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

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I. Overview.

As of January 2012, six states and the District of Columbia issue marriage licenses to same-sex couples (CT, IA, MA, NH, NY, VT). In addition, California same-sex marriages entered before November 5, 2008, are valid. Nine states recognize a status, such as civil union or registered domestic partnership, that carries the same rights and obligations as marriage under state law (CA, DE, HI, IL, NV, NJ, OR, RI, WA). This paper will refer to these statuses as “domestic partnership.”

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 some courts have found that they may do so as to their welfare plans as well. *See Medellin v. CommunityCare HMO, Inc.*, 2011 WL 1299066 (N.D. Okla., March 31, 2011) (collecting cases); *Catholic Charities of Maine, Inc. v. City of Portland*, 304 F. Supp. 2d 77 (D. Me. 2004) (discussing election of ERISA coverage by church welfare plan to avoid city requirement that contractors provide health benefits to employees’ same-sex domestic partners).

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 under the current state of federal anti-discrimination law.

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, some states mandate the provision of same-sex spouse or domestic partner coverage by insured plans through a regulation of insurance, or mandate that insurers offer employers the option of providing such 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 possible limited exceptions discussed below, private employers are free to define these terms in their benefit plans to include same-sex couples, or to use other terms to extend eligibility to same-sex spouses or domestic partners, as the plan chooses to define those terms. See Union Sec. Ins. Co. v. Blakeley, 656 F3d 275 (6th Cir. 2011) (holding that whether an opposite-sex cohabitant was a domestic partner within the meaning of an ERISA-governed life insurance plan should be determined by reference to the plan language, not by reference to a federal common-law definition of “domestic partner”); see also Baldwin v. University of Pittsburgh Medical Center, 636 F.3d 69 (3d Cir. 2011) (holding that meaning of “children” in a welfare plan was to be determined by reference to the intent of the parties and not to state law).

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); see also In re Marriage of J.B. and H.B., 326 S.W.3d 654 (Tex. App. 2010) (holding Texas same-sex marriage ban does not deny equal protection under Fourteenth Amendment under rational basis test).

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), currently on appeal to the First Circuit, the District of Massachusetts 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.

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).

A district court held that California state employees had stated claims against federal and state government defendants that DOMA § 3 violates due process and equal protection by precluding them from enrolling their same-sex spouses in the state's long-term care insurance plan for its employees. *Dragovich v. U.S. Department of the Treasury*, 2011 WL 175502 (N.D. Cal, Jan. 18, 2011).

Lastly, two bankruptcy courts have rejected DOMA-based challenges to same-sex married couples’ joint bankruptcy petitions. In *In re Balas*, 449 B.R. 567 (Bkcy. C.D. Cal. 2011), the court denied a motion by a federal bankruptcy trustee to dismiss a joint petition filed by a same-sex married couple, holding that “no legally married couple should be entitled to fewer bankruptcy rights than any other legally married couple.” *Id.* at 579; see also *In re Somers*, 448 B.R. 677, 683-84 (Bkcy. S.D.N.Y. 2011) (finding insufficient cause to dismiss joint bankruptcy petition by same-sex married couple).

Relatedly, in *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011), the court affirmed a district court’s decision to enjoin enforcement of a state law terminating healthcare benefits for same-sex domestic partners of state employees, holding that the employees were likely to prevail on the merits of the claim that the law was unconstitutional.

As of January 2012, at least a dozen constitutional challenges to DOMA were pending in the federal courts.1

C. **Internal Revenue Code Definition of “Dependent.”**

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The status of a domestic partner or same-sex spouse as a tax dependent affects a variety of 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. Nothing precludes a plan from providing continuation coverage to persons who are not qualified beneficiaries, including same-sex spouses or domestic partners.

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.

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.

In 2011, California’s Insurance Nondiscrimination Act amended the relevant statutes to close a perceived loophole in the IEA by providing that the IEA applies to health insurance policies and health care service plans that are marketed, issued, or delivered to a resident of California, regardless of the situs of the contract or the master group policyholder. See Cal. Ins.
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.

Some state insurance commissioners have also mandated that insurers provide spousal benefits to same-sex spouses. See State of Connecticut Insurance Dept., Bulletin IC-21 (Nov. 18, 2008), available at http://www.ct.gov/cid/lib/cid/BullIC21.pdf (“[T]he term ‘spouse’ as used in existing insurance policies will now be interpreted to include a same sex spouse, pursuant to a legal marriage entered into in Connecticut or another state which recognizes same sex marriage.”); State of New York Insurance Dept., Circular Letter No. 27 (2008), available at http://www.ins.state.ny.us/circltr/2008/cl08_27.htm.


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 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. See “For Gay Employees, an Equalizer,” The New York Times, May 21, 2011. However, the “gross up” amount is itself taxable income.

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. 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.
A second question arises as to the requirement that a DRO “relate[] to . . . marital property rights.” It is possible that a DRO relating to marital property rights of a tax-dependent same-sex spouse or domestic partner could meet this requirement. See Owens v. Automotive Machinists Pension Trust, 551 F.3d 1138 (9th Cir. 2009) (holding that a state court order related to “marital property rights” when it directed payment of pension benefits to a tax dependent who had lived for 30 years in a “quasi-marital” opposite-sex relationship with the employee; DOMA did not control the meaning of “marital property” in ERISA § 206). As of 2010, IRS recognizes the community property obligations of same-sex married couples and domestic partners in community property states, and requires that they file their federal income tax returns accordingly, supporting the argument that the meaning of “marital property” is a question of state law. See IRS Chief Counsel Advisory 201021050, 2010 WL 2147821 (May 28, 2010).

B. Survivor Benefits.

REA also protects spousal interests in pension benefits by requiring that the default benefit for a married participant in a defined benefit plan be a qualified joint and survivor annuity and that plans provide a qualified preretirement survivor annuity for the surviving spouse of a married participant who dies before retiring. ERISA § 205, 29 U.S.C. § 1055. Because of DOMA, these requirements likely do not extend to a participant in a domestic partnership or a same-sex marriage – although, as noted, IRS recognizes community property rights of same-sex spouses and domestic partners in community property states.

However, plans are free to provide survivor benefits to same-sex spouses and domestic partners, although such survivor benefits would not be QJSA or QPSAs. As the United States has recently written in a case challenging the constitutionality of DOMA, “Section 3 of DOMA imposes no blanket prohibition against a private retirement plan’s provision of benefits to the same-sex spouse of a plan participant.” Brief of the United States Regarding the Constitutionality of DOMA Section 3, Cozen O’Connor, P.C. v. Tobits, No. 2:11-cv-00045, Dkt. No. 97, p. 2; see Retirement Topics – Qualified Joint and Survivor Annuity, www.irs.gov/retirement/participant/article/0,,id=211555,00.html (concluding that qualified plan can pay non-QJSA survivor benefit to same-sex domestic partner). Providing such benefits will not cause a plan to fail to provide required benefits to an opposite-sex spouse, because a participant in a same-sex marriage or domestic partnership by definition has no opposite-sex spouse.

Survivor benefits provided to a same-sex spouse or domestic partner may carry different tax consequences for the beneficiary than survivor benefits paid to an opposite-sex spouse. For example, the “5-year rule” and the “life expectancy rule,” which relate to required timing of distributions of benefits under qualified plans, include a special rule for distributions to the surviving spouse of an employee, which allows a surviving spouse to postpone receiving distributions until the end of the year in which the participant would have attained age 70½. IRC § 401(a)(9)(B)(iv); see Retirement Topics – Qualified Joint and Survivor Annuity, supra.
Because a same-sex spouse or domestic partner is not a federally recognized spouse, he or she may not have this option.

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 constitutional amendment 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).

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).

A challenge by California state employees to the constitutionality of DOMA § 3 and IRC § 7702B(f) recently survived a motion to dismiss. Dragovich v. U.S. Department of the Treasury, 2011 WL 175502 (N.D. Cal, Jan. 18, 2011).

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. See In the Matter of the Statement of Issues Of: Linda L. Doyle, Case No. 8431, OAH No. 200804100 (Cal. Public Employees’ Retirement System, Sept. 29, 2009 (ordering CalPERS to provide survivor pension and health benefits to surviving registered domestic partner of CalPERS retiree who failed to designate domestic partner as beneficiary following change in law allowing her to do so).

Similarly, in Gerritsen v. City of Los Angeles, Case No. BC403760 (Cal. Super. Ct., County of Los Angeles, Sept. 15, 2009), the court held that the city was equitably estopped from denying survivorship benefits to a surviving domestic partner where the city had failed to notify...
the employee of additional requirements for designating a domestic partner beneficiary that did not apply to spouses, including requirement that proof of domestic partnership be submitted during the lifetimes of both partners.

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. As discussed above, the Ninth Circuit has held that refusal to enroll domestic partners in certain federal employee plans on the basis of DOMA is unconstitutional. In re Levenson, 587 F.3d 925 (9th Cir. 2009); see In re Golinski, 587 F.3d 956 (9th Cir. 2009).