



Spousal Equivalency: Alternatives in the Interim!

*Todd A. Solomon, McDermott Will &
Emery LLP*

*Teresa S. Renaker, Lewis, Feinberg,
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Communications at Levi Strauss & Co.*



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Employee Benefits for Domestic Partners & Same-Sex Married Couples & Other Best Practices for LGBT Personnel

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Reasons Employers Offer Domestic Partner Benefits

➤ Fairness

- Same-sex partners cannot marry or obtain “spousal” benefits
- Many employers wish to comply with internal non-discrimination policies banning “sexual orientation” discrimination

➤ Legal Requirements

- No federal law banning sexual orientation discrimination (ENDA merely proposed)
- City ordinances and California state law require some “contractors” to offer spousal equivalent benefits to domestic partners

Reasons Employers Offer Domestic Partner Benefits (continued)

➤ Employee Relations/Recruitment and Retention

- Estimates show that it costs five times as much to replace an employee as it does to keep one

➤ Market Competition

- GM, Ford Motor, and Daimler Chrysler all rolled out domestic partner benefits in 2000
- United Airlines, Continental Airlines, American Airlines, and U.S. Airways all rolled out domestic partner benefits in 2000

Reasons Employers Might Not Offer Domestic Partner Benefits

- **The Defense of Marriage Act (1996)**
 - Federal law providing that, for purposes of any benefit under federal law, “marriage” is defined as “a legal union” between one man and one woman
- **Cost**
 - Many employers fear increased costs in health plan
 - Actual cost increase minimal
 - 2000 Hewitt Study found that health care costs increased less than 1%
- **Low Participation Rates**
 - If employees won't use the benefit, why should we offer it?
- **Moral / Religious Objections**

Formulating a Domestic Partner Benefits Policy

➤ What Benefits to Offer

- Most common domestic partner benefit: coverage under health, dental, and vision plans
- Employee pays a “married” or “employee plus 1” health care premium to cover partner
- Survivor benefit in defined benefit pension plan
 - Not as common. Most often done by offering survivor benefits to any non-spousal beneficiary

Formulating a Domestic Partner Benefits Policy (continued)

➤ Non-ERISA Benefits

- Employee Discounts, Moving/Relocation Expenses, Education and Tuition Assistance, Bereavement Leave, Funeral Expenses, etc.

➤ FMLA-style Leave

- Some employers offer leave for illness of domestic partner or leave for birth/adoption of domestic partner's child
- FMLA only coverage legal "spouses"

Formulating a Domestic Partner Benefits Policy (continued)

- **Should We Cover Only Same-Sex Domestic Partners or All Domestic Partners?**
 - Assess employee demand
 - Assess cost
 - Fairness issues:
 - Cuts both ways - some feel that all partners should be covered while others believe opposite-sex partners should simply get married
 - Legal implications
 - Employers have been sued for discrimination for only covering same-sex partners. Challenges have been unsuccessful, as discrimination based on the right to marry is legally permissible and plaintiffs are not “similarly situated” with same-sex couples
 - Equal benefits ordinances requires employers to offer coverage to opposite-sex domestic partners

Formulating a Domestic Partner Benefits Policy (continued)

- How to Define Domestic Partner / What Proof to Require
 - Cohabitation requirement (6 or 12 month minimum often required)
 - Minimum duration of relationship (6 or 12 months most typical)
 - Financial Independence Requirement
 - Registration Requirements
 - Domestic partner can register their partnership in many states, cities, and localities
 - Competence / Not Related / Age Minimum
 - Note: Equal benefits ordinances technically require no more proof for domestic partnerships than for spousal relationships (seemingly no enforcement)

Formulating a Domestic Partner Benefits Policy (continued)

➤ Proof

- Most employers require employees to complete “Affidavit of Domestic Partnership”
- Signed statement/penalty of perjury - prevents fraud, but maybe legally questionable

Domestic Partner Benefits: Implementation Issues

➤ Tax Consequences

- Because domestic partners are not usually “dependents” or “spouses” as defined in Tax Code, employees are taxed on the “fair market value” of domestic partner health coverage
- Proposed federal laws designed to eliminate harsh tax result (nothing passed yet). 45 large companies joined a coalition to support this bill
 - Payroll system must be adjusted/recognition of imputed income and withholding
 - Calculating fair market value of coverage - most common method is difference in “employee plus one” premium and “employee only” premium
 - Because of Tax Code definition of “spouse” and “dependent,” domestic partners rarely qualify and therefore cannot usually be covered under Cafeteria Plan, FSA, or Health Reimbursement Arrangement

Domestic Partner Benefits: Implementation Issues (continued)

- After-tax premiums only
- No FSA reimbursement for domestic partner health costs
- No participation in HRAs or HSAs
 - Revenue Ruling 2006-36 - Possibility of HRA reimbursement for expenses for non-dependent can “taint” the whole HRA and make all reimbursements taxable. IRS informally indicated that this is not intended to apply to HRAs that make taxable reimbursements to domestic partners
- **State Tax Exemption for Imputed Income**
 - Vermont, California, New Jersey, Oregon, Connecticut, New Hampshire, and Massachusetts have passed laws providing that an employee will not be subject to state income tax on the value of coverage of a non-dependent domestic partner. Therefore, payroll systems must tax employees for federal purposes but not for state purposes. Also, employees in these states can pay for coverage on a pre-tax basis for state tax purposes.
 - Non-dependent domestic partner’s employment change in employment will not constitute “change in status” under cafeteria plan regulations

Domestic Partner Benefits: Best Practices

- Note that many companies now offer DP benefits, but which benefits are offered differs amongst companies
- Does the employer offer COBRA continuation health coverage for domestic partners? Which qualifying events? “Divorce”?
- Make sure the cost of domestic partner coverage is not higher than the cost of spouse or dependent coverage
- Make sure domestic partner’s children can get coverage (even if they are not the employee’s dependent)
- Try not to require too much proof of domestic partnerships
- Consider a tax gross-up for health benefit coverage
 - Tax Equity Act - proposed in 2007

Domestic Partner Benefits: Best Practices

- Make sure you allow domestic partners to certify to their “dependent” status for tax purposes
- Equalize parental leave policies and add adoption leave
- Consider adding adoption assistance
- Make sure all “non-ERISA” benefits and policies are amended to include domestic partners (e.g., bereavement leave, moving expenses, tuition reimbursement)
- Same-sex marriages should be treated as spousal relationships for pension plans and other benefits (e.g., 401(k) automatic beneficiary)
- Add pension survivor annuity coverage for domestic partners (or at least same-sex spouses)
- Implement Pension Protection Act rules regarding non-spouse rollovers and hardship withdrawals

Transgender Benefits

- Many health and prescription drug plans contain transgender exclusions
- LGBT-friendly employers should eliminate these exclusions and talk to insurers about which services (e.g., mental health, hormone therapy, sex reassignment surgery, short-term leave, etc.) are covered
- Non-discrimination policies should be amended to include “gender identity and gender expression”
- Companies should consider implementing gender transition guidelines
- Make sure dress codes are gender-neutral
- Currently, 124 Fortune 500 companies prohibit discrimination against transgender individuals in their policies. In 2001, only eight of the Fortune 500 had such a policy

LGBT Employment Policies: Best Practices


- Include “sexual orientation” and “gender identity” in your equal employment opportunity (EEO) policy
 - Get top management approval
 - Distribute the policy, and educate employees about what it means

LGBT Employment Policies: Best Practices

- Foster an inclusive work environment
 - Provide comprehensive diversity training
 - Use inclusive language in policies and in practice
 - Offer mentoring opportunities
 - Encourage self-disclosure and modify new hire data collection forms accordingly
- Support transgender employees
 - Educate employees about gender identify and gender expression
 - Demonstrate sensitivity around bathroom access issues

LGBT Employment Policies: Best Practices

- Create LGBT Networks
 - Encourage participation by all employees/communicate with management
 - Leverage the Network to support career development, recruiting efforts and business development opportunities
 - Partner with other employees resource groups
- Support the LGBT community
 - Offer philanthropic (financial and volunteer) or pro bono support to community-based organizations
 - Target marketing efforts to LGBT consumers
 - Attend diversity job fairs and conferences (e.g., Lavender Law, Out & Equal)

A black and white portrait of Teresa S. Renaker, a woman with short, curly hair, smiling. She is wearing a dark jacket over a patterned blouse.

Recommendations of the Bar
Association of San Francisco Equality
Subcommittee on LGBT Issues:
Employee Benefits
Best Practices

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Starting Points

- For most benefits, federal law is a floor, not a ceiling.
 - Plans need not define “spouse” in accordance with DOMA for most purposes.
 - Plans generally can extend spousal benefits to same-sex domestic partners and spouses.
- State insurance regulation may play a role in mandating equal benefits under ERISA-governed plans.

Defining “Domestic Partner” and “Spouse” or How Do You Know You’re a Domestic Partner?

- Plans need a clear, non-discriminatory definition of “domestic partner” and “spouse”
- Plans should not require a higher level of formality for establishing domestic partnership than for establishing marriage

Practical Considerations in defining “Domestic Partner” and “Spouse”

- Will the plan require documentation of a domestic partnership or same-sex marriage?
- Will the plan recognize an out-of-state domestic partnership or same-sex marriage?
- What if the employee relocates?
- How will dissolution be established?

Insurance Considerations

- While state law generally does not regulate private-employer benefits plans, states can indirectly regulate insured plans by regulating insurance.
- Some states now require that insured plans provide equivalent coverage to spouses and domestic partners:
California, New Jersey

Grossing Up for Taxes on Imputed Income

- Some employers attempt to equalize benefits by “grossing up” employees’ earnings to cover the tax on imputed income from domestic partner benefits.
- This practice demonstrates an employer’s commitment to equalizing the compensation of LGBT and heterosexual employees.

Practical Considerations in Grossing Up

- How will an employee's tax liability for imputed income be determined?
- Will the employer gross up again for tax liability on the initial gross-up?

Health Plan Continuation Coverage

- Under COBRA, a “qualified beneficiary” includes only a “spouse” under federal law (or a child).
- COBRA does not require that employers extend continuation coverage to persons other than “qualified beneficiaries,” but does not prohibit doing so.
- State law may require continuation coverage for domestic partners in insured plans.

Beneficiary Designations

- Plans should include domestic partners and same-sex spouses in default beneficiary provisions.
- Plan administrators should encourage employees to keep beneficiary designations up to date.

Practical Considerations in Retirement Plan Administration

- May a plan require the consent of a domestic partner or same-sex spouse with regard to benefits elections and beneficiary designations under retirement plans?
- Should a plan administrator qualify a domestic relations order issued in a domestic partnership dissolution or dissolution of a same-sex marriage?

Final Thoughts

- State law (other than insurance law) cannot mandate the provision of domestic partner or same-sex spouse benefits by ERISA-governed employee benefits plans.
- BUT recognition of same-sex relationships by some states creates a powerful incentive for employers to recognize such relationships in their benefits plans.
- NOT recognizing same-sex relationships will soon (if it hasn't already) become more administratively burdensome and costly for benefits plans than recognizing such relationships.



How to live it out - A Levi Strauss & Co. Success Story

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“The Levi Plaza in San Francisco looks like a futuristic lesbian, gay, transgender, queer workplace experiment...”

-- Michael Savage, *The Savage Nation*, 12/12/07



Why?

- Values - Empathy, Originality, Integrity, Courage
- History of progressive workplace practices
 - Desegregation in factories in CA in 1940s
 - Integrated factories in American South before government mandates and against local public opinion -
 - Project Change challenged institutional racism in cities where we had manufacturing
 - Created workplace policies and practices on HIV/AIDS that were adopted by hundreds of employers
 - First Fortune 500 company to offer DP health benefits
- What's the "right thing to do?"

What are we doing today?

- Examine issues through a human-rights lens
- Engage on the public policy front
 - State proposed legislation
 - Federal legislation (DP Tax Equity Act, ENDA)
 - Legal actions (Amicus)
- Challenge ourselves, take risks
 - Marketing/advertising

Looking ahead

- Defend our gains
- Continue to advocate at all levels
- Work with our NGO partners
 - On emerging issues
 - In various jurisdictions
- Share best practices and explore issues outside our experience



Questions & Answers



Closing Comments



Workplace
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Thank you for your participation!

Complete our Town Call survey at

http://www.surveymonkey.com/s.aspx?sm=peW1SQubtas_2fHjIDiNOv5g_3d_3d

Make a donation to Out & Equal:

<http://www.outandequal.org/about/Donations.asp>

Next Town Call: Thursday, August 28, 2008

**More questions, contact Pat Baillie, Training Manager
www.outandequal.org - 415-694-6521**

