-sex couples. See Air Transport Ass’n of Am. v. City & County of San Francisco, 992 F. Supp. 1149, 1174 (N.D. Cal. 1998), aff’d in part and remanded in part on other grounds, 266 F.3d 1064 (9th Cir. 2001).

Likewise, state anti-discrimination laws are preempted by ERISA insofar as they apply to employee benefit plans, except to the extent that state law is consistent with Title VII. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983) (in pre-Pregnancy Disability Act case, holding New York Human Rights Law pregnancy discrimination provision preempted as to ERISA plans). Thus, state prohibitions on sexual orientation or marital status discrimination are inapplicable to ERISA plans.

However, the “insurance savings clause” allows states to regulate insured ERISA plans indirectly by regulating the terms of insurance policies. FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990); see Kentucky Association of Health Plans Inc. v. Miller, 538 U.S. 329 (2003) (“any willing provider” statute saved from preemption); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 387 (2002) (HMO independent review law saved from preemption). As discussed below, California has mandated the provision of domestic partner coverage by insured plans through a regulation of insurance, and New Jersey has mandated that insurers offer employers the option of providing domestic partner coverage.

B. DOMA.

1. DOMA’s Definition of “Marriage” and “Spouse.”

Section 3 of the federal Defense of Marriage Act (“DOMA”) defines the terms “marriage” and “spouse” for purposes of federal law: “In determining the meaning of an 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.” 1 U.S.C. § 7. Thus, where ERISA refers to “marriage” or “spouse,” these terms will exclude domestic partners and same-sex spouses.
While DOMA governs the interpretation of the terms “marriage” and “spouse” in the statute itself, DOMA does not prescribe the meanings of these terms as they appear in ERISA-governed benefit plans. With limited exceptions discussed below, private employers are free to define these terms to include same-sex couples or to use other terms to extend eligibility to same-sex spouses or domestic partners.

2. Constitutionality of DOMA Section 3.

DOMA withstood early constitutional challenges. See Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005) (holding DOMA Section 2 did not violate full faith and credit clause or due process; Florida was not required to recognize a Massachusetts same-sex marriage); Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006) (holding California registered domestic partners lacked standing to bring constitutional challenge to DOMA Sections 2 and 3).

More recent challenges have fared better. In two companion decisions, Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010), and Massachusetts v. United States Department of Health and Human Services, 698 F. Supp. 2d 234 (D. Mass. 2010), the District of Massachusetts recently held that DOMA Section 3 is unconstitutional as applied to the plaintiffs in those cases in that it denies equal protection under the Fifth Amendment to same-sex couples, exceeds Congressional power under the Spending Clause, and violates the Tenth Amendment reservation of powers to the states. As of this writing, both decisions are stayed pending possible appeals (due to be filed, if at all, in mid-October 2010).

Likewise, in Collins v. Brewer, – F. Supp. 2d –, 2010 WL 2926131 (D. Ariz. July 23, 2010), the court denied a motion to dismiss a complaint by state employees because while “[t]he State’s interests in cost control, administrative efficiency, and promotion of marriage are legitimate . . . the absolute denial of benefits to employees with same-sex domestic partners is not rationally and substantially related to these governmental interests.”

Adjudicating a complaint under the Ninth Circuit’s Employment Dispute Resolution Plan for federal public defenders, the Ninth Circuit held that to the extent that DOMA’s application “serves to preclude the provision of health insurance coverage to a same-sex spouse of a legally married federal employee because of the employee’s and his or her spouse’s sex or sexual orientation,” the statute violates due process and the EDR plan’s prohibition on discrimination on the basis of sexual orientation. In re Levenson, 560 F.3d 1145 (9th Cir. Judicial Council 2009). The court ordered the Director of the Administrative Office of the United States Courts to process beneficiary application requests “without regard to the sex of a listed spouse.” Subsequently, the court held that an order that the Federal Public Defender enter into separate contracts for health coverage for same-sex spouses was not an available remedy because the FPD lacked contracting authority, but back pay was available. In re Levenson, 587 F.3d 925 (9th Cir. 2009); see In re Golinski, 587 F.3d 956 (9th Cir. 2009).

These decisions would support challenges by private-sector employees and employers to

C. Internal Revenue Code Definition of “Dependent.”

The status of a domestic partner or same-sex spouse as a tax dependent affects a variety issues under pension and welfare plans, as discussed below. To be treated as a dependent under the Internal Revenue Code, a domestic partner or same-sex spouse must (1) have the same principal place of abode as the employee and be a member of the employee’s household, (2) receive more than half of his or her support for the taxable year from the employee, and (3) have gross income less than the applicable exemption amount. IRC §§ 151(d), 152(d). Other requirements for dependent status, such as that the dependent not be a spouse (for federal law purposes) or child of the employee, would by definition be met by a domestic partner or same-sex spouse.


A. Continuation Coverage.

1. Federal Law.

Amendments to ERISA by the Consolidated Omnibus Budget Reconciliation Act of 1986 (“COBRA”) added the requirement that ERISA-governed group health plans provide continuation coverage to employees and their “qualified beneficiaries” in the case of a loss or reduction of coverage due to various “qualifying events,” including termination of employment, reduction of hours, divorce, death of the employee, and bankruptcy of the employer. ERISA §§ 601-607, 29 U.S.C. §§ 1161-67. However, the term “qualified beneficiary” includes only a spouse or a dependent child. ERISA § 607(3), 29 U.S.C. § 1167(3). As a result, ERISA-governed health plans arguably are not required to provide continuation coverage to employees’ same-sex spouses or domestic partners, even if they provide regular coverage.

However, there is an argument that under certain circumstances, a plan may be required to provide continuation coverage to a same-sex spouse or domestic partner pursuant to the Treasury Regulations under COBRA. Treas. Reg. § 54.4980B-5, Q&A-1, states that “[i]f a qualifying event occurs, each qualified beneficiary . . . must be offered an opportunity to elect to receive the group health plan coverage that is provided to similarly situated nonCOBRA beneficiaries (ordinarily, the same coverage that the qualified beneficiary had on the day before the qualifying event). . . . If the continuation coverage offered differs in any way from the coverage made available to similarly situated nonCOBRA beneficiaries, the coverage offered does not constitute COBRA continuation coverage and the group health plan is not in compliance with COBRA unless other coverage that does constitute COBRA continuation coverage is also offered.” The regulations define “qualified beneficiary” as including the covered employee himself or herself where the “qualifying event” is termination of employment, reduction of hours,
or bankruptcy of the employer. Treas. Reg. § 54.4980B-3, Q&A-1, ¶¶ (a)(1)(i), (c). Applying these regulations, if a similarly situated active employees have the right to receive coverage for their same-sex spouses or domestic partners, then a covered employee who is a qualifying beneficiary must be offered an opportunity to elect to receive this same coverage under COBRA. Although a same-sex spouse or domestic partner – unlike an opposite-sex spouse or dependent child – would not have an independent right to elect COBRA coverage, the covered employee would have the right to elect that coverage on his or her behalf.

Anecdotally, most employers that provide health plan coverage to employees’ same-sex spouses or domestic partners choose to provide continuation coverage as well, for ease of administration if for no other reason. Employers and employees with plans that provide such coverage should ensure that their health plan documents are clear on the availability of continuation coverage for beneficiaries who are not “qualified beneficiaries.” In addition, employers should be aware of the possibility that domestic partner COBRA coverage may be required under the regulations described above.

2. **State Law.**

In states that recognize same-sex relationships, state insurance law may mandate continuation coverage for same-sex spouses or domestic partners.

3. **ARRA Subsidy for Laid-Off Employees and Their Qualified Beneficiaries.**

The American Recovery and Reinvestment Act of 2009 (“ARRA”) provides for a temporary COBRA premium subsidy for involuntarily terminated employees and their qualified beneficiaries. To be eligible, employees must have been terminated before June 1, 2010.

IRS Notice 2009-27 makes clear that “nonspousal domestic partners” are not eligible for the subsidy. IRS Notice 2009-27, Q&A -23. Although the ARRA subsidy is available where continuation coverage is provided pursuant to state law, the subsidy is not available to nonspousal domestic partners or same-sex spouses even if the applicable state law requires that continuation coverage be provided. IRS Notice 2009-27, Q&A -24. However, if coverage for a nonspousal domestic partner or same-sex spouse does not increase the COBRA premium above the premium for employee-only coverage, the subsidy is not affected. IRS Notice 2009-27, Q&A -25.

**B. Mandated Benefits Under State Insurance Law.**

As noted above, states are free to regulate insured ERISA plans through regulations of insurance. California’s Insurance Equality Act (“IEA”) requires that “health care service plans” (HMOs) and insurance policies provide coverage for registered domestic partners under the state’s Domestic Partner Rights and Responsibilities Act (“DPRRA”) that is equal to any
coverage provided for spouses. Cal. Health & Safety Code § 1374.58(a); Cal. Ins. Code §§ 381.5(a), 10121.7(a). IEA was effective January 2005. As a result, an insured private employer health plan in California must provide benefits to registered domestic partners if, and to the extent that, it provides benefits for spouses. However, an ERISA-governed health plan in California that is not funded through the purchase of insurance – that is “self-funded” – need not provide benefits to registered domestic partners.

Other states have also enacted legislation mandating that insured benefits be extended to same-sex spouses and domestic partners to the same extent as opposite-sex spouses, or mandating that insurance policies offer such benefits. According to one benefits consulting firm, as of January 2008, insurance laws in Connecticut, Massachusetts, New Hampshire, New Jersey, Oregon, Vermont, and the District of Columbia – in addition to California – mandated benefits, while Hawaii and Maine mandated offering benefits. See Mercer Human Resources Consulting, “Don’t need to offer domestic partner benefits? Are you sure?” (June 7, 2007) (available at http://us.select.mercer.com/search/article/20076561.


1. No Benefits Under FSAs, HSAs, or HRAs.

Domestic partners and same-sex spouses who are not tax dependents may not receive benefits under a Flexible Spending Account, Health Reimbursement Arrangement, or Health Savings Account. See Rev. Rul. 2006-36.

2. Employer Contributions Includible in Gross Income.

Employer contributions for medical or life insurance benefits for an employee’s spouse are not includible in the employee’s taxable income for federal tax purposes, and the employee may make contributions toward such benefits on a pre-tax basis. IRC §§ 105(b), 106(a); Treas. Reg. § 1.106-1. For a non-dependent domestic partner or same-sex spouse, however, employer contributions are taxable to the employee, and employee contributions must be made on an after-tax basis. Priv. Ltr. Rul. 9717018 (Apr. 25, 1997). The health care reform bill passed by the House would have given domestic partner health benefits the same tax treatment as benefits for

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1 One insurance industry group asserts that in 2009, sixteen states mandate the provision of domestic partner benefits. See Council for Affordable Health Insurance, “Health Insurance Mandates in the States 2009” (available at http://www.cahi.org/cahi_contents/resources/pdf/HealthInsuranceMandates2009.pdf) (listing CA, CT, DC, HI, IA, MD, ME, NH, NJ, NM, OR, PA, RI, VT, WA, WV). However, this figure appears to include states that provide domestic partner benefits for state employees but do not mandate that insurance policies issued to private employer plans include domestic partner or same-sex spouse benefits.
an employee’s DOMA spouse receive, but this provision did not appear in either the Senate bill or the reconciliation package.

The unequal tax treatment of welfare plan benefits for same-sex spouses, as well as the administrative burden on employers of compliance with the requirement to impute income to employees, were a focus of the court in Massachusetts v. United States Dept. of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010). Assessing the state’s standing to challenge the application of DOMA Section 3, the court agreed that the state had been injured by DOMA in several ways, including payment of increased Medicare taxes for state employees due to imputed income on health benefits for same-sex spouses. The state presented evidence that it had spent $47,000 to develop and implement systems to identify employees who enrolled same-sex spouses in its health plan and to calculate imputed income for each employee, and continued to incur costs on an ongoing basis to comply with these tax requirements.

At last count, six states had enacted legislation excluding the value of coverage for a non-dependent domestic partner from gross income for state tax purposes and permitting employees to make contributions for such coverage on a pre-tax basis for state tax purposes: California, Connecticut, Massachusetts, New Hampshire, New Jersey, and Oregon.

In an effort to ameliorate this tax inequality, some employers “gross up” employees’ earnings to cover the tax on employer contributions for domestic partner benefits.

IV. Pension Plan Issues.

A. QDROs.

ERISA preempts state marital property law and, furthermore, prohibits alienation or assignment of pension plan benefits. See Boggs v. Boggs, 520 U.S. 833 (1997); Egelhoff v. Egelhoff, 532 U.S. 141 (2001); ERISA § 206, 29 U.S.C. § 1056. To fill the void left by preemption of state law, Congress enacted the Retirement Equity Act of 1984 (“REA”), which amends ERISA’s anti-alienation provision to provide for the division of pension benefits upon termination of a marriage. ERISA § 206(d)(3), 29 U.S.C. § 1056(d)(3). Specifically, the statute provides that the prohibition on alienation or assignment of benefits does not apply to “the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order” (“DRO”), if the DRO is determined by the plan administrator to meet the requirements for a qualified domestic relations order (“QDRO”). ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A).

ERISA defines a DRO to include only a judgment, decree, or order that “relates to the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant.” ERISA § 206(d)(3)(B), 29 U.S.C. § 1056(d)(3)(B). Under DOMA, “spouse” cannot include a domestic partner or same-sex spouse, and, arguably, “marital property rights” cannot include rights arising out of a domestic
partnership or same-sex marriage. Thus, it appears that a judgment, decree, or order entered by a state court in connection with the dissolution of a domestic partnership or same-marriage will not be a DRO – and therefore cannot be determined to be a QDRO – unless it relates to a tax-dependent domestic partner or same-sex spouse. A plan administrator that qualifies a DRO arising out of such a dissolution may risk violating the anti-alienation provision.

The likely unavailability of QDROs for the division of what assets in defined benefit or defined contribution pension plans is a significant disadvantage for domestic partners or same-sex spouses who dissolve their relationship.

B. Spousal Consent.

REA also protects spousal interests in pension benefits by requiring that a married participant obtain the written consent of his or her spouse if the participant wishes to elect a form of pension benefit other than a 50% joint and survivor annuity (such as a lump-sum distribution or a single-life annuity), or designate a beneficiary other than the spouse. ERISA § 205(c)(1), (2), 29 U.S.C. § 1055(c)(1). Because of DOMA, this requirement likely does not extend to a participant in a domestic partnership or a same-sex marriage. Plans that require consent of domestic partners or same-sex spouses to benefits elections may risk violating the anti-alienation provision.

C. Rollovers.

Prior to January 1, 2007, non-spouses designated as beneficiaries under defined contribution pension plans (such as 401(k) plans) were required to take the benefits as a cash distribution subject to income tax. However, the Pension Protection Act of 2006 (“PPA”) for the first time authorized rollover distributions to non-spouse beneficiaries. IRC § 402(c)(11). The resulting IRA is treated as an inherited IRA, and therefore does not offer the full range of benefits extended to surviving spouses, it does offer non-spouse beneficiaries, including domestic partners and same-sex spouses, the opportunity to shelter such benefits from taxation.

The PPA left some confusion as to whether a rollover was available to a non-spouse beneficiary where not provided for by the plan terms. The Worker, Retiree, and Employer Recovery Act of 2008, effective for plan years beginning after December 31, 2009, clarifies that qualified plans are required to permit rollovers by nonspouse beneficiaries. IRC § 402(f)(2)(A).

IV. Government Employee Benefits Issues.

A. State Employees.

1. Generally.

As noted above, ERISA does not govern benefits provided by state or local governments
to their employees. Accordingly, state and local governments are generally free to provide benefits to the same-sex domestic partners and same-sex spouses of their employees, and may be required by state law to do so. However, state and local governments have faced litigation over their provision of such benefits, particularly in states with constitutional amendments banning same-sex marriage. See National Pride at Work, Inc. v. Governor of Mich., 481 Mich. 86 (2008) (state’s constitutional amendment banning same-sex marriage precludes public employers from providing same-sex domestic partner benefits); Knight v. Superior Ct., 128 Cal. App. 4th 14 (2005) (state’s domestic partnership law did not violate constitutional amendment banning same-sex marriage); S.D. Myers, Inc. v. City & County of S.F., 336 F.3d 1174 (9th Cir. 2003) (city’s requirement that city contractors provide domestic partner benefits not preempted by state’s domestic partnership law); see also Irizarry v. Board of Educ. of City of Chicago, 251 F.3d 604 (7th Cir. 2001) (no equal protection or due process violation in extending benefits to same-sex but not opposite-sex domestic partners); see also “Validity of governmental domestic partnership enactment,” 74 A.L.R. 5th 439 (2009) (collecting cases). A full discussion of these issues is beyond the scope of this paper.


State and local government employees will face the same issues with taxation of welfare benefits as do private-sector employees. In addition, the Internal Revenue Code specifically denies tax-qualified status to state-sponsored long-term care plans that cover same-sex domestic partners or same-sex spouses. IRC § 7702B(f). As a result, states have carved their long-term care plans out of requirements that state government provide benefits to same-sex domestic partners. See Cal. Fam. Code § 297.5(g).

3. Tax Qualification Issues for Governmental Pension Plans.

Shortly after the enactment of California’s Domestic Partner Rights and Responsibilities Act, the IRS ruled that a county’s IRC § 457(b) deferred compensation plan will fail tax qualification requirements if it interprets the term “spouse” in the plan to include domestic partners. Priv. Ltr. Ruls. 200524016, 200524017 (June 17, 2005). However, it does not appear that tax qualification would be jeopardized if the plan were amended to extend benefits to domestic partners by its terms rather than by interpretation of the term “spouse.” See Helgeland v. Wisc. Municipalities, 307 Wis. 2d 1 (2008).


Where domestic-partner benefits rights of state employees have expanded over time through successive enactments, issues have arisen regarding the notice, if any, to be provided to state employees regarding these expansions. For example, in California, state employees gained the right to domestic partner health benefits at the time that the state’s domestic partner registry was established in 2000. See former Cal. Gov. Code §§ 22867-877. However, it was not until
January 1, 2005, that state employees gained the right to designate their registered domestic partners to receive surviving spouse benefits under the state’s pension plan. *See* Cal. Fam. Code § 297.5(a); Cal. Gov. Code § 21451. Because state employees were required to take the affirmative step of designating their previously-registered domestic partners to receive spousal pension benefits, issues have arisen as to the type of notice of the new right required to be provided to state employees and retirees.

**B. Federal Employees.**

Interpretation of the term “spouse” or “marriage” in federal law to extend benefits to the same-sex domestic partners or same-sex spouses of federal employees would be precluded by DOMA. While President Obama on June 19, 2009, signed an executive memorandum extending certain benefits to domestic partners of federal employees, the administration has taken the position that extension of most spousal benefits to domestic partners would violate DOMA. Pending legislation, the Domestic Partner Benefits and Obligations Act (H.R. 2517/S. 1102), would extend all federal spousal employee benefits to both same-sex and opposite-sex domestic partners of federal employees, with domestic partnership being established by affidavit.