Employment Benefits: Will Your Significant Other Be Covered?

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NOTE

EMPLOYMENT BENEFITS:

WILL YOUR SIGNIFICANT OTHER BE COVERED?

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I. INTRODUCTION

Traditionally, employment benefits have covered only married partners and their dependents. However, due to significant changes in the structure of the family unit,¹ there is an increasing need to expand employment benefits to encompass individuals who do not fit the traditional category used to determine eligibility for such benefits.² The non-traditional family structure is often classified as a "domestic partnership" which generally consists of either a heterosexual couple who has decided not to marry, or a homosexual couple who is not legally allowed to enter into marriage.³ The emerging trend has been to expand the scope of employment benefits to include an employee's domestic partner.⁴ "These benefits may include such items as medical, vision, and dental insurance, sick leave, bereavement leave, and prepaid legal serv-


³. See id.

⁴. See id.
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Some jurisdictions have passed ordinances that implement programs aimed at expanding the application of medical and other benefits. However, in many instances these programs have been limited to city or local government employees. Approximately twenty-five percent of firms with 5,000 or more employees offer health benefits to non-traditional partners. However, only thirteen percent of all United States employees are offered a domestic partnership benefit program. Although certain municipalities have domestic partnership registries, often the effect of the registration is simply symbolic, since some registered partners still do not receive health benefits. Further, several municipalities that do not have domestic partnership registries still provide for the extension of the benefits. Some private companies have followed the example set by local governments and instituted similar programs extending employee benefits to encompass domestic partners. This trend, however, has not reached all jurisdictions, nor has it been implemented by all employers, leaving a large number of people without the protection of essential employment benefits.

This Note examines the subject matter of domestic partnerships. Part II will review the various definitions of domestic partnerships through an in-depth look at domestic partnership registries and recent innovative laws. Part III will examine broad and narrow definitions of domestic partnerships. Part IV will discuss existing domestic partnership programs that have been adopted by private employers. Part V will examine potential advantages in adopting these programs, including employee equality, attracting new employees, retaining current employees, improving employee moral, increasing productivity, and maintaining consistency in company anti-discrimination policies. Part VI will discuss the potential disadvantages of implementing domestic partnership programs. Part VII will address the tax issues associated with the expansion of employee benefits. Part VIII will express the authors’ view

5. Id.
7. See Knauer, supra note 6, at 340, 347.
9. See id.
10. See Knauer, supra note 6, at 340-41.
11. See id. at 341.
12. See discussion infra Part III.
13. See Knauer, supra note 6, at 339-40.
that the recognition of domestic partners in the context of employment benefits is advantageous for employees, as well as employers, wishing to keep up with our ever-changing society.

II. DOMESTIC PARTNERSHIP DEFINED THROUGH VARIOUS PARTNERSHIP REGISTRIES AND INNOVATIVE LAWS AND ORDINANCES

A domestic partnership is defined in the context of health benefits as "a type of relationship that an employer chooses to recognize as equivalent to marriage for the purposes of extending employee benefits otherwise reserved for the spouses of employees."14 A number of jurisdictions have enumerated similar requirements that must be met for a significant other to be classified as a domestic partner.15

In almost all cases, to form a domestic partnership the couple must file an affidavit of domestic partnership.16 When filing the affidavit both parties must attest to meeting the enumerated fundamental requirements.17 These requirements usually include that both partners are at least eighteen years of age, share a residence with one another intending to do so indefinitely, are financially and emotionally interdependent, are not ceremonially or common-law married to any other person, are not involved in any other domestic partnership, and are "not related by blood closer than would be permissible by state marriage laws."18 The process of registering a domestic partnership is often designed with the purpose of restricting "eligibility to bona fide relationships."19

A. Miami Beach

On June 17, 1998, an ordinance was passed in Miami Beach, Florida deeming that the term "immediate family" includes a domestic partner.20 To be considered a domestic partner, such individuals must regis-

14. Id. at 337-38.
15. See Robert L. Eblin, Note, Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others), 51 OHIO ST. L.J. 1067, 1072-75 (1990) (describing numerous jurisdictions that have set forth domestic partnership requirements, such as Berkeley, Santa Cruz, Seattle, San Francisco, and New York City).
17. See id.
18. Spencer & Brinhurst, supra note 1, at 8.
19. Knauer, supra note 6, at 346.
20. See Miami Beach Recognizes Domestic Partnerships, CARIBBEAN TODAY, July 31, 1998, at 3; see also Leaves for Sick Partners, SUN-SENTINEL (Fl. Lauderdale, Fla.), July 5, 1998, at 6B.
ter their partnership, attest to some of the fundamental requirements mentioned above, and must consider himself or herself a member of the other partner’s immediate family.\textsuperscript{31}

\textbf{B. Chicago}

The city of Chicago has more stringent requirements than many other jurisdictions for persons filing an affidavit of domestic partnership.\textsuperscript{22} In addition to the standards set forth above, Chicago further obligates that the partners meet any two of the following four requirements:

1. The partners have been residing together for at least twelve (12) months prior to filing the Affidavit of Domestic Partnership. 2. The partners have common or joint ownership of a residence. 3. The partners have at least two of the following arrangements: a. Joint ownership of a motor vehicle; b. A joint credit account; c. A joint checking account; d. A lease for a residence identifying both domestic partners as tenants. 4. The City employee declares that the domestic partner is identified as a primary beneficiary in the employee’s will.\textsuperscript{23}

\textbf{C. New York City}

New York City has undergone some very positive and progressive reform regarding domestic partnerships.\textsuperscript{24} On July 7, 1998, New York City Mayor Rudolph W. Giuliani signed a landmark law delineating the requirements of the city’s domestic partnership registry.\textsuperscript{25} The legislation is thought to be “one of the most comprehensive local domestic partnership ordinances in the United States, both in extending benefits and in imposing responsibilities on domestic partners.”\textsuperscript{26} This legislation codified an evolving domestic partnership registration system in existence since 1989.\textsuperscript{27}

\begin{enumerate}
\item \textsuperscript{21} See Miami Beach Recognizes Domestic Partnerships, supra note 20, at 3.
\item \textsuperscript{22} See Knauer, supra note 6, at 347-48.
\item \textsuperscript{23} CHICAGO, ILL., MUN. CODE § 2-152-072 (1997).
\item \textsuperscript{24} See ADMINISTRATIVE CODE OF THE CITY OF NEW YORK § 3-241 (1998).
\item \textsuperscript{26} Arthur Leonard, Mayor Giuliani Proposes His Domestic Partnership Policy, CITYLAW, May/June 1998, at 49.
\item \textsuperscript{27} See id.
\end{enumerate}
The evolution of New York City's domestic partnership law began when former Mayor Edward I. Koch passed Executive Order No. 123 in 1989, which required city agencies to recognize domestic partners with regard to city employee sick leave, bereavement leave, hospital rights, and visitation rights, each of which were traditionally afforded to spouses. The requirements to obtain domestic partnership status in 1989 included:

1. that either both partners are residents of the City or at least one of the partners is a City employee;
2. that they both be at least eighteen years old;
3. that neither of them be legally married;
4. that they have a close and committed personal relationship exhibiting mutual responsibility;
5. that they have lived together for at least one year on a continuous basis at the time of registration;
6. that they have registered their relationship with the City agency by which they were employed.

In January of 1993, former Mayor David N. Dinkins established a central domestic partnership registry and reaffirmed the order of 1989. Once joining the New York City Domestic Partnership Registry (the Registry), a member was entitled to various benefits, including the following: bereavement leave upon the death of a domestic partner or a domestic partner's child or relative, child care leave when a domestic partner becomes a parent through birth or adoption, and visitation rights in the event a domestic partner or their family member is incarcerated or in a detention facility. Additionally, membership in the Registry was considered evidence of being a family member for purposes of property rights and succession rights. The benefits of the Registry were only offered to city employees and did not extend to the domestic partners of private employees.

The current legislation, signed by Mayor Giuliani in 1998, has made some significant adjustments to the prior executive orders. Most importantly, the law eliminates the requirement that the partners live to-

28. See id.
29. Id.
30. See id. This new order was signed by Mayor Dinkins on January 7, 1993 as Executive Order No. 48. See Judith E. Turkel, Domestic Partnership Registration and Agreements, in LEGAL ISSUES FACING THE NON-TRADITIONAL FAMILY, at 479, 482 (PLI Est. Plan. and Admin. Course Handbook Series No. D-232, 1994).
31. See Turkel, supra note 30, at 484-85.
32. See id. at 485-86.
33. See id.
34. See Leonard, supra note 26, at 49.
gathering for at least one year prior to registration. It simply requires that the couple “have lived together on a continuing basis, but without specifying a period of time.” Furthermore, the legislation establishes a minimum of at least six months between successive partnerships. A person previously involved in a domestic partnership must file documents with the County Clerk acknowledging the termination of that relationship.

The new legislation is thought to be “a significant step forward in the human rights continuum,” since it extends to domestic partners various Administrative Code and City Charter provisions applicable to spouses. The law also grants domestic partners the “health benefits provided by the City to City employees and retirees and their eligible family members pursuant to stipulation or collective bargaining agreements.” Furthermore, the legislation enumerates that it is the city’s policy, with regard to its collective bargaining law, to provide the domestic partners of city employees the same benefits available to the spouses of city employees.

This landmark legislation is distinguishable from previous New York City orders and domestic partnership laws adopted in other jurisdictions, not only due to its extremely comprehensive coverage, but, more importantly, due to the obligations it places upon domestic partners. The law requires registered domestic partners of city employees to disclose financial statements, even where the position is non-paying, if the partner’s position has some kind of decision-making authority.

35. See id.
36. Id.
37. See id.
38. See id.
40. See id. New York City’s domestic partnership law was challenged by the American Center for Law and Justice on the grounds that the city did not have jurisdiction over matters of marriage and domestic partnership. See Court Upholds Domestic Partner Law, NEWSDAY (Queens, N.Y.), Nov. 6, 1999, at A17. However, the Appellate Division of the Supreme Court of the State of New York upheld the law and found that the city could properly legislate in the area of domestic partnership. See Slattery v. City of New York, 697 N.Y.S.2d 603, 605 (N.Y. App. Div. 1999).
41. Mayor Giuliani Signs Landmark Domestic Partnership Legislation, supra note 25.
42. See id.
43. See Leonard, supra note 26, at 49.
44. See id.
D. San Francisco

San Francisco has passed groundbreaking legislation with regard to domestic partners. The ordinance requires all companies doing business with the city to provide employment benefit packages to their employees’ domestic partners equal to those provided to the spouses of their employees. Those employers who want to do business with the city must have the same benefit plans in all their places of business. Furthermore, the domestic partnership packages have to be provided throughout the duration of the employer’s contract with the city. San Francisco set the standard by requiring “private employers who offer benefits to employees’ spouses to also offer domestic-partner benefits as a condition of doing business with the city.”

E. California

California has made great strides in the area of domestic partnership law. On January 3, 2000, the State of California commenced a state registry for domestic partners. The new statewide program provides health insurance coverage for same-sex partners of state and municipal employees. The registry, however, “excludes most heterosexual unmarried couples” by limiting registration to those heterosexual couples who are over the age of sixty-two and receive

47. See id.
48. See id.
52. Id.
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benefits from Social Security or Supplemental Security Income. The rationale for excluding most heterosexual couples from the state registry is that they have the option to enter into marriage.

The California law has accomplished two important functions. First, it has given same-sex couples visitation rights when their domestic partner is hospitalized. Second, it allows government agencies to provide health insurance for an employee's domestic partner or a retiree who receives health care coverage through CalPERS, the state's Public Employee Retirement System.

F. Vermont: On the Forefront of New Domestic Partnership Trends

On December 20, 1999, the Supreme Court of the State of Vermont handed down a landmark decision in *Baker v. State* finding that "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law." The plaintiffs, three same-sex couples, commenced this lawsuit after being denied the issuance of marriage licenses from their local town clerks. The couples were all involved in long-term relationships, spanning from four to twenty-five years. The town clerks' justification for denying the couples' applications for marriage licenses was that under Vermont state law they were all ineligible to obtain such a license as a same-sex couple. The trial court dismissed the plaintiffs'
complaint and found that same-sex couples were not entitled to marriage licenses. Subsequently, the plaintiffs appealed.

Although the plaintiffs sought an injunction and declaratory relief providing them with the right to obtain marriage licenses, the Supreme Court of the State of Vermont did not grant either form of relief. Instead, the court left to the Legislature the decision of whether to allow gay marriages or to create a domestic partnership law, extending to domestic partners all of the benefits received by a spouse.

Baker is of great significance because the "opinion provides greater recognition of—and protection for—same sex relationships than has been recognized by any court of final jurisdiction in this country with the instructive exception of the Hawaii Supreme Court." The Vermont court decision could impact same-sex couples' rights regarding the right to marry, tax deductions, inheritance rights, and the extension of health benefits to employees' domestic partners. As the court pointed out, failure to offer same-sex couples the same benefits and protections offered to married couples is discrimination. These couples "seek nothing..."
more, nor less, than legal protection and security for their avowed commitment to an intimate and lasting human relationship [which] is simply, when all is said and done, a recognition of our common humanity."

As a result of Baker v. State, two bills were proposed in the Vermont legislature. On January 4, 2000, the Vermont State Senate introduced a bill pertaining to state domestic partnerships which was sent to the Senate Committee on Judiciary on January 5, 2000. Under the proposed bill, domestic partners must:

have a common residence . . . consider themselves to be members of each other’s immediate family . . . agree to be jointly responsible for one another’s basic living expenses . . . neither be married nor a member of another domestic partnership . . . not be related by blood in a way that would prevent them from being married to each other . . . each be at least 18 years old . . . each be competent to enter into a contract . . . [and] each sign a declaration of a domestic partnership.

This bill "recognize[s] domestic partnerships as a union between two persons who have committed themselves to one another" and bestows upon domestic partners the "same rights and obligations under state law that are conferred on spouses in a marriage."

More importantly, on April 26, 2000 Vermont Governor Howard Dean signed an extraordinary bill recognizing civil unions between same-sex couples effective on July 1, 2000. The purpose of the law is to respond to the constitutional violation found by the Vermont Supreme Court in Baker v. State, and to provide eligible same-sex couples the opportunity to "obtain the same benefits and protections af-

68. Id. at *20.
71. Id.
forded by Vermont law to married opposite sex couples” as required by Chapter I, Article 7th of the Vermont Constitution.73

Under the new legislation, same-sex couples can obtain civil union licenses from a town clerk and have their unions certified by a judge, justice of the peace, or clergyman.74 To have a valid civil union the couple must “not be a party to another civil union or a marriage” and “be of the same sex and therefore excluded from the marriage laws of [the] state.”75 Although, relatives may not enter in to a civil union, the legislation provides that upon establishing a “reciprocal beneficiaries relationship” certain relatives can receive some of the benefits and protections afforded to spouses.76

As a member of a civil union, a person is entitled to virtually all of the same benefits, privileges, and responsibilities attributable to a spouse under state law.77 Some of the benefits and protections extended to parties of a civil union include hospital visitation and notification rights, various property and succession rights, rights regarding emergency and non-emergency medical care, child custody rights, estate and probate rights, the marital communication privilege, and immunity from compelled testimony.78 Additionally, the dissolution of the union would be facilitated through the family court.79

This law is an enormous step for same-sex couples because “without the legal protections, benefits and responsibilities associated with civil marriage, same-sex couples suffer numerous obstacles and hardships.”80 Through the passage of this civil union legislation, Vermont has bestowed “the most sweeping set of rights for same-sex couples in the country.”81

While there is a great deal that must still be done with regard to domestic partnership laws,82 the new and innovative legislation passed

75. Id.
76. See id. A reciprocal beneficiary relationship includes those couples who are related by blood or by adoption and thus are unable to enter into a civil union or marriage. See id.
77. See id.
78. See id.
80. Id.
81. Id.
82. For example, while California’s current state registry has given important rights to homosexual couples, there is still much missing. The law does not extend social security benefits, inheritance provisions, or health coverage to the same-sex partner of a state employee after the death of that employee. See Pyle, supra note 50, at A1. Additionally, same-sex couples are not
by New York City, San Francisco, and the State of California, as well as the decision by the Supreme Court of the State of Vermont, has set the tone for a new approach to the issue of domestic partnerships. Additionally, it is likely that many other jurisdictions will need to adopt their own domestic partnership plans, if they wish to keep up with the changing times.

III. BROAD VERSUS NARROW DEFINITIONS OF DOMESTIC PARTNERSHIPS

Although many jurisdictions have established similar criteria detailing what constitutes a domestic partner, domestic partnership benefit provisions have been constructed both narrowly and broadly, leaving ambiguity over who should or will be covered when benefits are extended. The narrow definition limits coverage to homosexuals and their partners who are prevented by law from being married. Conversely, the "broad definition includes heterosexuals and their families who do not have a recognized legal relationship." Approximately seven municipalities, including Baltimore, Chicago, New Orleans, and Philadelphia, have allowed only same-sex couples to be covered under domestic partnership benefits. On the other hand, at least thirty-four municipalities, including New York and Detroit, now offer health care benefits broadly to both same-sex and opposite-sex unmarried couples.

In municipalities applying the broad standard, often the majority of registered partners are heterosexual couples. For example, in Boston, the majority of the 197 registered domestic partnerships were heterosexual. Additionally, in New York City, as of January 1999, there were approximately 9,500 people registered as domestic partners, with at least fifty-five percent of those persons involved in heterosexual rela-

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84. See id.
85. Id.
87. See id.
88. See id.
89. See id.
These results have also been seen in other jurisdictions, including Seattle and San Francisco.91

A. Supporters of the Utilization of the Narrow Definition

The legal opportunity for opposite-sex partners to marry is the rationale for restricting the definition of domestic partner to include only same-sex partners.92 Kim Mills, the Educational Director of a Washington-based gay-rights group, is a supporter of the utilization of the narrow definition and approves of tailoring the extensions to only homosexual couples.93 Mills explained that heterosexual couples can marry, if they want to utilize their partner’s employment benefits, however gay couples cannot legally marry and therefore have no alternative way to secure benefits for their partners.94

Massachusetts Governor Paul Cellucci expressed that he would only support a bill that extends health care benefits to same-sex couples.95 The problem, according to the Governor, is that the extension of employee benefits to unmarried heterosexual couples undermines the institution of marriage.96

On May 24, 1998, Cardinal John O’Connor, Archbishop of New York’s Roman Catholic Archdiocese, strongly opposed the City’s new domestic partnership legislation.97 The Cardinal explained that it is contrary to the “natural moral law” to equate unmarried couples with those couples that are married.98 In his sermon, Cardinal O’Connor explained that he believed the new law would undermine the institution of marriage by officially recognizing unmarried couples and bestowing upon them certain rights and privileges that were traditionally only provided to married couples.99

On the other hand, as pointed out by Professor Arthur Leonard of New York Law School, many of the legal entitlements of marriage are beyond the scope of municipal legislation or regulation.100 Consequently,

90. See Court Upholds Domestic Partner Law, supra note 40, at A17.
91. See Leonard, supra note 26, at 49.
92. See Knauer, supra note 6, at 346.
93. See Zeller, supra note 86, at 2181-82.
94. See id. at 2182.
95. See id. at 2180.
96. See id.
97. See Leonard, supra note 26, at 49.
98. See id.
99. See id.
100. See id.
it is unlikely that the inclusion of opposite-sex couples in domestic partnership registries will have a significant effect upon the decision of said couples to marry.  

B. Supporters of the Utilization of the Broad Definition

In contrast, others argue that a broad definition should be applied with regard to domestic partners so as to include both same-sex and opposite-sex couples. Some advocates of this position concede that the real importance of this extension is that it is a step in the direction of universal health care. Other supporters of this position rely on personal freedom principles. For example, Dorian Solot, co-founder of the Alternatives to Marriage Project, argues that Americans must expand their definition of families to include those individuals who decide that marriage is not right for them. Solot explained that "[t]his is really an issue of equal pay for equal work [and s]ociety shouldn’t judge people for their personal choices . . . . [but] should support them." Whether a broad or narrow definition for domestic partnership is utilized, the reality remains that "many legal incidents of marriage are preempted by state or federal law and cannot be changed at the municipal level." Since private sector employee benefits are governed by federal law, rather than state law, much of the local or city legislation passed, such as New York City’s new domestic partnership law, will not reach private employees. Mayor Rudolph W. Giuliani has expressed his hopes that the passing of the 1998 domestic partnership law will set the stage for the rest of the country. The Mayor explained that these laws represent

102. See Pianko & Silverberg, supra note 83, at S3.
103. See Zeller, supra note 86, at 2182.
104. See id.
105. The Alternatives to Marriage Project is a new national organization based in Boston that offers their resources, advocacy and support to people who choose not to marry, are unable to marry, or are deciding whether marriage is right for them. See Relationships: Saturday Workshop Will Focus on Alternatives to Marriage, PROVIDENCE J. (R.I.), Jan. 7, 1999, at H16.
106. See Zeller, supra note 86, at 2182.
107. Id.
108. Leonard, supra note 26, at 49.
109. See id.
a logical step forward in ensuring that those couples who choose to live in economically dependent and committed relationships continue to receive these important rights, benefits and protections and equal treatment under the law, free from discrimination.... [We are] committed to equal treatment under the law for all people, regardless of race, religion, national origin, gender or sexual orientation."

When a progressive law extending domestic partnership benefits is passed by a city or state, it should encourage private employers to adopt these policies, thus moving toward universal and equitable health care for all employees.

IV. EXISTING PRIVATE EMPLOYER DOMESTIC PARTNERSHIP PROGRAMS

Today, "over 350... private employers, universities, labor unions and governmental entities provide benefits to domestic partners."

Three private companies that have extended domestic partner benefits are Lotus Development Corporation (Lotus), Ben & Jerry's, and Levi Strauss.

The fact that corporations such as these have extended health benefits to domestic partners "illustrates that society is beginning to recognize the need for an expanded definition of family." Although these companies were among the first to institute benefit plans that covered domestic partners, the implementation of these plans was not due to the companies' benevolence, but rather as an answer to employee pressure. Whatever the motivating force behind these companies' actions, their programs have been studied and copied, in part, if not completely, by other employers around the country.

A. Lotus

In 1991, Lotus became the first large private corporation to extend health benefits to cover the domestic partners of its employees. The

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111. Mayor Giuliani Signs Landmark Domestic Partnership Legislation, supra note 25.
112. Spencer & Bringhurst, supra note 1, at 8. For example, some of the private employers include The Village Voice, Warner Bros., Apple Computer, Inc., Nike, American Express, and Tower Records. See id.
114. Id.
115. See id.
116. See Rickel, supra note 2, at 744. Levi Strauss has received requests from over 100 companies for the information on their domestic partner benefits program. See id. at 742 n.9.
117. See Rickel, supra note 2, at 742 (citing Robert J. Durst, II, Esq., Health Care Benefits:
employee benefits plan, known as the “Lotus Alternative,” specifically granted benefits to same-sex “spousal equivalents.” A Lotus spokesman stated that “one of [the company’s] operating principles is to value diversity and encourage it.” Despite this principle, the “Lotus Alternative” denied coverage to opposite-sex unmarried partners on the theory that they have the option to marry, while same-sex partners do not.

While some of the employers in the United States that offer benefits to domestic partners have followed the rationale behind the “Lotus Alternative,” some have decided that it is better to extend coverage to unmarried opposite-sex partners even though they have the option to marry.

B. Ben & Jerry’s

Ben & Jerry’s implemented a plan that offered health care coverage to the unmarried partners of its workers regardless of the sex of the partner. This plan made it possible for both opposite and same-sex domestic partners of employees to obtain the same benefits. In 1993, Ben & Jerry’s Human Resources Manager stated that “‘family is who you love and live with.’” The company reasoned that all employees and their families deserved protection from the threat of financial ruin due to illness or injury, thus their plan protected against such devastation.

C. Levi Strauss

Levi Strauss, like Ben & Jerry’s, implemented a program that covered the domestic partners of their employees regardless of their sex.
Levi Strauss "was the first Fortune 500 Company and the largest U.S. employer to extend health benefits to unmarried couples." Levi Strauss decided to extend the health benefits to heterosexual couples and follow its overall non-discriminatory policy, which included discrimination based on marital status and sexual orientation. To qualify for the program, unmarried couples had to "share a committed relationship through living together, being financially interdependent and maintain joint responsibility for each other's common welfare, as well as considering themselves life partners."

D. MCA, Inc.

In May 1992, MCA, Inc., introduced health insurance coverage for same-sex domestic partners. MCA's plan promoted equal treatment for homosexuals and required that domestic partners sign an affidavit. The affidavit affirmed that "neither partner is married to anyone else; the partners reside together and intend to do so permanently; they are not related by blood; they are both mutually responsible for the costs of basic living expenses; and both partners are at the minimum age of consent."

To date, there is a large number of Fortune 500 Companies which have joined the trend of extending employment benefits to domestic partners. Perhaps these companies will continue to set the example for

127. Rickel, supra note 2, at 743.
128. See id.
131. See Baker, supra note 129, at 51.
132. Id.
other private employers who have not chosen to extend employment benefits to domestic partners.

V. POTENTIAL ADVANTAGES OF ADOPTING DOMESTIC PARTNERSHIP PROGRAMS

In making a decision to offer benefits to domestic partners, employers must weigh the possible advantages and disadvantages of expanding coverage to include this group of individuals.

A. Equity for Unmarried Employees

One of the advantages of offering domestic partnership benefits is that it provides equity for unmarried employees regardless of sexual preference. Employee benefits can account for up to forty percent of employee compensation, therefore, offering domestic partnership coverage may ensure less financial disharmony among married and unmarried employees. "Benefits are part of the overall compensation, and if some people are not allowed this benefit because of their sexual orientation, they are not getting fair compensation." Moreover, in 1998, Sean Cahill, Chair of the Lesbian & Gay Political Alliance of Massachusetts, said that “[d]omestic partner benefits are about equal pay for equal work. I don’t see how equality threatens anybody.”

B. Attracting New Employees

Another advantage of offering domestic partnership benefits is the potential for attracting new employees. Companies who offer domestic partnership benefits have a competitive advantage over other employers because they are providing important benefits to employees that may be unavailable elsewhere. “This is just one more way to attract people in a tight, competitive labor market.” Employees generally like

134. See Spencer & Bringhurst, supra note 1, at 8.  
135. See id.  
138. See Spencer & Bringhurst, supra note 1, at 8.  
139. See id.  
140. Troy May, Partner Benefits Move to Forefront, BUS. F'RST-COLUMBUS 1, Jan. 22, 1999, at 1 (quoting Tim King, Vice President of the Chicago-based Aon Consulting Inc.).
to work in “an environment that is progressive and free from discrimination.”

C. Improvement of Employee Morale, Productivity, and Retention of Current Employees

The offering of domestic partnership benefits may also help to improve employee morale, raise productivity, and help retain current employees. The Village Voice, a New York weekly newspaper, was the first company in the United States to realize the potential benefits that can be derived from offering domestic partnership benefits to its employees, and did so in 1982. Some employees greatly value an employer who acknowledges and supports the individual needs of its employees. For example, Mary Jo Hudson, an associate with the law firm Arter & Hadden LLP, said of her firm offering domestic partnership benefits, “It means that they value me as an individual and an important employee, and that they are concerned for my family and well-being.” She stated that her employer’s decision to offer the benefits, “demonstrates the firm is committed to diversity and that’s very important for me in where I work.” In 1992, Ben & Jerry’s, who began offering their employees domestic partnership benefits in November 1989, received the Personnel Journal’s Optimas Award in the Quality of Life category for “creating [a] supportive environment for employees, which, in turn, helps support the company’s fiscal vitality.” As is evident from the preceding examples, a benefits plan that covers domestic partners can lead to improved employee morale and increased efficiency.

D. Consistency of Company Policies and Minimizing the Risk of Discrimination Lawsuits

Employers can also realize an advantage from maintaining consistency in company anti-discrimination policies. Most employers have anti-discrimination policies to prevent discrimination based on marital

141. Id. (quoting Su Lok, spokeswoman for Lucent Technologies in Columbus, Ohio).
142. See Spencer & Bringhurst, supra note 1, at 8.
143. See id.
144. See id.
145. May, supra note 140, at 1.
146. Id.
147. Rickel, supra note 2, at 749.
148. See Spencer & Bringhurst, supra note 1, at 8.
status, sexual orientation, and other factors. Offering domestic partnership benefits can prevent claims of discrimination from arising when an employer only provides coverage to the spouses or dependents of employees. The potential cost to defend such a lawsuit would likely exceed the expense of simply offering the benefits. Thus, the employer may enjoy increased productivity resulting from a more positive work environment while incurring the least amount of cost and negative publicity.

VI. POTENTIAL DISADVANTAGES OF DOMESTIC PARTNERSHIP PROGRAMS

There are various potential disadvantages an employer might be faced with when considering whether or not to extend employee benefits to domestic partners. The main concerns are often cost and fraud. However, as explained below, these potential disadvantages are often misfounded and overly exaggerated.

A. Costs

When considering whether or not to extend domestic partnership benefits, the primary concern for an employer is cost. "Costs may be associated with administrative changes, legal consultations, marketing and benefit communication efforts, expanded enrollment, the addition of dependents with unknown risk factors (such as AIDS), or premium increases due to adverse selection and insurance riders." However, these administrative costs are usually only preliminary and result from the commencement of these programs.

Contrary to their fears, private employers have found that the use of domestic partnership programs has not significantly increased their costs and there has been no outbreak of AIDS cases or protest from the public. For example, Home Box Office, Inc. found that covering a domestic partner was actually less expensive than covering an em-

149. See id.
150. See id.
151. See id.
152. Id.
153. See Spencer & Brinhurst, supra note 1, at 8.
ployee's spouse. In 1998, the spokesman for the Albany Medical Center reported that there really was no downside to adopting a domestic partnership program. He explained that "[a]s a health-care institution, we like to see people insured, because too many patients come through our doors with no insurance." A KPMG Peat Marwick study found that premium increases for companies who offer the domestic partnership benefits were almost identical to those companies who did not offer the benefits. Further, the cost of adding such a benefit ranges from a mere one-to-two percent increase in premiums.

Additionally, insurance companies are also finding that the extension of benefits to domestic partners is not as costly as they anticipated. When benefits were first extended, many insurance companies charged higher rates for domestic partnership coverage than they charged for spousal coverage. The reason for these higher rates was that insurers thought their costs would greatly increase due to AIDS cases, however this has not been the case.

There are numerous reasons that explain why domestic partnership coverage has not greatly increased costs, and in many cases costs even less than spousal coverage. One reason is that the enrollment of same-sex couples tends to be very low (usually only one percent of total personnel), thus resulting in minimal additional costs. For example, in 1998, only 200 of 100,000 IBM employees utilized this special benefit plan. In the same year, only twenty employees of Albany Medical Center's 6,500 member staff, including full and part-time employees, availed themselves of the domestic partnership policy. According to David Pratt, an Associate Professor at Albany Law School and an employee benefits attorney, one reason the number of couples who apply

156. See Plastiras, supra note 154, at 23.
157. Id.
158. See May, supra note 140, at 1.
159. See id.
160. See Plastiras, supra note 154, at 23.
161. See Savast, supra note 155, at 70.
162. See id.
163. See Coverage Examined, DAYTON DAmY NEWS, Feb. 1, 1999, at 4B. A contract compliance officer with the San Francisco Human Rights Commission explained that the city's fear of its costs increasing due to HIV and AIDS care has not materialized since the city's benefit plan was enacted in 1991. See id.
164. See Plastiras, supra note 154, at 23.
165. See id.
166. See id.
for the benefits is so low could be attributed to the fact that both partners in many same-sex relationships are employed and therefore have their own insurance plan coverage. Furthermore, some homosexual employees may be hesitant to apply for the benefits because they may not want their employers or co-workers to know about their sexual preferences.

A second reason costs have not significantly increased, according to the International Foundation of Employee Benefit Plans, could be the rebalancing of costs in a particular group.69 For example, female couples enrolling in these domestic partnership programs are at a lower risk of AIDS than heterosexual couples.70 Also, male couples do not usually have the costs of pregnancy and childbirth which are typically incurred by heterosexual couples.

Third, “AIDS is no more expensive—and, in some cases, is less expensive—to treat than other catastrophic illnesses, such as kidney diseases or cancer.”71 Medical costs for cancer, organ transplants, and cardiac care, which affect the population at large, are significantly more expensive than AIDS treatment.72 The cost of treating AIDS has fallen to approximately $100,000 per case,73 while the cost of treating a premature baby can rise as high as $1 million.74

Additionally, children are one of the major costs in any health-insurance plan.75 “Domestic partners tend to have a smaller family size, so you’re covering two people rather than an average family of four or five.”76 Therefore, since most lesbian and gay couples do not have children, this can actually save insurance carriers a great deal of money.77 As a result, some insurers have found that additional charges for domestic partners are unnecessary.78

167. See id.
168. See id.
169. See Savasta, supra note 155, at 70.
170. See id.
171. See id.
172. Plastiras, supra note 154, at 23.
173. See Savasta, supra note 155, at 70.
175. See Savasta, supra note 155, at 70. “Premature babies can be the most expensive insurable item.” Plastiras, supra note 154, at 23.
176. See Coverage Examined, supra note 163, at 4B.
177. Id.
178. See Plastiras, supra note 154, at 23.
179. See id. For example, Empire Blue Cross and Blue Shield offers domestic partnership coverage to groups of fifty or more and they do not charge for the additional coverage. See id.
Another fear for employers and insurance companies is that domestic partnership provisions invite fraud. Critics have argued that employees will try to exploit the benefit provisions by enrolling sick relatives or friends, particularly those with AIDS, who would otherwise not be covered. However, this fear is unfounded. "The potential for fraud exists in any employee benefit program" and not simply those made for domestic partners. Thus, the potential for fraud should not be a barrier to the extension of these important benefits to domestic partners.

To guard against fraud, a prerequisite to most insurance coverage is the advance registration of the domestic partnership. For registration, many cities require the couple to sign a legally binding affidavit regarding their relationship before they can receive any benefits. These restrictions and requirements are built-in to help prevent against fraud and abuse. Also, an employer concerned with the possibility of fraud can investigate employees' assertions in the affidavit, thereby deterring those making dishonest claims with the threat of termination or criminal charges.

Although an employer can define a domestic partner however they choose, the insurance carrier usually requires the couple to show proof of financial interdependence. This additional requirement of the insurer can also reduce the risk of fraud. Moreover, employees who attempt to assert that their sick relative or friend is their domestic partner may find little value in their fraudulent claim. Many insurance companies utilize pre-existing condition clauses, which limit the benefits one may receive where an illness existed prior to enrollment. Furthermore, if the employer does not fully fund the domestic partnership coverage, the employee may incur premium payments larger than the

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180. See id.
181. See Eblin, supra note 15, at 1082-83.
182. See Bradford, supra note 174, at 60.
183. Eblin, supra note 15, at 1083.
184. See id.
185. See Plastiras, supra note 154, at 23.
186. See Coverage Examined, supra note 163, at 4B.
187. See Bradford, supra note 174, at 60.
188. See Eblin, supra note 15, at 1083.
189. See Plastiras, supra note 154, at 23.
190. See id.
191. See Eblin, supra note 15, at 1083.
192. See id.
benefits that their claimed domestic partner would receive. Therefore, employees who attempt fraudulent claims may, in the long run, find their efforts futile.

As explained above, the potential disadvantages related to the extension of employment benefits to domestic partners tend not to materialize. Furthermore, any disadvantages that may arise are greatly outweighed by the tremendous advantages that result from the implementation of these benefits.

VII. TAX RAMIFICATIONS

There are numerous tax issues an employer must consider when deciding whether to grant domestic partnership benefits. The most prominent issue is the marriage penalty. The marriage penalty describes the situation in which two unmarried, income earning individuals pay less income tax than they would if they were married. The amount of the penalty fluctuates based upon the individuals' income and number of dependents.

Under the Internal Revenue Code (the Code), an employer’s health coverage contributions are not included in an employee’s gross income when used for an employee or an employee’s spouse or dependent. Additionally, reimbursements received under an employer’s healthcare package are not included in an employee’s gross income where those benefits relate to expenses incurred for the medical care and treatment of an employee or an employee’s spouse or dependent.

Tax consequences arise when employer-provided health coverage is extended to anyone other than an employee or an employee’s spouse or dependent. An employee receiving domestic partnership benefits will have the employer’s contribution included in his or her gross income. Under Section 61 of the Code, the amount included in the gross income is equal to “the excess of the fair market value of the group medical coverage provided by the [employer] over the amount paid by

193. See id.
194. See Kasten, supra note 49, at B7.
195. See Vetter, supra note 130, at 5.
196. See id.
197. See id.
199. See I.R.C. § 105(b) (West 1999).
200. See Pianko & Silverberg, supra note 83, at S3.
Thus, an employee will receive an increase in the employee's taxable income without raising their real income.\textsuperscript{203} The Code provides some relief by excluding from an employee's gross income any amount that the employee was previously taxed on the value of the coverage.\textsuperscript{204} Although an employer is free to determine the reasonable estimates for the fair market value of domestic partnership coverage, this cost is still considered income for an employee under the Code and is subject to the applicable tax.\textsuperscript{205}

In several private letter rulings, the Internal Revenue Service (IRS) has consistently stated that amounts paid for domestic partners' health benefits are not excluded from an employee's gross income.\textsuperscript{206} In some of these rulings, which specifically addressed domestic partner benefits, the IRS deferred to state law to define the term "spouse."\textsuperscript{207} However, more recently, the IRS has deferred to the Defense of Marriage Act for its definition of spouse.\textsuperscript{208} Consequently, the IRS has determined that a same-sex domestic partner will not be treated as an employee's spouse and will not be given preferential tax treatment otherwise provided to spouses.\textsuperscript{209}

The determination of a domestic partner as a dependent of the employee is necessary to avoid the extra taxation on domestic partnership benefits.\textsuperscript{210} If the domestic partner qualifies as a dependent of the employee for income tax purposes, the preferential tax treatment for health plan coverage will follow, despite the fact that a domestic partner will not be treated as a spouse under the Defense of Marriage Act.\textsuperscript{211} Under Section 152(a) of the Code, if the employee (1) provides over half the domestic partner's support, (2) the domestic partner has as his or her principal place of residency the employee's home and (3) is a member

\begin{footnotes}
\item[202] Id.
\item[203] See Vetter, supra note 130, at 5.
\item[204] See I.R.C. § 104(a)(3) (West 1999).
\item[205] See Pianko & Silverberg, supra note 83, at 83.
\item[209] See Pianko & Silverberg, supra note 83, at 83.
\item[211] See id.
\end{footnotes}
Employment Benefits for Domestic Partners

of the employee's household, then the domestic partner will be considered the employee's dependent for income tax purposes.\textsuperscript{212} However, Section 152(b)(5) places a limitation on the definition of dependent, providing in part that "[a]n individual is not a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law."\textsuperscript{213} Since the IRS defers to local law regarding cohabiting same-sex partners, those residing within jurisdictions that find the sexual relations between domestic partners as criminal, will not be able to claim one another as a dependent.\textsuperscript{214}

"In the years since its enactment, a number of taxpayers have contended that § 152(b)(5) did not preclude their claimed exemptions."\textsuperscript{215} However, the United States Tax Court has frequently decided against these taxpayers.\textsuperscript{216}

Conversely, in 1980, the United States Bankruptcy Court for the Western District of Missouri applied Section 152(b)(5) in \textit{In re Shackelford}\textsuperscript{217} and found for the taxpayer. It was the IRS's contention that the taxpayer, Mary M. Shackelford, had claimed an invalid dependent exemption.\textsuperscript{218} On her tax return, she claimed as dependents her three minor children and Mr. Francis H. Simons, who was unemployed at the time of filing.\textsuperscript{219} Ms. Shackelford and Mr. Simons were both single and did not have any children together.\textsuperscript{220} The IRS denied Ms. Shackelford's claim that Mr. Simons was a dependent based on Section 152(b)(5) of the In-

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\begin{footnote} See I.R.C. § 152(a), (a)(9) (West 1999).
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\begin{footnote} See Vetter, supra note 130, at 7.
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\begin{footnote} Id. at 10.
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\begin{footnote} See Peacock v. Commissioner, ¶ 78,030 T.C.M. (P-H) 183 (1978). The taxpayer and his claimed dependent portrayed themselves as husband and wife, including her using his family name. See id. at 184. The Arizona State statute prohibited "open and notorious cohabitation or adultery." Id. at 188 (quoting ARIZ. REV. STAT. § 13-1409 (1999) (formerly § 13-222)). To reach its result, the Tax Court assumed that unmarried cohabitation was "open and notorious" unless proven otherwise, since there was a presumption of guilt and the accused had to prove their innocence. See id.; see also Ensminger v. Commissioner, 610 F.2d 189, 192 (4th Cir. 1979) (upholding the Tax Court's decision denying the benefit of § 152(b)(5) because the taxpayer violated the state statute forbidding lewd and lascivious cohabitation). Nicholas v. Commissioner, 62 T.C.M. (CCH) 467, 469 (1991) (denying petitioner's claim under title 30, section 1-4.5 of the Utah Code which requires that in order to establish a spousal relationship, a court must determine that the parties had a contractual relationship and held themselves out as husband and wife). In this case the taxpayer had not obtained the court order required by state law and therefore was not found to be legally married. See id.
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\begin{footnote} 3 B.R. 42 (Bankr. W.D. Mo. 1980).
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\begin{footnote} See id. at 43.
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ternal Revenue Code and a Missouri statute. However, the court could not find a state statute indicating that merely living together was unlawful. Therefore, Ms. Shackelford’s claimed exemption of her unemployed domestic partner as a dependent was allowed.

The results of other Section 152(b)(5) cases may vary because of the differences in the laws of each state. An employee’s overall income tax paid annually can also vary depending on whether or not their domestic partner can be classified as a dependent under the Tax Code, the type of group benefits plan that the employer offers, and the manner in which the employer reasonably calculates the fair market value of domestic partnership coverage under a group health plan.

VIII. CONCLUSION

It is the authors’ opinion that all employees should be offered equitable employment benefits, whether an employee wishes to claim benefits for his or her spouse, or his or her domestic partner. It seems illogical to say that the family of a married employee is eligible for employment benefits, but the family of an unmarried employee is not. This is discrimination in its most basic form and should no longer continue. As we begin our journey into the twenty-first century, the trend of recognizing domestic partners will undoubtedly continue to flourish. Those employers wishing to keep up with our ever-changing society would be wise to seriously consider adopting these advantageous new programs. Employers who fail to do so, may find themselves unable to compete against employers who offer such employment benefits, particularly in competitive labor markets.

221. See id. at 44.
222. See In re Shackelford, 3 B.R. at 44. The court stated:

[I]n this day and age, can it be said that merely living together is open, gross lewdness or lascivious behavior? Does this conduct openly outrage decency? Is it injurious to public morals? Would the language in State v. Bess, 20 Mo. 420 (1855) "What act can be more grossly lewd or lascivious than for a man and woman, not married to each other, to be publicly living together, and cohabiting with each other," still be applicable today? I think not.

Id. (quoting State v. Bess, 20 Mo. 420, 421 (1855)).
223. See id. at 45.
Finally, the tremendous advantages of extending employee benefits to domestic partners far exceed the costs, which are minimal to nonexistent. As evidenced by many jurisdictions and through numerous private employer programs, the results are positive and can have endless rewards for employees, employers, and society as a whole.

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