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Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners

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DOMESTIC PARTNERSHIP BENEFITS: WHY NOT OFFER
THEM TO SAME-SEX PARTNERS AND UNMARRIED
OPPOSITE SEX PARTNERS?

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I. INTRODUCTION

Today, thirteen percent of all United States employers offer benefits to the domestic partners of their employees.¹ Larger companies, those with more than 5,000 employees, the figure is twenty-five percent.² Benefits offered to domestic

¹John Hendren, *Domestic-Partner Policies Increase in U.S. Companies Thirteen Percent Offer Benefits, Study Says*, COMMERCIAL APPEAL (Memphis), June 29, 1997, available in 1997 WL 11959999; Christopher Calhoun, *Wilson's Latest Anti-Gay Wedge Misses Board of Regents: UC Employees Deserve What Major Businesses Already Concede: Domestic Partner Benefits*, L.A. TIMES, Nov. 20, 1997, available in 1997 WL 14002397; John Hendren, *Southern Baptists' Boycott Bucks a Trend/Thirteen Percent of All U.S. Employers Offer Health Benefits to Partners of Gay Workers*, ORANGE COUNTY REG., June 30, 1997, available in 1997 WL 7430509.

²See sources cited *supra* note 1.

partners often include both hard and soft benefits.³ Hard benefits, which are commonly called "cost intensive benefits," may include medical, vision, and dental insurance along with pension or retirement benefits.⁴ Other benefits are referred to as soft benefits and may include bereavement leave, legal services, employee discounts, health and fitness programs, relocation policies, and child care.⁵

The number of companies offering such benefits has increased dramatically in this decade. Over the past three or four years, the number of public and private employers offering domestic partner benefits has increased from about 200 to over 600 in 1997.⁶ Some of the reasons cited by employers for offering such benefits include employee recruitment and retention, and the employer's own non-discrimination policy.⁷

However, not every employer offering such benefits include both heterosexual and homosexual partners in their policy⁸ mainly because they believe heterosexuals can legally marry, whereas, homosexuals cannot.⁹ Domestic partner benefits can be defined in either narrow or broad terms.¹⁰ In the broad definition, employment benefits are given to all individuals regardless of their marital status or sexual orientation.¹¹ On the other hand, the narrow definition extends benefits only to homosexuals and their partners who are legally prohibited from getting married.¹²

³Alice Rickel, *Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family*, 16 WHITTIER L. REV. 737, 737 (1995); John O. White, *UCSD Staff Home Page, Domestic Partner Benefits Update* (visited Mar. 1, 1998) <<http://orpheus.ucsd.edu/sa/partner.html>>.

⁴*Id.*

⁵*Id.*

⁶Assembly OKs Bill on Domestic-Partner Health Benefits, SAN DIEGO UNION-TRIB., June 3, 1997, available in 1997 WL 3136863; Michael Bradford, *Employers More at Ease with Partner Benefits: Expert Michael Bradford*, BUS. INS., Sept. 22, 1997, available in 1997 WL 8295421.

⁷Julie Cohen Mason, *Domestic Partner Benefits*, MGMT. REV., Nov. 1, 1995, available in 1995 WL 8081062; Sherry Boschert, *Domestic Partner Benefits: A Trend Toward Fairness, an Update for News Media Executives, Produced by the National Lesbian and Gay Journalists Association* (1997) (visited Mar. 1, 1998) <<http://www.nljja.org/programs/DP/DPtrend.html>>; *Human Rights Campaign, Domestic Partnership Benefits for Same-Sex Couples, Achieving Domestic Partnership Benefits and Why They Matter* (visited Mar. 1, 1998) <<http://www.hrc.org/issues/workplac/dp/index.html>>; White, *supra* note 3.

⁸Rickel, *supra* note 3, at 737.

⁹Howard Pianko & Dean L. Silverberg, *Domestic Partner Benefits on the Rise, What Are the Legal and Tax Issues?*, 218 N.Y.L.J. 96 (1997) [hereinafter Pianko & Silverberg].

¹⁰*Id.*

¹¹*Id.*

¹²*Id.*

Of the companies that offer benefits for unmarried employees' partners, about half exclude heterosexual couples.¹³

Employers offering these benefits to same-sex domestic partners only, may face legal challenges such as marital status and sexual orientation discrimination or equal protection arguments¹⁴ from their unmarried heterosexual employees. In addition, states and municipalities have been increasing the potential of such litigation by passing laws that prohibit discrimination based on sexual orientation and marital status especially in the areas of housing and employment.¹⁵

This Note examines the potential of such legal challenges when employers use the narrow definition in structuring their domestic partner benefit programs. In addition, avoiding challenges by simply not offering benefits will be discussed. However, before discussing any discrimination issues, this Note will begin with some background and definitions that will bring the reader up-to-date on domestic partner benefits as they are interpreted today.

II. DOMESTIC PARTNERSHIP DEFINED

A. Background: The Changing Definition of Family

Since 1970, the number of cohabitating Americans increased by more than 400 percent.¹⁶ Nearly three million of the 93 million households in the United States consist of unmarried couples.¹⁷ Single-parent households make up an additional fifteen percent of families. Many of these single-parents have unmarried partners.¹⁸ As these statistics show, the traditional family—a working dad, stay-at-home mom,

¹³Jill Hodges, *'Partner' Benefits May Not Apply to Heterosexuals/Employers Can Encounter Thickets When They Extend Benefits Beyond Traditional Boundaries*, STAR TRIB., June 7, 1996, available in 1996 WL 6915860.

¹⁴See cases cited *infra* pp. 22-35.

¹⁵Lewis Becker, *Recognition of Domestic Partnerships by Governmental Entities and Private Employers*, 1 NAT'L J. SEXUAL ORIENTATION L. 90, 92 (1995) <<http://sunsite.unc.edu/gaylaw/issue1/becker.html>>; see also Michele Matassa Flores, *Bottom Line Determines Benefits for Unmarried Partners*, SEATTLE TIMES, Feb. 7, 1994, available in 1994 WL 3648933 ("The city of Seattle and King County have laws against discriminating on the basis of sexual orientation or marital status.").

¹⁶J. Robert Cowan, *The New Family Plan: Employee Benefits and the Non-Traditional Spouse*, 32 U. LOUISVILLE J. FAM. L. 617, 618 (1993-94); David G. Richardson, *Family Rights for Unmarried Couples*, 2 KAN. J.L. & PUB. POL'Y 117, 117 (1993).

¹⁷Cowan, *supra* note 16, at 618; D'Vera Cohn, *Cohabiting Couples Are a Settled Bunch; Many Unwed Partners Own Homes, Have Children, Census Reveals*, WASH. POST, Mar. 20, 1994, available in 1994 WL 2277358; Ruth Padawer, *Unwed, Uninsured Domestic Partners Press for Reforms*, RECORD, Dec. 5, 1993, available in 1993 WL 7909956.

¹⁸Cowan, *supra* note 16, at 618.

two kids and a dog—is near extinction.¹⁹ In fact, census data demonstrates fewer than ten percent of current households consist of this so-called traditional family.²⁰

The concept of family has largely been founded on the existence of marriage, but the legal definition of family has become quite unsettled.²¹ Depending upon the purpose, courts and legislatures have defined family differently.²² However, the U.S. Census Bureau has remained somewhat with the traditional concept of family by defining it as "two or more persons related by birth, marriage or adoption who reside in the same household."²³

More and more Americans today are expanding this concept of family by thinking of family as people to whom they have some emotional tie as opposed to merely a bloodline relationship.²⁴ In 1989, a survey conducted by Massachusetts Mutual Life Insurance Company asked 1,200 randomly selected adults to define the word "family."²⁵ Almost three-quarters of the survey respondents chose the more broad description of family as being "a group of people who love and care for one another."²⁶ Only twenty-two percent of the respondents chose the traditional description of family as being "group of peoples related by blood, marriage, or adoption."²⁷

In California, a task force on the family designed a functional approach to family by suggesting that family could be defined by the "functions" performed by each of its members.²⁸ These functions included:

- (1) maintaining the physical health and safety of family members by providing for their shelter, food, clothing, health care, and economic sustenance;
- (2) providing conditions for emotional growth, motivation, and self-esteem within a context of love and security;
- (3) helping to shape a belief system from which goals and values are derived, and encouraging shared responsibility for family and community;
- (4) teaching social skills and critical thinking, promoting life-long education, and providing

¹⁹Frank Swoboda, *Extending the Benefits Umbrella to a Wider World; Consulting Firm Finds Relatively Few Firms Making Domestic Partners Eligible*, WASH. POST, June 4, 1995, available in 1995 WL 2096955.

²⁰Suzanne B. Goldberg, *Employment Benefits and Insurance: Working with Your Client to Achieve Full and Equal Benefits*, 232 PRACTICING L. INST. 157, 159 (1994).

²¹Mary Patricia Treuhart, *Adopting a More Realistic Definition of "Family,"* 26 GONZ. L. REV. 91, 96 (1990/1991).

²²*Id.*

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 97; *see also* Richardson, *supra* note 16, at 119.

²⁶Treuhart, *supra* note 21, at 97.

²⁷Richardson, *supra* note 16, at 119.

²⁸*Id.* Treuhart, *supra* note 21, at 97.

guidance in responding to culture and society; and (5) creating a place for recreation and recuperation from external stresses.²⁹

This functional definition of family is consistent with societal policies of the promotion of marriage and the encouragement of stable families.³⁰ It is possible to have traditional families based on a legal marriage where none of the above mentioned functions are present. This type of family may further the societal policy of the promotion of marriage, but it does not encourage or further the policy of family stability.³¹

If we were to use this functional approach to families, many non-traditional families, such as those not based on a valid marriage, would be legitimized.³² As it applies to domestic partner benefits, only those families that promote societal family values would be extended such benefits.³³ Companies would not have to worry about unmarried employees signing up "roommates" or "friends."³⁴

In addition to the American public redefining the concept of family, our courts have begun to recognize that the traditional concept of family is changing. For instance, in 1989, the New York Court of Appeals decided that the definition of family should be interpreted broadly. The court in *Braschi v. Stahl Associates Co.* believed a more realistic view of a family includes a long-term relationship "characterized by an emotional and financial commitment and interdependence."³⁵ In *Braschi*, a life partner of a deceased tenant in a rent-controlled apartment moved for a preliminary injunction to prevent eviction.³⁶ Under New York City Rent and Eviction Regulations, a landlord, upon the death of a rent-control tenant, may not dispossess "either the surviving spouse of the deceased tenant or some other member of the deceased tenant's family who has been living with the tenant."³⁷ The court believed that the determination as to whether an individual is entitled to noneviction protection under these regulations should be based upon an objective examination of the parties' relationship.³⁸ The court suggested a number of factors including: exclusivity and longevity of the relationship, level of emotional and financial commitment, manner in which the parties held themselves out to society, and the reliance each of the parties placed on the other for daily family services.³⁹

²⁹Treuthart, *supra* note 21, at 97.

³⁰Richardson, *supra* note 16, at 119.

³¹*Id.*

³²*Id.*

³³*Id.*

³⁴*Id.*

³⁵*Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49, 54 (N.Y. 1989).

³⁶*Id.* at 51.

³⁷*Id.* at 50.

³⁸*Id.* at 55.

³⁹*Id.* See, e.g., Joan E. Schaffner, *The Essence of Marriage*, 66 GEO. WASH. L. REV. 195, 204 (1997) (book review) ("[T]he court, in deciding whether Mr. Braschi and his male life-partner of ten years comprised a 'family' under the New York rent control regulations,

Since *Braschi*, New York has amended its rent control ordinance to include eight enumerated factors to determine whether a family exists:

1) the longevity of the relationship; 2) sharing of household and family expenses; 3) intermingling of finances as evidenced by joint bank accounts, personal and real property, credit cards, and loan obligations; 4) engaging in family-type activities such as jointly attending family functions and social and recreational activities; 5) formalizing of legal obligations and responsibilities to each other by executing wills naming each other as executor and beneficiary, conferring upon each other the authority to make health care decisions, and making a domestic partnership declaration; 6) holding themselves out as family members to other family members and society in general; 7) regularly performing family functions such as caring for each other or each other's extended family members, and 8) engaging in any other action which evidences the intention of creating a long-term, emotionally-committed relationship.⁴⁰

These eight enumerated factors came directly out of the *Braschi* decision.⁴¹

The *Braschi* court recognized that the legal or traditional definition of family was inconsistent with the purpose of the rent-control ordinance which was to protect sudden eviction of family members.⁴² This court emphasized relational interests instead of legal and bloodline interests when defining a family.⁴³

In 1983, the California courts also recognized that unmarried couples could be similar in relationship to that of a married couple.⁴⁴ In *Butcher v. Superior Court of Orange County*, a woman sued for loss of consortium when her live-in-partner suffered personal injuries after being struck by an automobile driven by Butcher.⁴⁵ At the time of the accident, the couple had lived together for eleven and one half years, had two children together, filed joint income tax returns, and had joint bank accounts.⁴⁶ Butcher moved for summary judgment on the woman's claim based on the argument that there was no valid or legal marriage between the couple. The trial court denied Butcher's motion and he appealed.⁴⁷ The appellate court recognized a right of the unmarried woman to bring a claim of loss of consortium where the plaintiff can show that the relationship parallels that of a marital relationship.⁴⁸ The

explained that a 'more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.')

⁴⁰Richardson, *supra* note 16, at 120.

⁴¹*Id.*

⁴²*Id.*

⁴³*Id.*

⁴⁴*Butcher v. Superior Court of Orange County*, 139 Cal. App. 3d 58 (Cal. Ct. App. 1983).

⁴⁵*Id.* at 59.

⁴⁶*Id.* at 60.

⁴⁷*Id.*

⁴⁸*Id.* at 70.

court concluded that "evidence of the stability and significance of the relationship could be demonstrated by the duration of the relationship; whether the parties have a mutual contract; the degree of economic cooperation and entanglement; exclusivity of sexual relations; and whether there is a 'family' relationship with children."⁴⁹ Thus, the court recognized that more than a relationship's legal status should be considered when granting consortium rights to couples.⁵⁰

However, not all courts are willing to set tradition aside and opt for the more modern view of family relationships. In *Elden v. Sheldon*, the Supreme Court of California overruled *Butcher*.⁵¹ The court believed the inquiry as to whether a relationship was "stable and significant" was too difficult a burden to impose on the courts.⁵² The court gave a laundry list of cases supporting its holding that a loss of consortium claim is founded on a legal marriage, and absent such a marital relationship, the right to recover does not exist.⁵³

Many private organizations have also thrown their hats into the ring to come up with definitions of family that meet the modern trend towards broad definition. The Home Economics Association defines family as:

[T]wo or more persons who share resources, share responsibilities for decisions, share values and goals, and have commitments to one another over a period of time. The family is that climate that one comes home to; and it is that network of sharing and commitment that most accurately describes the family unit, regardless of blood, legalities, adoption or marriage.⁵⁴

In 1978, the American Humanist Association stated "any two people...wishing to make a commitment to one another...should be considered a family...and receive those benefits accorded to families by society. Blood kinship should not be required of family members, nor should marriages."⁵⁵ In addition, in December 1994, the U.S. Office of Personnel Management published a new rule that defines family as "spouses, parents, children, brothers and sisters and their spouses and 'any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.'"⁵⁶ It is hoped that this new rule will allow federal workers use of their sick leave to provide care for ill domestic partners.⁵⁷

⁴⁹*Butcher*, 139 Cal. App. 3d at 70.

⁵⁰*Richardson*, *supra* note 16, at 120.

⁵¹*Elden v. Sheldon*, 758 P.2d 582, 590 (Cal. 1988).

⁵²*Id.*

⁵³*Id.* at 589.

⁵⁴*Factoids on Domestic Partnership Benefits* (visited Mar. 1, 1998) <<http://www.buddybuddy.com/d-p-fac.html>>.

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

It should be noted, however, that not everyone subscribes to this new broad definition of family.⁵⁸ The National Pro-Family Coalition adopted at the 1981 White House Conference on Families the following definition of family: "persons who are related by blood, marriage or adoption."⁵⁹ The Coalition's definition excludes "committed relationships established by unmarried heterosexual partners and lesbian, gay, or bisexual partners, as well as any children in their relationships."⁶⁰ In addition, the definition excludes "'marriages' or commitments among more than two adults and relationships between stepparents and stepchildren--even though such individuals might very strongly identify themselves as being family members of one another."⁶¹

However, the broader definition of family seems to be winning out. For example, in 1992, the American Heritage Dictionary changed the words "blood, marriage or adoption" in its definition of family, and, instead, described it as "[t]wo or more people who share goals or values, have long-term commitments to one another, and reside usually in the same dwelling place."⁶²

Although there are cases where the courts are reluctant to redefine the traditional concept of family, it is clear from the attitudes of the American public and cases where the courts have applied a broader definition that a gradual change in the status of the nontraditional family is occurring. While some jurisdictions are ready to redefine the concept the family, others are not.⁶³ As a result, it is still unclear as to how these nontraditional family relationships will be treated by employers when offering benefits to their employees.

B. Definition and Requirements

1. What is a Domestic Partnership?

Although there is currently no standard legal definition of a domestic partnership, most definitions include the following elements: "1) the couple live together and have a close, personal relationship; 2) they are responsible for each other's welfare, as evidenced by financial interdependence; 3) they are not legally married to anyone else; 4) they are not related by blood."⁶⁴ Not every definition of domestic partnership includes heterosexual and homosexual partners. For example, Stanford University

⁵⁸Kris Franklin, "A Family Like Any Other Family:" *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1029 (1990/1991).

⁵⁹*Id.*

⁶⁰*Id.* at 1030.

⁶¹*Id.*

⁶²*Living in the Past*, WASH. TIMES, Sept. 19, 1997, available in 1997 WL 3684053.

⁶³Stephen N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REP. 49, 52 (1994).

⁶⁴*Sample Proposal for Domestic Partner Benefits* (visited Mar. 1, 1998) <<http://www.hrc.org>> [hereinafter Sample Proposal]; See also Christine Woolsey, *Benefits for Domestic Partners No Longer Rare*, BUS. INS., Apr. 4, 1994, available in 1994 WL 3834290 ("Most domestic partner definitions include three requirements: the partners must be involved in a committed relationship; must live together; and must be financially interdependent.").

defines a domestic partner as "the partner of an eligible employee who is of the same sex and shares a long-term commitment."⁶⁵

Regardless of gender requirements, it appears that domestic partnership is more than cohabitation without the legal status of marriage.⁶⁶ The major advantage of domestic partnership is the increasing recognition of the entity by both business and government through the offering of employment benefits that traditionally have only been offered to legally married couples.⁶⁷ It has become a means through which equality can be achieved among all employees regardless of sexual orientation, and in some instances, marital status.⁶⁸

2. Domestic Partnership Ordinances

Domestic partnership registration is currently available in a limited number of jurisdictions.⁶⁹ This registration procedure is established through local ordinance.⁷⁰ Registration usually involves the filing of an affidavit attesting to the creation of such partnership and the payment of a small fee.⁷¹ Various eligibility requirements, often resembling those requirements to enter into marriage, may be imposed on the applicants.⁷² Common requirements may include: "the parties be at least 18 years old, that each be mentally competent, that the parties not be related by blood ties closer than would bar marriage in the state, and that neither of the parties have an existing marriage or domestic partnership."⁷³ Some may require that a previous domestic partnership have been terminated for a minimum period of time before a new registration can be filed.⁷⁴

In addition, ordinances may require that the parties reside together, declare they have a committed relationship, and assume an obligation for the basic living expenses of the other.⁷⁵ Some municipalities may require additional formalities such as witnesses, notarization of declaration, and statements under oath concerning the partners' qualifications.⁷⁶ In some cities, the registration becomes part of public record. For example, Ann Arbor and San Francisco registrees are given the option to have the registration filed or to simply retain a copy to be shown on an as needed

⁶⁵Donald E. Coleman, *UC Weighs Partner Benefits. Faculty, Staff and Students Would Be Included in the University's Plan*, FRESNO BEE, July 14, 1997, available in 1997 WL 3910818.

⁶⁶Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 164 (1995).

⁶⁷*Id.*

⁶⁸*Id.* at 166.

⁶⁹Treuthart, *supra* note 21, at 101.

⁷⁰*Id.* at 101-02.

⁷¹*Id.* at 102.

⁷²Becker, *supra* note 15, at 91.

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.*

⁷⁶*Id.*

basis.⁷⁷ In addition, some cities require that at least one partner reside or work in the city.⁷⁸

In general, ordinances allow for termination of the domestic partnership by a unilateral act of one of the partners.⁷⁹ A statement or affidavit of termination usually must be filed with the city and a copy of such notice must be sent to the other partner.⁸⁰ Termination of the partnership automatically occurs upon the death of one of the partners.⁸¹

The City of Berkeley, California was the first city to adopt a domestic partnership ordinance.⁸² The policy was adopted on December 4, 1984 with dental coverage being available on April 1, 1985 and medical coverage available on July 1, 1985.⁸³ Its policy requires couples to file an affidavit attesting that they have lived together at least six months and "share common necessities of life."⁸⁴ Each partner must be at least eighteen years old, "declare that they are each other's sole domestic partner and that they are 'responsible for their common welfare.'"⁸⁵ A statement of termination must be filed when the partnership is dissolved.⁸⁶ A new partnership could not be entered into for at least six months.⁸⁷

Today, over fifty municipalities offer some sort of domestic partnership plan.⁸⁸ State employers include Commonwealth of Massachusetts, State of New York, and State of Vermont.⁸⁹

⁷⁷Becker, *supra* note 15, at 91.

⁷⁸*Id.* (Minneapolis and San Francisco limit joint or domestic partnership registration to couples where at least one partner lives or works in the city. Other cities, such as Berkeley and West Hollywood allow non-residents to register.).

⁷⁹*Id.*

⁸⁰*Id.*

⁸¹*Id.*

⁸²Robert L. Eblin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1072 (1990).

⁸³*Id.* at 1072.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.*

⁸⁷Eblin, *supra* note 82, at 1072.

⁸⁸*A Look at Employers Offering Domestic Partner Health Benefits*, GANNETT NEWS SERVICE, July 22, 1997, available in 1997 WL 8832628 (municipalities include: Alameda, California; Ann Arbor, Michigan; Atlanta, Georgia; Baltimore, Maryland; Boston, Massachusetts; Brookline, Massachusetts; Burlington, Vermont; Cambridge, Massachusetts; Carrboro, North Carolina; Chapel Hill, North Carolina; Chicago, Illinois; Corvallis, Oregon; Denver, Colorado; East Lansing, Michigan; Hartford, Connecticut; Iowa City, Iowa; Ithaca, New York; Laguna Beach, California; Los Angeles, California; Madison, Wisconsin; Middlebury, Vermont; New Orleans Louisiana; New York, New York; Oakland, California; Oak Park, Illinois; Olympia, Washington; Portland, Maine; Rochester, New York; Sacramento, California; San Diego, California; San Francisco, California; Santa Cruz, California; Seattle, Washington; Shorewood Hills, Wisconsin; Springfield, Massachusetts; St. Paul, Minnesota; Takoma Park, Maryland; Tucson, Arizona; West Hollywood, California;

In addition, some smaller municipalities are beginning to recognize domestic partnerships. In May of 1997, the 11,700 person town of Tumwater, Alaska became one of the smallest towns in America to grant benefits to domestic partners of municipal employees.⁹⁰ The town is hoping that this will attract and maintain good employees.⁹¹

3. Private Employers

The extension of domestic partner benefits in the private sector is generally seen as an outgrowth of such coverage at the government level.⁹² However, domestic partnership in the private sector can be traced as far back as 1982 when a union at New York's Village Voice newspaper obtained domestic partner benefits for its employees.⁹³ Up to 1990, only five companies offered benefits to domestic partners.⁹⁴ However, one commentator estimates that since then, there has been at least a one-hundred percent increase in the number of companies offering such benefits each year.⁹⁵

Private employers may require registration and other eligibility requirements similar to those imposed by municipalities offering benefits to domestic partners.⁹⁶ In most situations, the couple wanting to acquire benefits under a domestic partnership must sign an affidavit.⁹⁷ Ideal affidavits will resemble the terms of a legal marriage.⁹⁸ According to the Partners Task Force for Gay and Lesbian Couples, the elements of an ideal affidavit include:

- (1) Neither of us is married[; (2)] We are both over 18 years of age[; (3)] We were mentally competent to consent to contract when our domestic

West Palm Beach, Florida; Alameda County, California; Arlington County, Virginia; Dane County, Wisconsin; Hennepin County, Minnesota; King County, Washington; Los Angeles County, California; Marin County, California; Multnomah County, Oregon; San Francisco County, California; San Mateo County, California; Santa Cruz County, California; Travis County, Texas; and Wayne County, Michigan).

⁸⁹*Id.* See also Hargrove, *supra* note 63, at 50 (Ohio gives state employees sick and bereavement leave to care for domestic partners).

⁹⁰*Small Town Grants Benefits to Domestic Partners of City Workers*, ANCHORAGE DAILY NEWS, May 11, 1997, available in 1997 WL 11488726.

⁹¹*Id.*

⁹²Linda M. Laarman, *Employer Health Coverage for Domestic Partners--Identifying the Issues*, EMPLOYEE REL. L.J., Mar. 22, 1993, available in 1993 WL 2938897.

⁹³Terry Wilson, *Family Values Despite the Disney Brouhaha, Domestic Partnership Benefits Are Widely Available for Same-Sex Couples. So Why Are Very Few Taking Advantage of Them?*, CHI. TRIB., June 29, 1997, available in 1997 WL 3563332.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶Becker, *supra* note 15, at 97.

⁹⁷*Anatomy of a Domestic Partnership Affidavit, the Good, the Ugly, and the Bad* (visited Mar. 1, 1998) <<http://www.buddybuddy.com/affidavi.html>>.

⁹⁸*Id.*

partnership began[; (4)] We are the sole domestic Partner of each other and have no other domestic partners[; (5)] We agree to give notification of any change in the status of our agreement[; (6)] We share the common necessities of life and are responsible for each other's welfare[; and (7)] We declare under penalty of perjury that these statements are true and correct.⁹⁹

These affidavits can make partners potentially liable for each other's support and debts;¹⁰⁰ therefore, before signing such an affidavit, an attorney should be consulted.¹⁰¹

Although affidavits have elements similar to a legal marriage, those couples who are married do not have to sign such an affidavit. Documents relating to domestic partnerships can be quite costly to prepare and maintain; whereas, married couples do not have the expense of preparing these documents and obtain more benefits than couples living in a domestic partnership. Some employers may require additional documentation including one or more of the following: (1) joint lease, mortgage, or deed; (2) joint ownership of vehicle; (3) joint ownership of checking account or credit account; (4) designation of the domestic partner as a beneficiary for the employee's life insurance or retirement benefits; (5) designation of the domestic partner as a beneficiary of the employee's will; (6) designation of the domestic partner as holding power of attorney for health care; or (7) shared household expenses.¹⁰²

In addition, private employers may only offer benefits to same-sex couples and not to unmarried heterosexual couples.¹⁰³ Employers often cite the fact that heterosexuals have the option to marry as the reason for the distinction.¹⁰⁴

4. Costs and Other Concerns

However employers decide to structure their domestic partner benefits, costs have proven to be relatively small.¹⁰⁵ If a company chooses to extend benefits to both homosexual and heterosexual domestic partners, enrollment increases range from about one to ten percent.¹⁰⁶ Program costs will vary depending upon the

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²Drucilla Stender Ramey, *Model Domestic Partner Health Benefits Policy, the Ultimate Employee Handbook—A Workshop* (visited Mar. 1, 1998) <<http://www.courtvt.com/legalhelp/business/seminars/handbook/domestic.html>>.

¹⁰³*Id.*

¹⁰⁴*Id.*

¹⁰⁵Rickel, *supra* note 3, at 744.

¹⁰⁶*See generally* Larry Holyoke, *Domestic Partner Benefits Lag Behind Other Regions*, ST. LOUIS BUS. J. (visited Sept. 1, 1997) <<http://www.amcity.com/stlouis/stories/090197/focus3.html>> (Principal Financial Group reports less than one percent enrollment even though benefits are extended beyond same-sex couples and offered to a variety of non-traditional households); Jennifer Knight, *Firms Add Domestic Partner Benefits for Competitive Edge*, CORP. CASHFLOW MAG., Aug. 1, 1994, available in 1994 WL 12790380

benefits covered and the portion of the benefit paid by the employer.¹⁰⁷ In addition, companies offering medical benefits may experience a higher initial cost because many of these new unmarried partners have been left out of the medical system for a while.¹⁰⁸

Low utilization of domestic partner benefits can be attributed to a number of factors. These include: domestic partner may already receive benefits from another source; employee may be reluctant to disclose his or her personal relationship to the employer; benefits paid to unmarried partners are taxable; employees may be hesitant about signing a legal document which declares financial responsibility for the partner; and insurability problems such as pre-existing conditions may preclude coverage.¹⁰⁹ These factors may explain why few employees who have access to such benefits use them.¹¹⁰

Of the small number of employees that do take advantage of such benefits, costs tend to be lower than those of their married counterparts.¹¹¹ The lower costs may be attributed to eligible employees being younger and healthier.¹¹² In addition, they tend not to have children that need to be covered as dependents.¹¹³

(there is a one to two percent participation for same-sex couples and a two to four percent average for opposite-sex couples); Less Than One Percent Use Domestic Partner Benefits, TAMPA TRIB., May 4, 1997, available in 1997 WL 10785279 (Hewitt Associates found that when heterosexual couples were included, the participation rate sometimes reached three to four percent); Ann Merrill, *Domestic Partners/Many Companies Talking About Issue, but Few Have Done Anything About It*, STAR-TRIB., Jan. 26, 1994, available in 1994 WL 8435226 (if heterosexual couples are included, usage is about six percent); Elizabeth Neus, *Report: Domestic Partner Benefits Cost Same as Heterosexual Married Couples*, GANNETT NEWS SERVICE, July 22, 1997, available in 1997 WL 8832662 (companies that also cover heterosexual partners find that the coverage costs one to three percent of their medical benefits budget); Jane-Ellen Robinet, *Local Employers Wet Toes in Domestic Partner Benefits*, PITT. BUS. TIMES & J., Aug. 28, 1995, available in 1995 WL 7907346; Boschert, *supra* note 7 (if opposite-sex couples are included, enrollment may increase up to ten percent at most); *Sample Proposal*, *supra* note 64 (when offered to both same and opposite sex partners, enrollments increased less than three percent); Wilson, *supra* note 93 (including heterosexual couples boost costs about three percent).

¹⁰⁷Hodges, *supra* note 13.

¹⁰⁸GTE Testing New Family Health Centers, BUS. INS., July 26, 1993, available in 1993 WL 7806631.

¹⁰⁹*Id.* See also *Study Says Domestic Partners Not Costly*, MED. & HEALTH, June 5, 1995, available in 1995 WL 7721935 [hereinafter *Study Says*].

¹¹⁰Jonathan Marshall, *Domestic Partners Benefits Unused*, SAN FRANCISCO CHRON., May 31, 1995, available in 1995 WL 5283839.

¹¹¹Talila Baron, *Extending Health Benefits to 'Domestic Partners' Fast Becoming Good Business*, BUS. J., Apr. 11, 1994, available in 1994 WL 13107329.

¹¹²*Id.*

¹¹³Rickie Windle, *More Companies Exploring Domestic Partner Benefits, Those Who Offer It Say It Hasn't Caught on Yet*, AUSTIN BUS. J., Mar. 15, 1996, available in 1996 WL 10029684.

When same-sex partners are involved, companies often worry that costs will increase due to HIV and AIDS related claims.¹¹⁴ However, the U.S. Government and insurance actuaries have estimated that heart disease, cancer, and the costs of premature birth can be much higher than the lifetime cost of treating a person with AIDS.¹¹⁵ For example, the average lifetime medical cost for treatment of HIV is \$119,000 per patient as compared to premature infant care which can cost up to \$1 million.¹¹⁶

In addition to cost concerns, employers may fear that domestic partner provisions invite fraud.¹¹⁷ Critics argue that employees will enroll sick friends and relatives. However, no evidence of fraud has been demonstrated thus far.¹¹⁸ Because of the requirements employees must meet to qualify for domestic partnership, it is unlikely there will be substantial fraud.¹¹⁹ In addition, the threat of discharge and/or criminal sanctions will likely deter any fraudulent claims by employees.¹²⁰

If an employee should sign up a sick friend or relative, pre-existing condition clauses may limit benefits for illnesses existing on enrollment.¹²¹ In addition, the employee may have to pay more in premium than the friend or relative will receive in benefits.¹²² Therefore, fraud and abuse of domestic partnership benefits seems to be minimal or nonexistent. The fraud and abuse should be no more than that which currently exists with marriage.¹²³ Companies normally do not ask for proof of marriage, and employees are generally free to sign up their spouses.¹²⁴

As this discussion reveals, cost concerns and potential for abuse is minimal in the area of domestic partner benefits. Companies extending benefits to both same- and opposite-sex domestic partners will find that their costs are slightly higher than those employers that offer benefits to same-sex couples only.¹²⁵ This is because there will

¹¹⁴Rickel, *supra* note 3, at 745.

¹¹⁵*Sample Proposal*, *supra* note 64.

¹¹⁶*Partner Benefits Uncommon, but Not Costly, Says Study*, AM. MED. NEWS, Sept. 4, 1995, available in 1995 WL 10009089 [hereinafter *Partner Benefits Uncommon*]; See also Jean Latz Griffin, *Push for Domestic-Partner Benefits Picking Up Steam*, CHI. TRIB., Nov. 8, 1993, available in 1993 WL 11121378; Aurora Mackey, *Domestic Partner Benefits Are Catching on Slowly; Employers' Experiences Show Providing Benefits for Domestic Partners Costs No More Than Doing Do for Heterosexual Married Couples*, BUS. & HEALTH, Apr. 1, 1994, available in 1994 WL 13102164; Diane Stafford, *In Giving Benefits, Fair Is Fair*, KAN. CITY STAR, Mar. 21, 1996, available in 1996 WL 2423708.

¹¹⁷Eblin, *supra* note 82, at 1082.

¹¹⁸*Id.* at 1083.

¹¹⁹*Id.*

¹²⁰*Id.*

¹²¹*Id.*

¹²²*Id.*

¹²³Hargrove, *supra* note 63, at 56.

¹²⁴*Id.*

¹²⁵Rickel, *supra* note 3, at 747.

be more heterosexuals than homosexuals taking advantage of these benefits.¹²⁶ However, employers find that their fears are unwarranted and are generally pleased with the outcome of their program.¹²⁷

5. Tax Implications

Section 106 of the Internal Revenue code excludes from the employee's gross income employer-provided group health insurance coverage for the employee, the employee's spouse, and the employee's dependents.¹²⁸ Section 105(b) of the Code excludes from the employee's gross income any additional benefits received through the employer-provided health coverage that directly relate to medical expenses incurred by the employee, his or her spouse, and dependents.¹²⁹ However, section 104(a)(3) of the Code requires that the employee pay taxes on the difference between the fair market value of such coverage and the amount the employee paid for the coverage if the employer-provided health insurance is extended to anyone besides the employee, his or her spouse and dependents. Additional benefits such as those discussed in 105(b) of the Code are also to be included in the employee's gross income if those benefits were extended to any person other than the employee, his or her spouse, and dependents.¹³⁰

In private letter rulings, the IRS has deferred to state law in defining the term "spouse." However, in its most recent ruling in January of 1997, the IRS relied on the newly enacted Defense of Marriage Act in defining the term.¹³¹ The Defense of Marriage Act provides that same-sex domestic partners will not be treated as spouses in regards to any federal law.¹³² The IRS concluded that same-sex partners could not be afforded the preferential tax treatment that has been afforded to spouses.¹³³

However, the partner may still qualify as a dependent under section 152 of the Code allowing the partner preferential treatment as the employee's dependent.¹³⁴ Section 152(a)(9) of the Code defines a dependent for income tax purposes as any individual residing in the taxpayer's home that receives more than half of his or her support from the taxpayer.¹³⁵ However, section 152(b)(5) of the Code provides that such dependent cannot be claimed for income tax purposes if the relationship

¹²⁶Hodges, *supra* note 13 (about two-thirds of participants are heterosexual couples); *Partner Benefits Uncommon*, *supra* note 116 (about 67% of the couples electing coverage are opposite-sex); *See also Study Says*, *supra* note 109.

¹²⁷Rickel, *supra* note 3, at 747.

¹²⁸Hargrove, *supra* note 63, at 55; William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1, 5 (1995); Laarman, *supra* note 92; Pianko & Silverberg, *supra* note 9.

¹²⁹Pianko & Silverberg, *supra* note 9.

¹³⁰*Id.*; Laarman, *supra* note 92.

¹³¹Pianko & Silverberg, *supra* note 9.

¹³²*Id.*

¹³³*Id.*

¹³⁴*Id.*

¹³⁵*Id.* Vetter, *supra* note 128, at 8.

between the taxpayer and the dependent is in violation of local law.¹³⁶ In other words, if state law prohibits cohabitation between unmarried people, then the domestic partner could not qualify as a dependent.¹³⁷

If the domestic partner does not qualify as a dependent under these provisions, the employee will be taxed on the value of the coverage pursuant to section 61 of the Code.¹³⁸ The IRS held in a private letter ruling that the fair market value used to calculate the amount on which the employee is to pay taxes should be determined by the value of the group rate.¹³⁹ However, the IRS did not elaborate on how to determine the fair market value of group coverage other than to say it could be less or more than individual coverage or the subjective value of the coverage to the employee.¹⁴⁰

Employers offering benefits to domestic partners will have to determine the fair market of value of such benefits for withholding and reporting purposes. This may be a difficult process due to lack of clear guidelines from the IRS.¹⁴¹ However, a company considering the offering of such benefits might be wise to ask for assistance on such calculation from employers already offering such benefits.

C. Marriage v. Domestic Partnership: How Do Benefits Compare?

Marriage is generally a relationship between two individuals and the state, whereas, a domestic partner benefit plan is a relationship between two individuals and an employer or between two individuals and a municipality.¹⁴² Individuals barred from marriage or choosing not to get married can spend as much as \$3,000 on legal related expenses to set up a domestic partnership, whereas, a marriage license typically costs about \$35.¹⁴³ In addition, marriage licenses self perpetuate, and domestic partnerships may require additional expense in the periodic review of legal documents.¹⁴⁴

The Partners Task Force for Gay & Lesbian Couples charts the comparison of benefits for marriage and domestic partnerships. The following is a partial representation of this chart.¹⁴⁵

¹³⁶Vetter, *supra* note 128, at 7; Laarman, *supra* note 92; Pianko & Silverberg, *supra* note 9.

¹³⁷Laarman, *supra* note 92.

¹³⁸*Id.*

¹³⁹*Id.*

¹⁴⁰*Id.*

¹⁴¹*Id.* Pianko & Silverberg, *supra* note 9.

¹⁴²Demian, *Comparing Legal Marriage/Ceremonial Marriage/Domestic Partner Benefits* (visited Mar. 1, 1998) <<http://www.buddybuddy.com/m-comp.html>>.

¹⁴³*Id.*

¹⁴⁴*Id.*

¹⁴⁵*Id.*

Benefits Comparison at the State Level

	<u>Legal Marriage</u>	<u>Domestic Partnership</u>
1. Assumption of Spouse's Pension	Automatic	No
2. Bereavement Leave	Automatic in most places	Only certain workplaces
3. Burial Determination	Automatic	No
4. Certain Property Rights	Automatic	No
5. Child Custody	Automatic	No
6. Crime Victim's Recovery Benefits	Automatic	No
7. Divorce Protections	Automatic	No
8. Domestic Violence Intervention	Automatic	Only in some jurisdictions
9. Exemption of Property Tax on Partner's Death	Automatic where available	No
10. Housing Lease Transfer	Automatic where Available	Only in New York City
11. Inheritance	Automatic	Will necessary and is Contestable. Domestic Partnership could Influence court Decision
12. Immunity from Testifying	Automatic	No
13. Insurance Breaks	Automatic	No
14. Joint Adoption and Foster Care	Probable	No. Often reviewed by court. Some states prohibit adoption and foster care.
15. Joint Bankruptcy	Automatic	No
16. Joint Parenting (Insurance Coverage, School Records)	Automatic	No
17. Medical Decisions on Behalf of Partner	Automatic	No. Physician's directives or powers of attorney are necessary with few exceptions
18. Reduced Rate Memberships	Automatic where available	Only certain organizations
19. Sick leave to care for partner	Automatic where available	Only certain organizations
20. Visitation of Partner's Children	Probable, depending on divorce decree	No. Often must go to court.
21. Visitation of Partner in hospital (intensive care)	Automatic	often prohibited. Physician's directives or powers of attorney must be drawn.
22. Visitation of Partner in Prison	Automatic	Only certain cities
23. Wrongful death benefits (Loss of consort)	Automatic	No

Benefits Comparison in the Federal System
(Includes Civil Servants and the Military)

	<u>Legal Marriage</u>	<u>Domestic Partnership</u>
1. Access to Military Stores	Automatic	No
2. Assumption of Spouse's Pension	Automatic	No
3. Bereavement Leave	Automatic	No
4. Insurance Breaks	Automatic	No
5. Medical Decisions on Behalf of Partner at Military of VA Hospitals	Automatic	No
6. Sick Leave to Care for Partner	Automatic	No

	<u>Legal Marriage</u>	<u>Domestic Partnership</u>
7. Veteran's Discounts	Automatic	No
8. Visitation of Partners in Hospital or Prison	Automatic	No

Benefits Comparison for All U.S. Citizens

	<u>Legal Marriage</u>	<u>Domestic Partnership</u>
1. Immigration	Automatic	No
2. Social Security Survivor Benefits	Automatic	No

As this comparison shows, the benefits bestowed upon married couples are far more than those given to individuals living in a domestic partnership. Thus, domestic partnerships are a poor second to legal marriage; however, there are still benefits to such a relationship. These include: (1) health insurance benefits they would otherwise be unable to get; (2) social recognition of the relationship; (3) creation of a dialog on discrimination issues in the workplace; and (4) proof of growing recognition of the importance of attracting and keeping employees.¹⁴⁶

III. LEGAL ISSUES: CHALLENGES TO DOMESTIC PARTNER BENEFITS

A. Preemption

Generally, federal preemption is not a concern; however, ERISA is one federal law that limits the ability of local governments to provide equal benefits between married employees and employees registered in a domestic partnership.¹⁴⁷ It preempts any law that "relates to any employee benefit plan described" in ERISA, unless it is specifically exempted.¹⁴⁸

While ERISA does preempt local ordinances, most preemption will take place at the state level. However, most activity in the area of domestic partnership is taking place at the local level, and it is unclear as to the extent to which these local governments may recognize these new relationships that are not recognized by state law.¹⁴⁹

Most states have strengthened local self-government by providing for municipal home rule.¹⁵⁰ Home rule provisions are generally of two types. The first is where the municipality is treated as a state within a state. The city has full police power over local affairs and some immunity from state legislative interference.¹⁵¹ A court may find it difficult to distinguish between matters of state concern and local

¹⁴⁶*Domestic Partnership Benefits* (visited Mar. 1, 1998) <<http://www.buddybuddy.com/d-p.html>>.

¹⁴⁷Craig A. Bowman & Blake M. Cornish, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1203 (1992) [hereinafter Bowman & Cornish]; see also Rickel, *supra* note 3 (discussion of how ERISA effects domestic partner benefits).

¹⁴⁸Bowman & Cornish, *supra* at 1203.

¹⁴⁹*Id.* at 1198.

¹⁵⁰*Id.* at 1199.

¹⁵¹*Id.*

affairs.¹⁵² The court in *Lilly v. City of Minneapolis*,¹⁵³ discussed infra, struggled with just such an issue. The second type of home rule is generally referred to as the "legislative" model. This model gives local governments all the powers the legislature could grant except those restricted or denied to the municipality by the legislature.¹⁵⁴

Generally, however, if a local government forbids something authorized by the state or allows something forbidden by the state, the provision will be struck down.¹⁵⁵ Express preemption is unlikely in the field of domestic partnerships as no state has expressly prohibited municipalities from recognizing these relationships thus far.¹⁵⁶ In addition, courts frequently allow local regulation that seems to conflict with a state statute by prohibiting something the state has permitted by implication; however, if the state is held to have occupied the field, then the regulation will be struck down.¹⁵⁷

Even if there is no conflicting state statute, local governments may be precluded from legislating "if the state has occupied or preempted the field in a matter of statewide or general concern."¹⁵⁸ California's Supreme Court has come up with the following test to determine whether implied preemption exists:

In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme. There are three tests: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of . . . local [regulation] on the transient citizens of the state outweighs the possible benefit to the [local government].'¹⁵⁹

A court may also strike down a regulation where it concludes that the ordinance conflicts with state policy.¹⁶⁰

It is difficult to determine whether the court will find that a field has been preempted. Each jurisdiction has its own home rule provisions and statutory schemes.¹⁶¹ However, in recent years, local governments have been allowed to make

¹⁵²*Id.*

¹⁵³*Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Mo. Ct. App. 1995).

¹⁵⁴*Bowman & Cornish, supra* note 147, at 1199.

¹⁵⁵*Id.* at 1200.

¹⁵⁶*Id.*

¹⁵⁷*Id.*

¹⁵⁸*Id.*

¹⁵⁹*Bowman & Cornish, supra* note 147, at 1200-01.

¹⁶⁰*Id.* at 1201.

¹⁶¹*Id.*

strong laws in areas such as public health, education, housing, employment, and mass transit. Municipalities have been given fairly wide latitude in these areas.¹⁶²

Although marriage and divorce are regulated at the state level, this does not necessarily preempt the entire area of domestic relations law.¹⁶³ However, local governments would be expressly preempted from providing benefits such as the ability to file joint tax returns or the right to adopt children. These benefits and consequences of traditional marriage could not be provided by local ordinance to domestic partners.¹⁶⁴

B. Court Decisions in the Area of Preemption

Lilly v. City of Minneapolis: Health Insurance for Domestic Partners Denied

The case of *Lilly v. City of Minneapolis* involves a domestic partnership ordinance for the City of Minneapolis.¹⁶⁵ The City is a home rule charter municipality whose charter was adopted by election on November 2, 1920.¹⁶⁶ On January 25, 1991, City Council passed the Domestic Partnerships Ordinance which defines domestic partners as two adults who:

- (1) Are not related by blood closer than permitted under marriage laws of the state;
- (2) Are not married or related by marriage;
- (3) Are competent to enter into a contract;
- (4) Have no other domestic partner with whom the household is shared, or with whom the adult person has another domestic partner;
- (5) Are jointly responsible to each other for the necessities of life;
- (6) Are committed to one another to the same extent as married persons are to each other, except for the traditional marital status and solemnities.¹⁶⁷

On November 17, 1992, the Commission on Civil Rights for the City ruled that the employee benefits program discriminated against lesbian employees of the Library Board based upon their "affectional preference."¹⁶⁸ On April 2, 1993, City Council passed a resolution authorizing reimbursement to city employees for health insurance costs of domestic partners and qualified blood relatives who are not considered dependents under current City health plans.¹⁶⁹ The resolution excludes reimbursement if the domestic partner or family member has access to other group health insurance coverage or Medicare.¹⁷⁰

¹⁶²*Id.* at 1201-02.

¹⁶³*Id.* at 1203.

¹⁶⁴*Id.*

¹⁶⁵*Lilly*, 527 N.W.2d at 107; *see, e.g.*, Bowman & Cornish, *supra* note 147, at 1198-99 (discussing home-rule limits for localities); David C. Wiegel, *Proposal for Domestic Partnership in the City of Detroit: Challenges Under Law*, 74 U. DET. MERCY L. REV. 825, 826 (1997) (using *Lilly* to examine challenges to City of Detroit's new ordinance).

¹⁶⁶*Lilly*, 527 N.W.2d at 108.

¹⁶⁷*Id.* at 109.

¹⁶⁸*Id.*

¹⁶⁹*Id.*

¹⁷⁰*Id.*

The court of appeals held that council resolutions authorizing reimbursement to city employees for domestic partners' and non-dependent blood relatives' health insurance costs were ultra vires and without legal force and effect.¹⁷¹ The court reasoned that insurance coverage for political subdivisions' employees and their dependents was of statewide concern.¹⁷² Therefore, the city's power to act must be narrowly construed unless the legislature has expressed otherwise.¹⁷³

The court considered the legislative history of the 1993 amendments to the Minnesota Human Rights Act.¹⁷⁴ The Act was amended to prohibit discrimination based on sexual orientation.¹⁷⁵ Prior to the vote to approve the amendment, the author of the bill, Senator Spear, stated: "There is nothing in here about domestic partners benefits. Nothing that could lead to it."¹⁷⁶ Given this statement, the court thought it was apparent that the legislature did not intend to give the same health care benefits to domestic partners as are available to married employees.¹⁷⁷ Therefore, the City cannot expand a state statute with respect to whom may receive medical benefits when the legislature has made it a matter of statewide concern and has defined who may receive such benefits.¹⁷⁸

Atlanta v. McKinney: No Employee Benefits for Persons Who Are Not Dependents under State Law

The *Atlanta v. McKinney* case also concerned the issue of preemption in domestic partner law.¹⁷⁹ The case involved a challenge to four city ordinances "that prohibit discrimination on the basis of sexual orientation, establish a domestic partnership registry for jail visitation, and extend insurance and other employee benefits to domestic partners of [C]ity employees."¹⁸⁰ The court held that the City had the power to enact the anti-discrimination and registry ordinances, but exceeded its authority in extending employee benefits to persons not defined as "dependents" under state law.¹⁸¹

As to the extension of employee benefits, the issue before the court was "whether the [C]ity impermissibly expanded the definition of dependent to include domestic

¹⁷¹*Id.*

¹⁷²*Lilly*, 527 N.W.2d at 111.

¹⁷³*Id.*

¹⁷⁴*Id.* at 112.

¹⁷⁵*Id.*

¹⁷⁶*Id.*

¹⁷⁷*Id.*

¹⁷⁸*Lilly*, 527 N.W.2d at 113.

¹⁷⁹*Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995); *see e.g.*, Clayton P. Gillette, *The Exercise of Trumps by Decentralized Governments*, 83 VA. L. REV. 1347, 1398 (1997) (citing case as involving judicial invalidation of gay rights ordinances on grounds that more centralized decision makers had jurisdiction over the subject matter).

¹⁸⁰*McKinney*, 454 S.E.2d at 519.

¹⁸¹*Id.*

partners."¹⁸² The Municipal Home Rule Act (MHRA) grants cities the authority to provide insurance benefits for city employees and their dependents, but does not define the term "dependent."¹⁸³ However, other state statutes defined a dependent either as a "spouse, child, or one who relies on another for financial support."¹⁸⁴ The court held that domestic partners did not meet any of the statutory definitions of "dependent."¹⁸⁵ Since the court found it was beyond the City's authority to define dependents inconsistent with state law, the benefits ordinance was invalidated as ultra vires under MHRA and the Georgia Constitution.¹⁸⁶

Atlanta v. Morgan: Domestic Partner Benefits Upheld

After *Atlanta v. McKinney*, the Atlanta City Council passed another ordinance which provides certain insurance benefits to domestic partners of City employees who are registered as domestic partners under the City's registry.¹⁸⁷ In enacting the ordinance, the City followed the holding in *McKinney* and eliminated from the ordinance's definition of dependent any language that recognized any new relationship similar to marriage.¹⁸⁸ The new ordinance was again challenged.¹⁸⁹

The issue in this case was the same as that in *McKinney*: "Whether the [C]ity acted within its authority to provide benefits to its employees and their dependents by defining 'dependent' consistent with State law."¹⁹⁰ The court determined that it must look to the ordinary meaning of the term "dependent" in order to decide whether the definition provided in the City's benefit ordinance is consistent with State law.¹⁹¹ The ordinance defines the term "dependent" as "one who relies on another for financial support."¹⁹² In addition, the domestic partner shall be dependent if:

- (i) The employee makes contributions to the domestic partner of cash and supplies, and the domestic partner relies upon and uses those contributions to support himself/herself in order to maintain his or her standard of living. The contributions may be at irregular intervals and of irregular amounts, but must have existed for at least six months, and must be continuing.

¹⁸²*Id.* at 521.

¹⁸³*Id.*

¹⁸⁴*Id.*

¹⁸⁵*Id.*

¹⁸⁶ *McKinney*, 454 S.E.2d at 521.

¹⁸⁷ *Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997).

¹⁸⁸*Id.* at 195.

¹⁸⁹*Id.* at 193.

¹⁹⁰*Id.* at 194.

¹⁹¹*Id.*

¹⁹²*Id.* at 195.

(ii) The employee is obligated, based upon his/her commitment set forth in the Declaration of Domestic Partnership, to continue the financial support of the domestic partner for so long as the domestic partnership shall be in effect.

(iii) The domestic partner is supported, in whole or in part, by the employee's earnings, and has been for at least the last six months.¹⁹³

Based on the court's review of Georgia case law, the court concluded the ordinance's definition of dependent was consistent with the ordinary meaning of "dependent" and the definition attributed to the term as used in Georgia statutes.¹⁹⁴ The court looked to various dictionary definitions and prior case law.¹⁹⁵ In finding that the definition was consistent with State law, the ordinance was found not to be in violation of either the Georgia Constitution or the Municipal Home Rule Act.¹⁹⁶

Anonymous v. City Light: Federal Law Preemption

After a decision in *Anonymous v. City Light*, federal law was found to preempt the application of the ruling to private employers.¹⁹⁷ In this case, an employee of City Light was denied medical and dental benefits for her domestic partner. The Human Rights Department ruled against City Light concluding that discrimination against "cohabitants" or "domestic partners" is a form of marital status discrimination which is prohibited under Seattle's Fair Employment Practices Ordinance (FEPO).¹⁹⁸ The ruling was initially believed to apply to both city and private employers within Seattle; however, Seattle's city attorney later determined that provisions of the federal Employee Retirement Income Security Act (ERISA) preempted the FEPO as applied to private employers.¹⁹⁹

C. Other Court Challenges

The following cases offer a framework of additional case law on the subject of domestic partner benefits.

Donovan v. Workers' Compensation Appeals Board of the State of California: Death Benefits Granted

In *Donovan v. Workers' Compensation Appeals Board of the State of California*, Earl Donovan was eventually awarded \$25,000 in death benefits for the death of his live-in companion, Thomas Finnerty.²⁰⁰ Finnerty became one-hundred-percent

¹⁹³*Morgan*, 492 S.E.2d at 195.

¹⁹⁴*Id.*

¹⁹⁵*Id.*

¹⁹⁶*Id.* at 196.

¹⁹⁷Eblin, *supra* note 82, at 1073-74.

¹⁹⁸*Id.* at 1074.

¹⁹⁹*Id.* See also Rickel, *supra* note 3.

²⁰⁰See Sue Nussbaum Averill, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253, 257 (1993) (discussion of *Donovan v. Workers' Compensation Appeals Bd. of the State of California*, 187 Cal. Rptr. 869 (Cal. Ct. App. 1982)).

disabled due to an injury sustained on the job. He became seriously depressed about his disability and died after attempting suicide.²⁰¹ Donovan filed a claim for death benefits alleging that Finnerty's injury led to his suicidal tendencies, and, therefore, his death was work-related.²⁰²

The Workers' Compensation Board held that the two men's relationship was "illicit;" therefore, Donovan was not a "good faith member of Finnerty's household," and Donovan was awarded limited medical costs.²⁰³ Donovan appealed this decision to the California Court of Appeals, which remanded the decision back to the Board to decide the issue of dependency.²⁰⁴ The Board, relying on *Marvin v. Marvin*,²⁰⁵ ruled that Donovan was a "good faith member of Finnerty's household and his total dependent."²⁰⁶ The court recognized that a gay person could be a "good faith member of another's household." Therefore, that person could be considered the employee's dependent for workers' compensation purposes.²⁰⁷

Brinkin v. Southern Pacific Transportation Co.: Funeral Leave Benefits Denied

In *Brinkin v. Southern Pacific Transportation Co.*, Brinkin was denied funeral benefit leave when his same-sex partner of eleven years died.²⁰⁸ The benefit was automatically available to married employees.²⁰⁹ The union denied Brinkin's

²⁰¹*Id.*

²⁰²*Id.* at 257-58.

²⁰³*Id.* at 258.

²⁰⁴*Id.*

²⁰⁵*Marvin v. Marvin*, 134 Cal. Rptr. 815 (Cal. 1976) ("Woman who had lived with man for seven years without marriage brought suit to enforce alleged oral contract under which she was entitled to half the property which had been acquired during that period and taken in man's name, and to support payments. The Superior Court, Los Angeles County, William A. Munnell, J., granted the judgment on the pleadings for defendant, and plaintiff appealed. The Supreme Court, Tobriner, J., held that provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; that court should enforce express contracts between nonmarital partners except to the extent the contract is explicitly founded on the consideration of meretricious sexual services, despite contention that such contracts violate public policy; that in the absence of express contract, the court should inquire into the conduct of the parties to determine whether that conduct demonstrates implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties, and may also employ the doctrine of quantum meruit or equitable remedies such as constructive or resulting trust, when warranted by the facts of the case; that in the instant case plaintiff's complaint stated a cause of action for breach of an express contract and furnished suitable basis on which trial court could render declaratory relief; and that the complaint also could be amended to state a cause of action founded on theory of implied contract or equitable relief.").

²⁰⁶Averill, *supra* note 200, at 258.

²⁰⁷*Id.*

²⁰⁸*See Id.* at 260 (discussion of *Brinkin v. Southern Pacific Transp. Co.*, 572 F. Supp. 236 (N.D. Cal. 1985)); *See also* Eblin, *supra* note 82, at 1067, 1079 and n.105-10 (1990) (discussion of *Brinkin v. South Pacific Transp. Co.*, No. A034147, slip op. (Cal. Ct. App. 1987)).

²⁰⁹Averill, *supra* note 200, at 260.

grievance, and Brinkin brought action against the union and his employer.²¹⁰ Brinkin brought his action in federal court alleging that the denial of funeral benefits violated his privacy rights under the California Constitution, violated the California Fair Employment Act and Housing Act, and violated the San Francisco police code.²¹¹ The district court remanded the action back to the state court after concluding it had no jurisdiction in the case.²¹²

The case finally reached the California Court of Appeals where the court held that employers may lawfully grant benefits to married persons without offering them to unmarried persons.²¹³ Brinkin was classified by the courts as a single, adult male and not an immediate family member of his domestic partner.²¹⁴

Hinman v. Department of Personnel Administration: Denial of Dental Benefits

In *Hinman v. Department of Personnel Administration*,²¹⁵ the California Court of Appeals held that the denial of dental benefits to domestic partners of employees did not unlawfully discriminate against homosexual employees in violation of the Equal Protection clause because the Department's policy made a distinction on the basis of marital status not between heterosexual or homosexual employees.²¹⁶ Because there was no discrimination on the basis of sexual orientation, strict scrutiny analysis did not apply.²¹⁷ In addition, the policy of restricting coverage to spouses and families was found to be reasonably related to the state's interest in promoting marriage.²¹⁸ Also, dental benefits under state plans qualified as bona fide fringe benefits and were exempted from marital status discrimination.²¹⁹

In *Hinman*, the employee, Hinman, and Larry Beatty had lived together for over twelve years.²²⁰ The two men owned a home together, placed their assets in a joint

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.*

²¹³*Id.*

²¹⁴*Id.*

²¹⁵*Hinman v. Department of Personnel Admin.*, 167 Cal. App. 3d 516 (Cal. Ct. App. 1985); see also Averill, *supra* note 200, at 258, 259; Hargrove, *supra* note 63, at 51; see e.g., *Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625, 1634 (1996) (citing *Hinman* as the leading case on the issue of employee benefits for homosexual life partners); Rita M. Neuman, *Closing the Door on Cohabitants Under Wisconsin's Open Housing Law*, 1995 WIS. L. REV. 965, 999 (1995) (using *Hinman* as support that public policy may be strong enough to override intent not to discriminate based on sexual orientation).

²¹⁶*Hinman*, 167 Cal. App. 3d at 516.

²¹⁷*Id.*

²¹⁸*Id.* See also Todd R. Dickey, *Reorienting the Workplace: Examining California's New Labor Code Section 1102.1 and Other Legal Protections Against Employment Discrimination Based on Sexual Orientation*, 66 S. CAL. L. REV. 2297, 2319 (1993).

²¹⁹*Hinman*, 167 Cal. App. 3d at 516-17.

²²⁰*Id.* at 520.

bank account, shared common necessities of life, and named each other as primary beneficiaries in their wills and life insurance policies.²²¹

Hinman applied for dental coverage for himself and Beatty under the state's employee dental plan; however, coverage for Beatty was denied.²²² Hinman filed a letter of grievance with the Department, but his grievance was denied on the basis that Beatty did not qualify as a spouse or dependent under existing contracts or statutes.²²³ Hinman filed a petition for writ of mandate for declaratory relief and injunctive relief. The Department responded by way of demurrer which was sustained by the trial court without leave to amend.²²⁴

The court of appeals found that there were no allegations or evidence that benefits were denied based entirely on Hinman's sexual orientation, and this was a case of "alleged under-inclusiveness of governmental regulation or legislation."²²⁵ Therefore, the differentiation between groups alleged to be "similarly situated" becomes the basis of a de facto discrimination claim.²²⁶

Hinman argued that homosexual employees with same-sex partners are similarly situated to married heterosexual employees.²²⁷ He further argued that because homosexuals cannot legally marry, the term "spouse" is not neutral to homosexuals and is a classification based on both marital status and sexual orientation.²²⁸ Therefore, Hinman believed the court must use strict scrutiny analysis because classifications based on sexual orientation are suspect.²²⁹

The court disagreed with Hinman's arguments. The eligibility requirements for the state dental plan excluded all nonspouses of both opposite- and same-sex employees.²³⁰ The court concluded, "[h]omosexuals are simply a part of the larger class of unmarried persons, to which also belong the employees' filial relations and parents, for example. The terms have the same effect on the entire class of unmarried persons."²³¹ Therefore, there was no difference in the effect of the eligibility requirement on unmarried heterosexual or homosexual employees.²³²

²²¹*Id.* at 520-21.

²²²*Id.* at 521.

²²³*Id.*

²²⁴*Id.* at 521.

²²⁵*Hinman*, 167 Cal. App. 3d at 524.

²²⁶*Id.*

²²⁷*Id.*

²²⁸*Id.*

²²⁹*Id.*

²³⁰*Hinman*, 167 Cal. App. 3d at 526.

²³¹*Id.*

²³²*Id.*

Thus, *Hinman* is not similarly situated to married heterosexual employees but is similarly situated to unmarried heterosexual employees.²³³

The court also found that the restriction of coverage to spouses and family of employees was reasonably related to the state's interest in promoting marriage.²³⁴ California courts have allowed marital status discrimination as long as it is rationally related to a legitimate state purpose.²³⁵ The court found that the state has a legitimate interest in promoting marriage, and this interest can be furthered by "conferring statutory rights upon married persons which are not afforded unmarried partners."²³⁶

This decision established a strong precedent in the area of domestic partner benefits for homosexual employees. By not granting review, California's Supreme Court has established that denial of benefits to unmarried homosexual partners does not violate employment policy and statutory protections prohibiting sexual orientation discrimination.²³⁷

Phillips v. Wisconsin Personnel Commission: Denial of Family Health Insurance Coverage

In *Phillips v. Wisconsin Personnel Commission*,²³⁸ the court held that an employer could limit dependent health insurance coverage to employees' spouses and children without violating marital status, sexual orientation, or gender provisions of the Wisconsin Fair Employment Act.²³⁹ In addition, the court found that the rule did not violate state equal protection.²⁴⁰

Phillips and Tommerup had a committed lesbian relationship in which they shared incomes, rented a home, and owned a car together. They carried joint renters and car insurance and also took vacations together. Tommerup had been financially dependent on Phillips for several years, because she was attending college in pursuit of her graduate degree.²⁴¹ Phillips applied to her employing agency to change her health care benefits from single to family coverage to provide for Tommerup as her "dependent."²⁴² The administrator of the state health insurance plan denied her application on the basis that Tommerup did not meet the definition of "dependent" under the applicable rules.²⁴³ Phillips filed a discrimination complaint with the

²³³*Id.* See also Eblin, *supra* note 82, at 1079; Kate Latimer, *Domestic Partners and Discrimination: The Need for Fair Employment Compensation*, 12 *HAMLIN J. PUB. L. & POL'Y* 329, 334 (1991).

²³⁴*Hinman*, 167 Cal. App. 3d at 527-28.

²³⁵*Id.* at 526.

²³⁶*Id.* at 527.

²³⁷Averill, *supra* note 200, at 259-60.

²³⁸482 N.W.2d 121 (Wis. Ct. App. 1992).

²³⁹*Id.* at 123.

²⁴⁰*Id.*

²⁴¹*Id.* at 124.

²⁴²*Id.*

²⁴³*Id.*

personnel commission which was dismissed for failure to state a claim upon which relief could be granted, and the circuit court affirmed.²⁴⁴

Phillips argues that limiting health insurance coverage to the employee's spouse and children discriminates against her on the basis of her marital status, sexual orientation, and gender in violation of the Fair Employment Act.²⁴⁵ The court disagreed with Phillips arguments and addressed each one in turn.²⁴⁶

The court looked to the legislative history of the act to determine legislative intent. It found that the legislature did not intend a violation of the act where married employees are treated differently than single employees under the current benefits scheme. Nothing in the legislative history supported the contention that the state is prevented from providing benefits to an employee's spouse without extending them to an unmarried companion.²⁴⁷ In addition, the court found that there was no discrimination issue because Phillips was not "similarly situated" to a married employee in the context of a discrimination analysis.²⁴⁸ Phillips had no legal relationship to Tommerup. The law imposed no duty of support and no responsibility for providing medical care as it did on married couples.²⁴⁹ Thus, Phillips's legal status was not found to be similar to that of a married employee, and, therefore, she has no claim of marital status discrimination.²⁵⁰

Phillips's argument that she was discriminated against based on her sexual orientation was essentially the same position she took in her marital status discrimination argument.²⁵¹ The court agreed with the personnel commission's ruling that she was not discriminated against on the basis of sexual orientation because the challenged rule distinguishes between married and unmarried employees and not between homosexual and heterosexual employees. Coverage would be denied for Tommerup if their relationship was that of an unmarried heterosexual couple.²⁵² The court further notes that the fact Phillips and Tommerup cannot legally marry is not a basis for a claim of sexual orientation discrimination. The claim is that the laws are unfair because they do not recognize homosexual marriages.²⁵³ It is this restriction that limits Phillips's eligibility for family coverage and that is for the legislature to change, not the courts.²⁵⁴

Phillips also argued that she was being discriminated against because of her gender due to the fact she was being treated differently than similarly situated males.

²⁴⁴Phillips, 482 N.W.2d at 124.

²⁴⁵*Id.*

²⁴⁶*Id.*

²⁴⁷*Id.* at 125-26.

²⁴⁸*Id.* at 126.

²⁴⁹*Id.*

²⁵⁰Phillips, 482 N.W.2d at 127.

²⁵¹*Id.*

²⁵²*Id.*

²⁵³*Id.*

²⁵⁴*Id.*

The basis of her argument was that she could never qualify her partner as a "dependent" through the act of marriage, whereas, a male employee could marry Tommerup and qualify her as a dependent.²⁵⁵ The court again disagreed with Phillips and held that the only males she was similarly situated to were those with same sex partners, and that they also could not obtain coverage for their companions.²⁵⁶

Phillips also made a claim that the rule violated the equal protection guarantees of the Wisconsin Constitution "in that it creates a classification of people who are denied certain employment benefits on the basis of marital status, sexual orientation and gender."²⁵⁷ The court rejected her argument and found that because the rule challenged in this case does not classify by sexual orientation and gender, that ends the inquiry into an equal protection claim.²⁵⁸

The court in *Phillips* followed the same rationale as that used in *Hinman*. Both courts refused to grant unmarried couples the same access to employment benefits as those provided to married couples.²⁵⁹

Gay Teachers Association v. Board of Education of the City School District of New York: Health and Dental Benefits denied

In *Gay Teachers Association v. Board of Education of the City School District of New York*, several teachers and employees sued the New York City Board of Education in order to obtain health and dental benefits for their domestic partners.²⁶⁰ The employees were denied the benefits on the basis that only "legal spouses" were entitled to such benefits.²⁶¹ The plaintiffs argued that this denial of benefits unlawfully discriminated against them on the basis of marital status and thereby constituted sexual orientation discrimination.²⁶² In October of 1993, Mayor David Dinkins signed a court settlement which provides health benefits to all unmarried domestic partners of New York City employees.²⁶³

Reep v. Commissioner of the Department of Employment and Training: Approval of Unemployment Benefits

In *Reep v. Commissioner of the Department of Employment and Training*,²⁶⁴ the Supreme Judicial Court of Massachusetts held that the fact a "former employee was

²⁵⁵*Id.*

²⁵⁶*Phillips*, 482 N.W.2d at 128.

²⁵⁷*Id.*

²⁵⁸*Id.* at 129.

²⁵⁹Averill, *supra* note 200, at 127.

²⁶⁰183 A.2d 478, 575 N.Y.S.2d 1016 (1st Dep't 1992).

²⁶¹Hargrove, *supra* note 63, at 51.

²⁶²*Id.*

²⁶³*Id.* See also Vincent C. Green, *Same-Sex Adoption: An Alternative Approach to Gay Marriage in New York*, 62 BROOK. L. REV. 399, 408 (1996).

²⁶⁴593 N.E.2d 1297 (Mass. 1992); but see *Davis v. Employment Sec. Dep't*, 737 P.2d 1262 (Wash. 1987) (women leaving employment to enter "meretricious relationship" are not eligible for unemployment compensation).

not married to her partner of thirteen years did not preclude determination that she had 'urgent, compelling and necessitous' reason to leave her employment in connection with her decision to remain with [her] partner, who was relocating his business, for purposes of determining employee's entitlement to unemployment benefits."²⁶⁵

The plaintiff, a teacher in Norwell, declined an offer of reappointment for the following school year because her partner of thirteen years was relocating and she planned to go with him.²⁶⁶ After the move, she was unable to obtain a teaching position and applied for unemployment benefits.²⁶⁷ The Department of Employment and Training denied her claim because her decision to relocate with her partner did not constitute an "urgent, compelling and necessitous" reason.²⁶⁸ The board of review affirmed, and the plaintiff sought judicial review.²⁶⁹ The district court reversed the agency's decision, and this court transferred the case on its own motion and affirmed the district court judgment.²⁷⁰

The court inferred from the broad language of the statute that the legislature intended to provide standards that were flexible enough to insure effective application of legislative policy in all circumstances, and that these standards cannot be applied with "mathematical precision."²⁷¹ The court believed that it would be improper to create a rule where a nonmarried partner is denied an opportunity to show that his or her reasons for terminating employment were as "urgent, compelling, and necessitous" as those of a married person.²⁷² In addition, the court believed that workable standards could be created for making such determinations.²⁷³ It found the extra administrative burden did not justify the denial of benefits to persons "who can prove they acted reasonably, based on pressing circumstances, in leaving employment."²⁷⁴

Rovira v. AT&T: Denial of Death Benefits

In *Rovira v. AT&T*, the court held that the partner of a deceased employee could not collect death benefits even though the company promised not to discriminate on the basis of sexual orientation.²⁷⁵ The employee and Rovira lived together for twelve years during which time the couple pooled financial resources, shared responsibility

²⁶⁵*Reep*, 593 N.E.2d at 1298.

²⁶⁶*Id.* See also Kirsten Hagedorn Frey, *Employment Law-The Erosion of the Voluntary Quit Disqualification from Unemployment Compensation Benefits: Reep v. Commissioner of Department of Employment & Training*, 19 J. CORP. L. 183, 187 (1993).

²⁶⁷*Reep*, 593 N.E.2d at 1298.

²⁶⁸*Id.*

²⁶⁹*Id.*

²⁷⁰*Id.*

²⁷¹*Id.* at 1301.

²⁷²*Id.*

²⁷³*Reep*, 593 N.E.2d at 1301.

²⁷⁴*Id.*

²⁷⁵*Rovira v. AT&T*, 817 F. Supp. 1062 (S.D.N.Y. 1993).

for decision making that affected their lives, owned a home together, and took vacations together.²⁷⁶ In addition, Rovira was listed as the beneficiary of the employee's life insurance policy, and, under the employee's will, was named executor of the estate.²⁷⁷

After the employee's death, Rovira requested the "sickness-death benefit" for herself and her children under AT&T's benefit plan.²⁷⁸ This benefit provided one year's salary to the surviving spouse or unmarried children of an employee who died as a result of illness.²⁷⁹ Even though AT&T's personnel policies prohibited discrimination on the basis of sexual orientation or marital status, Rovira's request was denied because the women were not legally married, and the children were not the biological or adoptive children of the employee.²⁸⁰

The court ruled that noncompliance with its discrimination policy was permissible because the policy did not appear in the benefit plan documents; therefore, the Employee Retirement Income Security Act (ERISA) would not require AT&T to comply with its promise.²⁸¹

Ross v. Denver Department of Health & Hospitals: Denial of Family Sick Leave

In *Ross v. Denver Department of Health & Hospitals*, the court held that the denial of sick leave benefits did not violate the rule prohibiting sexual orientation discrimination, and the classification system used in the rules did not violate the Due Process or Equal Protection clauses.²⁸² Ross requested sick leave benefits to take care of her domestic partner.²⁸³ The Department of Health and Hospitals denied her request, because domestic partner did not meet the definition of "immediate family" as defined by the Career Service Authority Rules.²⁸⁴ She appealed the Department's decision.²⁸⁵

A hearings officer found that the definition of "immediate family" discriminated against Ross on the basis of sexual orientation which violated the Career Service Authority's anti-discrimination rule and ordered the Department to grant her

²⁷⁶*Id.* at 1064; *see also* Green, *supra* note 263, at 410 (describing Rovira's and Forlini's living arrangements).

²⁷⁷*Rovira*, 817 F. Supp. at 1064.

²⁷⁸Hargrove, *supra* note 63, at 51.

²⁷⁹*Id.*

²⁸⁰*Id.*

²⁸¹*Id.* *See also* Frank C. Morris, Jr., *Privacy and Defamation in Employment*, 42 ALI-ABA 201, 246 (Feb. 12, 1997); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1144 (1996).

²⁸²*Ross v. Denver Dep't of Health and Hosps.*, 883 P.2d 516 (Co. Ct. App. 1994); *see also* Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263, 310 (1997) (discussion of *Ross v. Denver Dep't of Health and Hosps.*).

²⁸³*Ross*, 883 P.2d at 518.

²⁸⁴*Id.*

²⁸⁵*Id.*

request.²⁸⁶ The Department appealed this decision to the Board which reversed the hearing officer's ruling.²⁸⁷ Ross sought judicial review in the district court which reversed the Board's decision and reinstated the hearing officer's order.²⁸⁸ The court of appeals found that the district court erred in ruling that the denial of Ross's sick leave violated the Career Service Authority Rule against discrimination on the basis of sexual orientation.²⁸⁹

The Career Service Authority defined "immediate family" as: "[h]usband, wife, son, daughter, mother, father, grandmother, grandfather, brother, sister, son-in-law, daughter-in-law, mother-in-law, father-in-law, brother-in-law, [and] sister in law."²⁹⁰ Ross acknowledged that her partner did not fall within this definition but argued that this definition was superseded and invalidated by a subsequent rule which states: "[T]he following administrative actions relating to personnel matters shall be subject to appeal: . . . c) Discriminatory actions: any action of any officer or employee resulting in alleged discrimination because of race, color, creed, national origin, sex, age, political affiliation, or sexual orientation."²⁹¹ The court, however, disagreed with Ross's argument and concluded that the fact this rule was promulgated later than the rule which defined "immediate family" did not mandate a conclusion that it had a superseding effect.²⁹² The court pointed out that Ross cited no legislative history to support her argument.²⁹³

The court found that homosexual employees, such as Ross, were not precluded from taking advantage of family sick leave benefits. The employee may use such benefits to take care of any person fitting the definition of "immediate family."²⁹⁴ The only portion of the definition that affected homosexuals differently is the language allowing the employee to use the benefit to care for a husband or wife; however, this portion did not differentiate between heterosexual and homosexual employees but rather between unmarried and married ones.²⁹⁵ Therefore, homosexual employees and unmarried, or similarly situated, heterosexual employees were not being treated differently.²⁹⁶

²⁸⁶*Id.*

²⁸⁷*Id.*

²⁸⁸*Id.*

²⁸⁹*Ross*, 883 P.2d at 518.

²⁹⁰*Id.*

²⁹¹*Id.*

²⁹²*Id.*

²⁹³*Id.* at 518.

²⁹⁴*Ross*, 883 P.2d at 519.

²⁹⁵*Id.*

²⁹⁶*Id.* at 520 (court cites to *Hinman* and *Phillips*); see also John H. Robinson & Catherine Pieronek, *The Law of Higher Education and the Courts: 1994 in Review*, 22 J.C. & U.L. 367, 722 (1996) ("The Colorado Court of Appeals determined that the DCSB's decision to deny Ross the requested sick leave did not violate a CSA rule prohibiting discrimination on the basis of sexual orientation. The court determined that the rule did not treat homosexual employees and similarly situated heterosexual employees differently, because a heterosexual

Ross further argued that the definition contained in the Authority's rules violated the Equal Protection and Due Process guarantees of the Colorado and United States Constitutions because it created a class of people denied benefits on the basis of their sexual orientation.²⁹⁷ The court disagreed with Ross's argument reiterating its point that Ross was not treated differently than other unmarried employees and ruled that she had not established a claim of denial of equal protection or due process.²⁹⁸

Rutgers Council of AAUP Chapters v. Rutgers State University: Denial of Health Benefits

In *Rutgers Council of AAUP Chapters v. Rutgers State University*, employees and their union appealed a decision of the Division of Pension which denied health insurance coverage to the employees' same-sex domestic partners.²⁹⁹ After the plaintiffs' requests for health insurance coverage for their same-sex partners were denied, they filed a grievance against Rutgers alleging discrimination; however, their grievance was denied.³⁰⁰ The plaintiffs then filed a complaint with the Law Division against Rutgers and other defendants alleging discrimination and violations of the New Jersey Constitution.³⁰¹ The case was transferred to the Appellate Division where the court found in favor of the University and the other defendants.³⁰²

All of the plaintiffs were professors at the University. Each had lived with their same-sex partner for over fourteen years, shared property and other financial obligations, and in one situation, raised a child together.³⁰³ The plaintiffs argued that the statutory term "dependent" should be read to include domestic partners who are the functional equivalent of spouses.³⁰⁴ They used the Law Against Discrimination

employee also would not be permitted to take sick leave benefits to care for an opposite-sex, non-spouse partner. The court also stated that, because the rule does not classify or differentiate on the basis of sexual orientation, there was no denial of equal protection or due process. The court found that the Equal Protection and Due Process Clauses simply require like treatment of persons who are similarly situated. Consequently, since unmarried homosexuals were treated the same as unmarried heterosexuals, the DCSB rule presented no constitutional problems.").

²⁹⁷*Id.* at 521.

²⁹⁸*Id.* at 521-22.

²⁹⁹*Rutgers Council of AAUP Chapters v. Rutgers State Univ.*, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); *see, e.g.* Julie Goldscheid, *Rutgers Council of AAUP Chapters v. Rutgers State University*, 242 PRACTICING L. INST. 57, 62-66 (1995) (statement of facts in *Rutgers Council of AAUP Chapters*).

³⁰⁰*Rutgers Council of AAUP Chapters*, 689 A.2d at 830.

³⁰¹*Id.*

³⁰²*Id.*

³⁰³*Id.*

³⁰⁴*Id.* at 830-31 (employees wrote to the Director of the Division of Pensions and enclosed The University of Iowa Domestic Partner Benefits Policy); *see also* *The University of Iowa Domestic Partner Benefits* (visited Mar. 2, 1998) <<http://www.uiowa.edu/~hrpersvc/benefits/dompart.html#elig>> (The University of Iowa's policy provides the following:

Programs

The University of Iowa offers faculty, professional and scientific staff the ability to insure their same sex domestic partner under various benefit programs. These programs include health, dental, vision, hearing aid, and accidental death and dismemberment insurance. This document will explain how these programs work for individuals in this situation. The University does not contribute towards the cost of any benefit program for your domestic partner. It only allows your domestic partner the access to an insurance product.

The University benefit program for its faculty and professional staff is considered a Section 125 flexible benefits program. The program is regulated by the I.R.S. and as a result, domestic partners are not permitted to participate in this program as a spousal equivalent. Instead, we offer your domestic partner the ability to carry their own insurance contract for each of the plans that are offered. Therefore, the flexible benefits enrollment materials that you as an employee receive each year will be for you. There is an exception to this general rule. The exception is if your domestic partner meets the Internal Revenue Service dependency guidelines, then your domestic partner may be included under the flexible benefits program. These dependency guidelines require that the domestic partner be totally dependent upon you for all living and income sources. If you feel that you meet this qualification, you must notify the Benefits Office in order to qualify for this special program. Otherwise, you and your partner will be considered separately for benefit purposes.

In order to insure a domestic partner, you must register that individual with the University Benefits Office. This is done by completing the Affidavit for Domestic Partner form that is attached to this document. A second attached document explains the criteria required for this domestic partner relationship. You need only to complete this affidavit once and it will remain in effect until such time as the relationship ends. It is your responsibility to notify the Benefits Office if a domestic partner relationship ends. A new affidavit would then have to be filed if another relationship comes into existence in the future.

Once you have registered with the University Benefits Office, you will receive a special insurance application form which must be completed by your partner. On this application form, your partner will designate the particular benefits in which they wish to participate. These benefit programs do not have to be the same benefit programs in which you are participating. There will be no medical questionnaire or pre-existing condition clauses involved in the coverage for your domestic partner. The effective date of the coverage will be assigned by the Benefits Office. It is generally the first of the month following the receipt of the completed application form.

When the completed insurance application has been received by the University Benefits Office, your domestic partner will receive their own identification cards for the dental insurance plans that they have selected. All claims will be filed by your partner under their own social security number. As far as any provider or insurance company is concerned, the domestic partner is an employee at The University of Iowa for insurance purposes. The domestic partner will receive all appropriate mailings and handouts concerning the selected insurance product.

Children of either you or your domestic partner may be insured under any of the benefit programs. If the children are your legal responsibility and you have the financial responsibility for them for health insurance, you will be given additional contributions from the University towards the cost of insuring these dependents. If this is the situation, you must supply the Benefits Office with the appropriate paperwork such as birth certificates, adoption paperwork, or divorce decrees in order to prove this financial relationship. If the dependent children are your domestic partner's, then there is no contribution for these individuals, but they may be included under your domestic partner's insurance plan. They cannot be included under your plans since they have no legal or financial ties to you. If there is a joint adoption relationship, then the dependent children may be included under your plans and you will also receive additional contributions from the University towards these costs.

The cost associated with the particular benefits that your domestic partner selects will be deducted from your paycheck on a monthly basis. These deductions will occur on an after-tax basis. Current Internal Revenue Service rules do not permit domestic partner benefits to be paid for with pre-tax money.

Federal and state COBRA regulations apply to your domestic partner. This means that if you or your domestic partner's insurance is canceled as a result of termination of employment, ending of the domestic partner relationship, or a child no longer qualifying as a dependent, the individual who loses the coverage will be eligible to continue the insurance on a voluntary basis for a period of time from 18 to 36 months, depending upon the reason for the loss of coverage. If and when an event such as this happens, the Benefits Office will notify the individuals involved of their particular rights under this legislation.

The issue of benefits for your domestic partner is complex. If you have additional questions, please feel free to contact the Benefits Office directly at 335-2676. As a note, all information supplied by you and your domestic partner is kept confidential and this information is not released to the insurance carrier or any party outside of the Benefits and Payroll departments which are involved in the processing of the enrollments and deductions.

Domestic Partners Eligibility

A qualified domestic partner, as defined below, is eligible to apply for coverage under The University of Iowa Health, Dental, Vision, and Hearing Aid Insurance plans.

To be eligible for coverage as a Domestic Partner, the University employee and the Domestic Partner must complete and file with the Staff Benefits Office an "Affidavit of Domestic Partnership" in which they attest that (a) are each other's sole domestic partner, responsible for each other's common welfare, (b) domestic partner must not be able to qualify for coverage as a common law spouse, (c) party is married, (d) partners are not related by blood closer than would bar marriage in the State of Iowa, (e) partner is at least 18 years of age and of the same sex, and (f) three of the following conditions exist for the partners:

(LAD) to further support their argument. Because LAD prohibited discrimination against an employee based on marital status and sexual orientation, they argued that it would be a violation of LAD to deny them coverage.³⁰⁵ However, the court rejected this argument pointing out that LAD excepted from its provisions benefit and insurance programs.³⁰⁶

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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 (home, condominium, or mobile home).
 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; or d. a lease for a residence identifying both domestic partners as tenants
 4. The Domestic Partner (a) been designated as a beneficiary of the employee's University of Iowa Group Life Insurance coverage, or (b) been designated as a beneficiary for the death benefit payable from the employee's retirement annuity contract, or (c) University employee declares that the Domestic Partner is identified as a primary beneficiary in the employee's will.
 5. The Domestic Partners have executed a "relationship contract," which (a) each of the parties to provide support for the other party and (b) provides, in the event of the termination of the domestic partnership, for a substantially equal division for any property acquired during the relationship.

Additional Provisions

1. Notification of Changes. The parties must agree to notify the Benefits office of any change in the circumstances which have been attested to in the documents qualifying a person for coverage as a Domestic Partner.
2. Liability for False Statements. If any company or the University suffers a loss because of a false statement contained in the documents submitted in connection with coverage for a Domestic Partner or as a consequence of the failure to notify the Benefits Office of a changed circumstance, the company or the University will be entitled to recover reasonable attorney fees in addition to damages for all such losses.
3. Termination. Either member of a domestic partnership may file a statement with the Benefits Office indicating the relationship has ended. A copy of the termination will be mailed to the other partner unless both have signed the termination statement.
4. Waiting Period. Following the termination of a Domestic Partnership, a twelve-month period must elapse before a University employee is eligible to designate a new Domestic Partner.).

³⁰⁵*Rutgers Council of AAUP Chapters*, 689 A.2d at 831.

³⁰⁶*Id.* at 832.

As to the plaintiffs' Constitutional claims, the court found no discriminatory intent behind the marital status classification.³⁰⁷ The court cited several cases where federal courts have held that sexual orientation classifications are not suspect.³⁰⁸ The court concluded that if the federal court refused to find the classification suspect, then it would not do so either, and, therefore, there was no reason to view marital status or sexual orientation as deserving of heightened scrutiny.³⁰⁹ Instead, the analysis turns on whether there was a "real and substantial relationship" between the differential treatment and the State's interest in the classification.³¹⁰

The court concluded that the state's interest should prevail. The importance of affordable health insurance and the State's interest in objective determinations of eligibility avoids a subjective analysis that would cause certain conflict in establishing criteria.³¹¹ Therefore, the plaintiffs' due process and equal protection arguments were denied.³¹²

University of Alaska v. Tumeo: Health Insurance Benefits Allowed

In *University of Alaska v. Tumeo*, two employees of the University were denied insurance benefits for their domestic partners, and they filed suit.³¹³ The Superior Court of Alaska found in favor of the employees³¹⁴ and the Supreme Court of Alaska affirmed.³¹⁵

Both employees were unmarried and involved in a same-sex relationship.³¹⁶ The University denied the employees' requests for domestic partner benefits on the basis that its "health care plan does not allow for coverage of a domestic partner, nor is there any obligation under the plan to provide for such coverage."³¹⁷ After the University's denial of the employees' grievances, the plaintiffs appealed to the superior court arguing that the University's health insurance program discriminates on the basis of marital status in violation of the Alaska Constitution.³¹⁸

The superior court held that "[t]he University, by providing added health care coverage for married employees but not for unmarried employees, is compensating

³⁰⁷*Id.* at 833.

³⁰⁸*Id.* (citing *Ben-Shalom v. Marsh*, 881 F.2d 454, 465-66 (7th Cir. 1989) *cert. denied*, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990) and *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 895 F.2d 563, 573-74 (9th Cir. 1990).).

³⁰⁹*Id.*

³¹⁰*Rutgers Council of AAUP Chapters*, 689 A.2d at 833.

³¹¹*Id.* at 833-34.

³¹²*Id.*

³¹³*University of Ala. v. Tumeo*, 933 P.2d 1147 (Ala. 1997).

³¹⁴*Tumeo v. University of Ala.*, No. 4FA-94-43 Civ., 1995 WL 238359 (Ala. Super. Jan. 11, 1995).

³¹⁵*University of Ala.*, 933 P.2d at 1156.

³¹⁶*Id.* at 1149.

³¹⁷*Id.*

³¹⁸*Id.*

married employees to a greater extent than it compensates unmarried employees" and that "using marital status as a classification for determining which of its employees will receive additional compensation in the form of third-party health coverage ... violates state laws prohibiting marital status discrimination."³¹⁹ Further, the court concluded that the definition of "dependent" that the University used was unlawful.³²⁰

The University admitted that it discriminated against the employees based on their marital status by "paying them less compensation than it pays other similarly-situated employees."³²¹ However, they argue that this discrimination did not violate the Human Rights Act, because the legislature did not intend to prohibit such discrimination.³²² The Supreme Court of Alaska disagreed with this argument and held "[t]he clear and unambiguous language of the Human Rights Act forbids discrimination in employment on the basis of marital status."³²³ As the superior court noted, "to allow this basis for disparate treatment would be to eliminate the prohibition against marital status discrimination. Any employer could raise the argument with respect to any item of employee compensation."³²⁴

D. Equal Protection

As noted earlier in the introduction, employers that do offer domestic partner benefits do not always extend these benefits to both homosexual and heterosexual unmarried partners. Some employers offer these benefits to homosexual couples only. These employers believe that heterosexual couples have the option of marriage, whereas, gay and lesbian couples do not.³²⁵ Depending on state law and whether the government is the employer, this reasoning leaves open the possibility of an equal protection challenge.

An unmarried heterosexual couple, who has been denied benefits where benefits are offered to homosexual couples, may attempt to argue an equal protection violation based on gender discrimination. The argument may be based on the fact that both the opposite- and same-sex couple are unmarried, and the only reason for the denial of benefits to the opposite-sex couple is the fact that one of the partners in the relationship is of a different gender than the other. If such an argument could be made successfully, the court may use an intermediate standard of review when

³¹⁹*Id.* See also *Tumeo*, 1995 WL 238359, at *6, *8.

³²⁰*University of Ala.*, 933 P.2d at 1149; see also *Tumeo*, 1995 WL 238359, at *6.

³²¹*University of Ala.*, 933 P.2d at 1150.

³²²*Id.* at 1152.

³²³*Id.*

³²⁴*Tumeo*, 1995 WL 238359, at *9.

³²⁵Alastair Goldfisher, *Who Are Domestic Partners?*, BUS. J., Aug. 21, 1995, available in 1995 WL 12104753; see also Rachel Gordon, *Katz Eyes Partners Laws for Gays Only, Asks City Attorney for Opinion on Excluding Straights; Such a Change Would Face Fierce Fight*, SAN FRANCISCO EXAMINER, May 16, 1997, available in 1997 WL 4339648 (discussion of San Francisco's ordinance and impact on companies doing business with the city which offer benefits to same sex partners only); see also Hodges, *supra* note 13.

making its decision. Intermediate analysis is generally associated with cases involving gender discrimination.³²⁶

The intermediate standard of review is not as difficult for the government to meet as the strict scrutiny standard of review which requires a compelling state interest in order for the government to prevail.³²⁷ In addition, the intermediate standard involves far less deference to the legislature as does the rational basis test.³²⁸ Under the intermediate standard, a classification will not be upheld unless it is found that such classification has a "substantial relationship" to an "important" government interest.³²⁹

Therefore, when arguing gender discrimination based on the fact you are an unmarried heterosexual couple as opposed to a homosexual couple, it must be shown that the law or policy is not substantially related to an important governmental interest. The government may argue that they have an important interest in the preservation of marriage and the maintenance of family; however, they may be contradicting this argument by offering privileges to some unmarried couples—homosexuals—while excluding non-married heterosexual couples.

Another way a non-married heterosexual couple may bring an equal protection challenge is by alleging discrimination on the basis of sexual orientation. In 1997, in the City of Milwaukee, the City Attorney's office issued a legal opinion which stated that any domestic partner benefit proposal must include heterosexuals as well as homosexuals.³³⁰ According to the opinion, failure to include heterosexuals would discriminate on the basis of sexual orientation.³³¹ In addition, the City of Oakland may face a court challenge to its domestic partner law based on sexual orientation discrimination because it extends benefits to homosexual couples and not unmarried heterosexual couples.³³² If such a challenge prevails, other employers offering domestic partner benefits to same-sex couples only may face similar challenges.

Although some have argued for strict scrutiny review in sexual orientation discrimination cases, the basis of review is likely to be rational basis review.³³³ Under the rational basis test, "the classification only has to have a rational relationship to any legitimate governmental interest in order to comply with the

³²⁶O'Brien, *supra* note 66, at 190-91.

³²⁷JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3 at 576 (4th ed. 1991) [hereinafter NOWAK & ROTUNDA]; *see also* O'Brien, *supra* note 66, at 190-91 (strict scrutiny analysis is generally associated with racial discrimination claims).

³²⁸NOWAK & ROTUNDA, *supra* note 327, §14.3 at 576.

³²⁹*Id.*

³³⁰Bill Meunier, *Domestic Partnership Proposal Amended*, WIS. LIGHT (visited, Sept. 14, 1997) <<http://www.wilight.com/archives/09-14-97/page4.html>>.

³³¹*Id.*

³³²Pamela Burdman, *Oakland Faces Legal Fight over Partner Benefits/State Agency Says Policy Favors Same-Sex Couples*, SAN FRANCISCO CHRON., Dec. 3, 1997, available in 1997 WL 6712250; *see also* *Oakland's Same-Sex Benefits Sparks Suit State Agency Wants All Couples Covered*, SACRAMENTO BEE, Dec. 3, 1997, available in 1997 WL 15807761.

³³³O'Brien, *supra* note 66, at 191.

equal protection guarantee."³³⁴ The court will uphold a classification under this standard "unless no reasonably conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."³³⁵

The employee will have to prove that the law or policy has no rational relationship to a legitimate end of government. The government or employer may argue that the preservation of marriage and family is a legitimate end and that not extending benefits to unmarried heterosexual couples is rationally related to that purpose. However, as noted earlier, the government or employer may be contradicting themselves because they are offering benefits to some married employees but not to others. The employee may argue that his or her sexual orientation—heterosexual—is the only basis for denial of such benefits.

The employer or government may be able to argue that unmarried heterosexuals and homosexuals are not similarly situated because heterosexual couples have the option to marry while homosexual couples do not.³³⁶ However, marriage may not be the best option for all heterosexual partners in need of insurance benefits. Although a non-married couple may be as committed to one another as that of a married couple, religious beliefs or financial reasons, such as loss of government benefits, may preclude such a couple from marrying.

In addition, the government may attempt to argue that married couples and homosexual couples are similarly situated in every way except that which is prohibited to them.³³⁷ However, it is difficult to determine whether such an argument will prevail. In cases such as *Hinman*, discussed *supra*, the court ruled that homosexuals were not similarly situated to married couples.³³⁸ However, other courts such as that in *University of Alaska*, discussed *supra*, found that such distinction constituted marital status discrimination.³³⁹

E. Alternative

Employers can avoid liability all together by simply eliminating all family coverage.³⁴⁰ Under that scenario, there are no issues regarding discrimination or equal pay because all employees' partners or spouses receive the same coverage which happens to be none.³⁴¹ However, this puts employees with families at risk of financial disaster should a family member become seriously ill.³⁴² In addition,

³³⁴NOWAK & ROTUNDA, *supra* note 327, §14.3 at 580.

³³⁵*Id.*

³³⁶Hodges, *supra* note 13.

³³⁷Latimer, *supra* note 233, at 334.

³³⁸*Id.* at 333-34.

³³⁹*University of Ala.*, 933 P.2d at 1149.

³⁴⁰Cowan, *supra* note 16, at 632.

³⁴¹*Id.*

³⁴²*Id.*

employers opting not to provide family coverage will likely have trouble attracting and retaining top employees.³⁴³

IV. THE PRESENT SITUATION

In late 1997, Representative Barney Frank of Massachusetts introduced a bill which would make domestic partners of federal employees eligible for health insurance coverage through the federal employee health program. These employees would also be eligible for lifetime survivor benefits under the federal pension, life insurance, and workers' compensation programs.³⁴⁴ Frank said it was time for the federal government to "recognize that people who live in committed relationships, regardless of their sexual orientation or marital status, ought to be eligible for the same basic set of benefits, including health care coverage, life insurance, health insurance and compensation for work injuries."³⁴⁵ Under the bill, labeled Domestic Partnership Benefits and Obligations Act of 1997, the extended health and retirement coverage would go to the following:

*Same- or opposite-sex couples (if one of them worked for the government or postal service) who are "living together, in a committed, intimate relationship."

*Couples who are responsible for each other's welfare and financial obligations.³⁴⁶

Couples would have to submit an affidavit of eligibility for benefits to the Office of Personnel Management. This affidavit would certify that the couple lived together in a committed domestic relationship.³⁴⁷

Also in 1997, lawyers for the New York City Council were asked to draft a domestic partner ordinance similar to one San Francisco adopted.³⁴⁸ Councilman Tom Duane, the bill's backer, wants it to be modeled after the San Francisco ordinance which requires city contractors to offer the same benefits to domestic partners that are extended to spouses.³⁴⁹ The proposal differs from San Francisco's ordinance in that San Francisco requires the couple to register with the city, whereas, New York City's proposal would permit all employees, whether registered or not, to

³⁴³*Id.*

³⁴⁴Mike Causey, *Bill Would Give Partners Benefits to Fed Workers*, SACRAMENTO BEE, Nov. 9, 1997, available in 1997 WL 15804050; *Frank Files Bill Giving Federal Workers Domestic Partnership Benefits* (last modified Jan. 23, 1998) <<http://www.house.gov/frank/netcauc.htm>>; *Frank Wants Domestic-Partner Benefits for Federal Employees*, ADVOC. INTERNET (visited Oct. 30, 1997) <<http://www.advocate.com/html/news/Oct30.html>>.

³⁴⁵Causey, *supra* note 344.

³⁴⁶*Id.*

³⁴⁷*Id.*

³⁴⁸Michael Prince, *New York City Eyes Partner Mandate: Councilman Seeks to Copy Controversial San Francisco Rule*, BUS. INS., Feb. 10, 1997, available in 1997 WL 8293789.

³⁴⁹*Id.*

apply for coverage.³⁵⁰ However, the proposal would require employees to provide some proof of their partner status to employers.³⁵¹

It should be noted that if same-sex marriages become legal, then homosexuals who do marry will likely receive the same benefits legally married couples currently receive.³⁵² This diminishes the need for domestic partnerships of same-sex couples. Should this happen, unmarried heterosexuals who are challenging laws and policies that offer benefits to same-sex partners may find that their argument of being "similarly situated" does not have the same impact as it did before. It would then be an argument of "unmarried" versus "married" employees. There would be no group of employees, other than blood relatives and others such as minors, that would not be allowed by the state to legally marry. The equal protection argument for unmarried heterosexuals would not have the same "bite" as it did prior to the legalization of same-sex marriages.

The federal government, however, has recently passed the Defense of Marriage Act (DOMA), which may severely limit the number of states recognizing same-sex marriages. DOMA allows states to choose not to recognize same-sex marriages that were performed in other states.³⁵³ Several states have enacted legislation prohibiting the recognition of such marriages.³⁵⁴ However, if a state does lift the ban on same-sex marriages, DOMA will likely face constitutional challenges under both the Full Faith and Credit Clause and the Equal Protection Clause.³⁵⁵

V. CONCLUSION

The traditional concept of family is changing in the face of judicial and legislative recognition of a broader definition of family. Because of this change in the family structure, domestic partnerships have developed. These arrangements offer an alternative to marriage for both same- and opposite-sex couples who either cannot marry or choose not to marry due to religious reasons or other consequences.

As case law indicates, there is no consistency of judicial review in the area of domestic partnerships. However, given the number of private and public employers currently offering such benefits, it appears that domestic partnerships are becoming the norm in our society. In addition, as governments and private employers vow not

³⁵⁰*Id.*

³⁵¹*Id.*

³⁵²In *Baehr v. Miike*, No. 91-1394 (Haw. 1st Cir. Dec. 3, 1996), the court held that the State of Hawaii had failed to show any compelling reason for the existing ban on same-sex marriages and found the ban unconstitutional. In 1998, the Hawaii voters approved a constitutional amendment giving the legislature the authority to limit "marriage" to opposite sex couples. The proposed amendment - 'Shall the Constitution of the state of Hawaii be amended to specify that the Legislature shall have the power to reserve marriage to opposite-sex couples?' -- was approved by 285, 381 "yes" votes (69.2%) to 117,827 "no" votes (28.6%). See *Damon Key Leong Kupchak Hastert Home Page* (visited Sept. 30, 1999) <http://www.hawaiiilawyer.com/same_sex/samestat.htm>.

³⁵³Cindy Tobisman, *Marriage v. Domestic Partnership: Will We Ever Protect Lesbians' Families?*, 12 Berkeley Women's L.J. 112, 115 (1997).

³⁵⁴*Id.*

³⁵⁵*Id.*

to discriminate based on marital status and sexual orientation, court challenges may arise if these employers do not extend the same benefits to their unmarried employees as they do to their married employees.

Although many employers currently offer domestic partner benefits to the same-sex partners of their employees, some of these employers choose not to offer such benefits to opposite-sex partners of unmarried employees. This may open the door for a discrimination or equal protection challenge. Employers argue that the differential treatment between unmarried opposite-sex and same-sex couples is warranted, because same-sex couples do not have the option to marry. However, there may be compelling reasons why opposite-sex couples cannot marry, therefore, defeating that argument.

In order to avoid preemption, domestic partnership legislation should be enacted at the state level. Such legislation allows social and legal recognition of these non-traditional unions and confers benefits without designating the relationship as a marriage.³⁵⁶ This approach may be less oppressive to unmarried, but committed couples.³⁵⁷

Although great strides have been made in the area of domestic partnership, not all employers or jurisdictions recognize a need to confer such benefits. If employees with non-traditional families want their employers to offer such benefits, they must continue to lobby for these benefits by pointing out the unfairness and inequities in not offering such benefits.³⁵⁸ As employees become more aware of compensation differentials based upon marital status, there will likely be more of a push on employers by their employees to offer such benefits.³⁵⁹ In addition, ordinances such as the one San Francisco enacted may force employers to offer these benefits whether they want to or not.³⁶⁰

Most employees rely on employment benefits for themselves and their families. These benefits are considered part of an employee's compensation package and provide financial and emotional support in the area of health care and retirement.³⁶¹ No matter where you look in our society, benefits and protections are being offered to married couples that are not available to unmarried couples.³⁶² As employers begin to recognize that offering benefits to non-traditional families of their employees can be achieved at minimal cost, they may be more willing to extend

³⁵⁶Treuthart, *supra* note 21, at 123.

³⁵⁷*Id.*

³⁵⁸Hargrove, *supra* note 63, at 59.

³⁵⁹*Id.*

³⁶⁰In 1997, San Francisco passed legislation requiring all city contractors to offer domestic partner benefits to their employees. *See generally, Business Learns to Live with Domestic Partners*, SAN FRANCISCO BUS. TIMES, Mar. 28, 1997, available in 1997 WL 7732127.

³⁶¹Averill, *supra* note 200, at 280.

³⁶²*Id.*

these benefits.³⁶³ These employers will be able to attract and keep good employees by offering benefits their competitors do not.

DEBBIE ZIELINSKI

³⁶³*Id.*