

GLAD

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EQUAL JUSTICE UNDER LAW

Domestic Partnership Benefits

Overview

December 2010

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800.455-GLAD (4523) or 617.426.1350

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Domestic Partnership - Quick Overview

What is a domestic partnership?

“Domestic Partnership” is now a common term and is often used to describe a committed couple who are not married--usually a same-sex couple, but sometimes heterosexual couples as well. In addition to the cultural understanding, the term “domestic partnership” can sometimes have legal consequences as well.

How can a domestic partnership be recognized for financial or legal purposes?

Committed couples often have emotional and economic bonds: sharing a deep and abiding love, splitting rent or a mortgage payment, jointly owning a car or other assets. But without taking formal legal precautions, the law treats them as though they are unrelated strangers. In other words, for financial and legal purposes, the couple is typically treated as two separate, unconnected individuals – not as a unit. Only civil marriage, civil unions and some state-sponsored domestic partnerships automatically confer an enormous edifice of legal protections and responsibilities on committed couples.

A domestic partnership can be a means to securing rights for a couple in limited but important circumstances, each described in greater depth below.

- Vis-à-vis each other: Some couples choose to enter into legal contracts or domestic partner agreements regarding their property and financial issues;
- Vis-à-vis one’s state or home town: Some states, cities or towns allow unmarried couples to register their domestic partnership as part of a “domestic partnership registry.” Often, this is symbolic only, with no concrete rights or responsibilities attached, but in some places registered domestic partners are given specific rights. For example,

Colorado, the District of Columbia, Hawaii, Maine, Maryland and Wisconsin offer limited rights to same-sex couples, while California, Oregon, Washington and Nevada offer essentially all the same state benefits that are offered to different-sex married couples.

- *Vis-à-vis one's employer:* Some employers offer health insurance or other benefits to domestic partners of employees just as they do with spouses. Both private and government employers can offer these benefits, and they can also include leave benefits (bereavement, family, parenting), travel and relocation expenses, family discounts and the like. However, if you leave an employer that offers domestic partner benefits for a job without those benefits, your only recourse is to try to persuade your new employer to start a domestic partner plan.

How can an unmarried couple protect their family legally?

Any lawyer will tell you that it depends on your individual circumstances. A few of the more common documents are:

- *Medical Power of Attorney or Health Care Proxy* – to ensure that your domestic partner (or whoever else you choose) has the right to make medical decisions for you if you become sick and incapacitated.
- *Will* – to designate who will take care of your final affairs and to distribute your property (however large or small). For people with children, a will is important for nominating the guardian you will want to care for your children after death.
- *Declaration As To Remains/Funeral Plans* – to indicate what you want to happen to your body when you die.
- *Financial Power of Attorney* – to take care of your financial affairs if you are unable to do so.

- *Domestic Partner/Cohabitation Agreement* – to sort out your financial affairs, both during the relationship, and in the event of a break up.

An attorney can help you decide which types of documents are appropriate for your situation, and also give you advice about tax and estate planning, including the advisability of joint ownership of homes and accounts. Those couples with children have an additional set of concerns to address with respect to adoption, co-parenting agreements, co-guardianships, wills and other matters.

For further information or for attorney referrals, feel free to call the GLAD Legal InfoLine at 800-455-GLAD, Monday – Friday, 1:30 – 4:30 pm.

What is a “domestic partnership registry”?

Some states, cities and towns have set up domestic partnership registries where couples can officially register their domestic partnership. Having a document that demonstrates your committed relationship may be valuable for a variety of different situations (for example, to declare yourselves to the world, to obtain benefits from a municipal employer).

However, unless state or local law says otherwise, there are not necessarily any benefits or responsibilities that flow directly from registering a domestic partnership. In certain places, registering a domestic partnership does provide concrete rights; it will qualify a couple for certain benefits within the state, town or city. For example, both California and Oregon offer domestic partnership registries that provide essentially all the state benefits that a different-sex married couple receive.

In many cases, one does not need to be a resident in order to register a domestic partnership. Cities and towns in New England that have

domestic partner registries include Boston (MA), Cambridge (MA), Provincetown (MA), Hartford (CT), and Portland (ME).

What are employer-based domestic partnership benefits?

If an employer offers domestic partnership benefits, this allows an employee to obtain for his or her partner (and sometimes their children) benefits that typically have been limited to married spouses. These can include health insurance, family leave, bereavement, relocation, tuition waiver, etc., and vary from employer to employer. Such benefits are not transferable from job to job; if a given employer offers domestic partnership benefits, they are offered as specific terms of employment. If you leave your job, you also leave the benefits.

Are there legal obligations associated with formalizing domestic partnerships?

This is an evolving area of the law. In some situations, after a couple has separated, one of the partners has argued to a court that the fact that the couple had been registered domestic partners (in a city or town, or through the workplace) means that the couple should be treated as having contracted for marital-type obligations. In other words, that the existence of the domestic partnership is a basis for dividing property acquired during the relationship on some basis other than how the property is titled. Before signing an affidavit or other legal document associated with receiving domestic partnership benefits, you may want to consult an attorney.

Frequently Asked Questions

About Employment-Based DP Benefits

What are the requirements for having a domestic partnership recognized in the workplace?

First off, the employer has to be willing to create a domestic partner plan. As a general matter, there is nothing to compel an employer to create a domestic partner plan.

Each employer can create its own definition of domestic partner. The common criteria are that the partners:

- Live together (sometimes for a specified period of time – 6 mos. to a year)
- Are financially interdependent
- Are not blood relatives in a way which would bar marriage
- Are at least 18 years old
- Are not legally married to anyone else
- Agree to inform the company in the event that they are no longer domestic partners.

In some cases, a couple will simply sign an affidavit (a sworn statement) certifying that they are financially interdependent. In other situations, the employer may require certain forms of documentation, such as a shared lease or joint checking account. A couple will not have to demonstrate that they split everything 50/50, but simply that they both contribute to shared expenses. In some situations, the employer may use a term other than “domestic partner” such as “spousal equivalent” or “life partner”.

Do federal employment protections extend to domestic partners?

Federal laws about employee benefits are designed only with a mind toward different-sex married employees and their children. They do not

equally protect the rights of employees with domestic partners.

- **COBRA:** The federal COBRA law allows an employee to maintain health insurance coverage at his or her own expense after leaving a job. The idea is to avoid gaps in insurance coverage.

More specifically, employers subject to COBRA (Consolidated Omnibus Budget Reconciliation Act of 1985) are required to allow qualified beneficiaries who lose coverage due to a qualifying event (ex. being fired) the opportunity to self-pay for coverage for a limited amount of time. However, domestic partners are not included in the definition of “qualified beneficiaries”, so the terms of COBRA do not apply to them. Employers that provide domestic partnership benefits may choose to provide “COBRA equivalent” continued coverage for domestic partners of employees; however, this is purely within the employer’s discretion.

- **The FMLA:** The Family and Medical Leave Act of 1993 (FMLA) requires employers subject to the FMLA to allow qualifying employees up to 12 weeks of leave each year for certain family or medical reasons, including the serious health condition of a spouse. Because the FMLA contains no provisions regarding leave to care for a domestic partner, some employers may choose to provide “FMLA equivalent” benefits for domestic partners of employees, although this is also purely within the employer’s discretion.
- **ERISA Pension Protections:** Another right commonly accorded to spouses is the right to agree or not to agree in advance if the employed spouse decides to name someone other than the spouse as the beneficiary of the employee’s pension. Similarly, a spouse has the right to sign off on his or her partner’s designation of another person for survivor benefits. Neither of these employment-based rights is extended to domestic partners.

What are the tax consequences of receiving domestic partnership benefits?

Unlike benefits provided to an employee's different-sex spouse, workplace benefits provided to an employee's domestic partner are counted as taxable income to the employee at both the federal and state level, unless the partner also qualifies as an IRS dependent. For example, an employee must pay income tax on the value of his or her domestic partner's health insurance benefits, but does not have to do so for a different-sex spouse.¹ In states where same-sex couples can marry or enter into civil unions, benefits provided to an employee's same-sex spouse are taxed at the federal level but NOT at the state level. Also, Rhode Island passed a law which exempts the spousal health benefits of both domestic partners and same-sex married couples from state taxation, but there is still a tax on the benefit at the federal level.

Why do some companies offer domestic partnership benefits to both same-sex and opposite-sex couples?

There are many possible reasons for an employer to make this choice. Some feel that the purpose of benefits is to help the families of their employees, and they are not going to pick and choose what families deserve support. In other situations, an employer may believe that a same-sex only policy will violate their non-discrimination policy. (Some same-sex-only plans have been challenged as discriminating based on sex, with mixed results.) Still others believe that domestic partnership policies should only apply to same-sex couples, because same-sex couples cannot currently marry anywhere in the United States except Massachusetts.

¹ See Internal Revenue Code, Private Letter Ruling 9603011 (Jan. 19, 1996).

Advocating for DP Benefits

I'm interested in trying to lobby my employer to offer domestic partnership benefits. What should I do?

Private Employees – Because of the lack of clear legal mandates requiring employers to offer domestic partnership benefits, employees who want to persuade their employers will have to demonstrate why extending benefits is good for hiring as well as employee retention and morale, as well as making the arguments about basic fairness and equity. They may also have to respond to employers' concerns regarding cost. Employees may also want to point out the competitive value associated with offering these benefits by comparing its workplace with similar employers who already provide benefits. It is generally helpful to organize with fellow employees, or to network with employees at other companies that are facing or have faced this situation.

Public Employees – Obtaining domestic partnership benefits at the state or municipal level is likely to require legislative change. Again, coalition-building will be important.

In both the public and private sectors, if you are a member of a union, you may want to consider pursuing domestic partnership benefits through the collective bargaining process. Again, state laws sometimes foreclose government workers from receiving certain benefits unless there is first a change in underlying insurance laws.

Some Tips for Organizing:

- 1) Form a LGBT employee group. It may be easier to make an impact if you're not working all alone.
- 2) Find out if your employer has a non-discrimination policy that covers sexual orientation or marital status. Does your company have a strong commitment to diversity? If so, it is a strong basis for making your case. If not, consider whether it makes sense to start educating your employer about equity and the diversity of its employees by starting with this step.

- 3) Look at other employers similar to yours. Do they offer domestic partnership benefits? What do their policies include? Your employer may want to keep up with others so as not to lose good employees to a competitor.
- 4) Look at your employer's current policy regarding benefits for spouses. What changes would need to be made in order to make the policy inclusive?
- 5) Find out who is responsible for making changes to your company's policy. How does the process work? What steps need to be taken?
- 6) If you know of employees at companies similar to yours that have organized around this issue, find out what strategies they used. Were they successful?
- 7) Investigate the cost issue. Your employer will want to know how domestic partner benefits will affect the bottom line.
- 8) Draft a proposal for domestic partnership benefits.

What is the cost of extending domestic partner benefits?

Some employers express concerns that extending domestic partner benefits might increase their health care costs. Research has shown that extending domestic partner benefits to employees' same-sex partners typically boosts coverage and costs by less than 1 percent.² When employers realize that the figure is very small, it may also help for them to consider the costs in social context. It is unlikely that employers would raise cost concerns if the same employees married and chose to cover their spouses under their health plans.

How do I find out if other employers in my field already extend benefits?

No list is ever 100% up to date, so the best thing to do is start with a list (see *Additional Resources* below) and then contact those entities to confirm, and place additional calls yourself to others not on the list.

² Badgett, M.V. Lee. 2001. *Money, Myths, and Change: The Economic Lives of Lesbians and Gay Men*. Chicago: University of Chicago Press.

My employer is willing to offer domestic partnership benefits, but our insurance company will not. What's going on?

In some cases, an employer may be willing to offer domestic partnership benefits, but will encounter resistance from the insurance company. For example, an insurer may require a company to have a minimum number of employees before offering domestic partnership benefits.

In general, insurers are allowed to set guidelines and requirements for the coverage they provide. When insurers refuse to extend coverage to domestic partners, it is usually because the insurer has decided not to underwrite such policies, and not because of external laws or regulations. Sometimes, insurance companies can be convinced to change their policies through lobbying efforts, especially if they come from the human resources department at the company. It may be worthwhile to investigate whether other employees at your company and elsewhere are pressuring the same insurer, and whether coalition-building would be possible.

State-Specific Information for New England

Are domestic partner health benefits offered to state employees?

CT: Not any longer. Although Connecticut offered domestic partnership benefits for its state employees for several years, there was an agreement that when marriage became available to same-sex couples those benefits would only be available to married or civil union spouses. Beginning in November 2009 domestic partnership benefits were terminated.

MA: Generally, no, except all Massachusetts state employees who are married can obtain benefits for their spouse. Certain managerial employees have expanded leave rights for their partners, according to the terms of a 1993 Executive Order by then-Governor Weld and some unions have bargained successfully for leave benefits. Overall, state employees do not have equal access to health benefits or other employee benefits for their partners, and the state pension system does not allow people to name unmarried partners as beneficiaries of an employee's pension. However, gay or lesbian state employees who are in a marriage can obtain benefits for their spouse.

ME: Yes. State employees can receive health insurance for their domestic partners. Domestic partners of employees of the University of Maine System can receive health insurance, tuition waiver, access to university facilities, and all spousal benefits not restricted by federal law.

[*Note:* State law requires insurers and other entities that provide health coverage including spousal benefits to also make available to group policyholders the *option* for additional benefits for domestic partners of employees. However, employers are in no way *obligated* to offer domestic partner benefits.]³

³ See 24-A M.R.S.A. §§ 2832-A, 2741-A, 4249 and 24 M.R.S.A. § 2319-A.

RI: Yes. Those who are interested in receiving such benefits are required to submit an affidavit to the benefits director of the division of personnel certifying that they fall under certain requirements, which includes providing proof of financial interdependence.

NH: In May 2006, the Merrimack County Superior Court ruled in *Bedford and Breen v. New Hampshire Technical College System*, a case filed by GLAD, that the denial of insurance and leave benefits to the families of two New Hampshire state employees constituted both disparate treatment and disparate impact violations of the New Hampshire law against sexual orientation discrimination in employment. Although the State of New Hampshire appealed this case to the New Hampshire Supreme Court, the State dropped its appeal in May 2007, in light of the passage of the civil union law, which requires that civil union spouses of state workers be provided access to health benefits. Since New Hampshire now allows same-sex couples to marry, gay and lesbian state workers who are married are also able to obtain benefits for their spouse.

VT: Yes, the State's Personnel Policies and Procedures extend domestic partnership benefits to state employees. The benefits include medical benefits, bereavement and visitation rights. State employees interested in receiving health and dental for their partners should contact the Department of Human Resources at (802) 828-3455 for an application. The application can also be found at: http://humanresources.vermont.gov/sites/dhr/files/pdf/benefits_compensation/DHR-Domestic_Partner_App_Policy.pdf. In addition, the married and civil union spouses of Vermont state employees are also eligible for benefits.

Can cities and towns provide domestic partner benefits to their own employees?

CT: Yes. Some towns including Avon, Cromwell, East Granby, Mansfield, North Stonington, Simsbury and West Hartford provide medical and dental benefits to domestic partners of town employees.

MA: While several cities and towns have done so in the past, a 1999 court ruling found that Boston did not have the power to expand the reach of the state insurance laws by including domestic partners in the group health system.⁴

ME: Yes. Many lawyers also believe this result is required by the non-discrimination law if the city or town provides benefits to heterosexual couples.

It is also possible that under Maine's mini-COBRA law for companies with fewer than 20 employees (sexual orientation is not covered by the Federal COBRA law), employees with domestic partners will have the same right as heterosexual couples to maintain health insurance coverage after employment ends.⁵

Some employers provided these benefits before the non-discrimination law was amended to include sexual orientation. For example, the City of Portland extends domestic partner benefits, including health insurance, to qualified domestic partners of City and School Department employees. In order to qualify for such benefits, an employee must have his or her partnership registered by the City and must provide the City or School Department with two or more forms of proof exhibiting that they are jointly responsible for each other's common welfare and share financial obligations. Examples of such proof include the joint mortgage or ownership of property; the designation as a beneficiary in the employee's will, retirement contract or life insurance; a notarized partnership agreement or relationship contract; and any two of the following: a joint checking account, a joint credit account, a joint lease, or the joint ownership of a motor vehicle.⁶

Note that municipal domestic partner plans have withstood a court challenge. In 2004, GLAD, together with the Portland City Attorney and cooperating counsel, successfully represented the City of Portland in a

⁴ *Connors v. Boston*, 430 Mass. 31 (1999).

⁵ 24-A Me. Rev. Stat. secs. 2849-B & C.

⁶ Portland, Me. Code, sec. 13.6-21 (2001). Available at: http://www.portlandmaine.gov/Chapter013_6.pdf.

challenge to the domestic partnership registry system and benefits offered there. The claim was that the domestic partnership law was superceded by the state anti-gay, anti-marriage law. See Pulsifer v. City of Portland, http://www.glad.org/GLAD_Cases/Pulsifer_Decision.pdf and http://www.glad.org/News_Room/press74-5-4-04.html.

In addition, the cities of Bar Harbor and Camden and the County of Cumberland provide domestic partner health insurance benefits to their employees. Portland also maintains a domestic partner registry which allows people to register their relationships and receive family memberships and rights in city-run facilities.

RI: Providence has ratified contracts with unions representing a majority of city employees that will provide domestic partner benefits for both same- and opposite-sex partners of city employees. As of now, non-union employees of the city may not be eligible for benefits because of the provisions of the Home Rule Charter. It remains to be seen whether other cities or towns will offer domestic partnership benefits.

NH: As of September 2002, the city of Concord offers insurance coverage for domestic partners of teachers. No one has challenged the power of a city or a town to offer domestic partnership benefits, and the New Hampshire Supreme Court has not ruled on the matter. A couple of other towns have offered domestic partnership benefits to some of their employees. Municipal employees who are in a civil union can obtain health benefits for their civil union spouse.

VT: Yes. Some of the cities that offer medical benefits for domestic partners of municipal employees include Burlington, and Middlebury. Employees who are in a civil union can obtain health benefits for their civil union spouse.

Can I use the state non-discrimination law to force my employer to provide domestic partnership benefits?

In New Hampshire, Connecticut, Vermont and Maine, this is an open question. On the one hand, the non-discrimination law says that an

employer can't discriminate on the basis of sexual orientation in terms of compensation, and employee benefits are a form of compensation. (Connecticut also forbids marital status discrimination). But on the other hand, lawsuits in other states have largely failed with these types of claims on the grounds that all unmarried people -- gay and non-gay alike -- are denied benefits, so there is no sexual orientation discrimination. What is clear is that a private or public entity may provide domestic partner benefits; the only question is whether the employer could be forced to do so through the non-discrimination law.

In Massachusetts, the non-discrimination law contains an explicit exemption stating that it cannot be used to require an employer to provide domestic partnership benefits.⁷ Similarly, in Rhode Island, the state non-discrimination law states that “nothing herein shall require those benefits to be offered to unmarried partners of named employees.”⁸ Thus, an employer is free to provide domestic partner benefits if it chooses to do so, but it cannot be forced to do so under these non-discrimination laws.

⁷ (Laws 1989, chap. 516, § 19)

⁸ R.I. Gen. Laws, § 28-5-7 (1)(ii).

Additional Resources

National Gay & Lesbian Task Force

http://thetaskforce.org/reports_and_research/dp_manual

Domestic Partnership Organizing Manual, by Sally Kohn (May 1999). This manual offers an overview and definition of domestic partnerships, as well as specific recommendations concerning the process of lobbying for domestic partnership benefits, including sample letters. It also provides a list of domestic partnership benefit information at various companies, municipalities and universities, including sample affidavits and documents.

Human Rights Campaign – WorkNet

<http://www.hrc.org/issues/workplace.asp>

Offers a comprehensive and up-to-date listing of workplaces that offer domestic partnership benefits and of insurance companies that will underwrite domestic partnership benefit plans, as well as a general overview of domestic partnership.

Gay & Lesbian Advocates & Defenders (GLAD)

www.glad.org

GLAD may be able to provide additional material about domestic partnership benefits to supplement this overview. For supplemental materials, contact GLAD's Legal Information Hotline at 800-455-GLAD, 1:30 - 4:30 pm, Monday - Friday.

Partners Task Force for Gay & Lesbian Couples

<http://buddybuddy.com/partners.html#heading-6>

Partners Task Force has a bibliography of resources and articles about domestic partnerships.

Gay & Lesbian Advocates & Defenders (GLAD) is the leading legal rights organization in New England dedicated to ending discrimination based on sexual orientation, HIV status and gender identity and expression. Through impact litigation, education and public policy work, GLAD seeks to create a better world that respects and celebrates diversity—a world in which there is equal justice under law for all.

GLAD's Legal Infoline and publications are provided *free of charge* to all who need them. We hope that those who are able will make a contribution to ensure that GLAD can continue the fight for equal justice under the law.

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Thank You!



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