

Equal Benefits For Equal Work? The Law of Domestic Partner Benefits

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Momentum mounts to give employee benefits to unmarried couples. Employers' interest in offering health and other benefits to same and opposite-sex unwed partners is rising at an almost exponential rate . . . About five hundred employers offered the benefits to unmarried partners [in 1997], up from about 200 in 1994.¹

The nation seems schizophrenic about domestic partner benefits. Same-sex marriage has not yet been legalized in any state.² On the one hand, local governments and private corporations increasingly embrace the concept of providing employees with these benefits. On the other hand, state and federal governments have simultaneously thrown up legislative roadblocks to providing domestic partner benefits. Regardless of what the government is doing, it is clear that a trend is emerging among private employers to offer domestic partner benefits to their employees. The trend is being led by some of the nation's most respected corporations, including Microsoft, Levi Strauss, Xerox, IBM, Walt Disney, Auto Desk, Bank of America and Chevron, all of whom offer, or plan to offer, health benefits to the domestic partners of their employees. Additionally, nationwide more than 40 governments (from the City of San Francisco to the State of Vermont), and 130 colleges and universities (from Stanford University to the University of Iowa), offer domestic partner benefit programs.

These programs are being adopted in the wake of the growing acceptance of gay rights. As Governor Angus King of Maine said this year at the signing ceremony of the Maine gay rights bill, "We have enemies in Maine. They are poverty, disease, and ignorance. They are not gay

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1. Albert Karr, *Work Week*, WALL ST. J., May 6, 1997, at 1.

2. Hawaii, however, has a case pending that could make Hawaii the first state to recognize same-sex marriages. See *Baehr v. Miike*, 910 P.2d 112 (1996). The Hawaiian Supreme Court is expected to rule during 1998.

people."³ With increasing sentiments toward the acceptance of gay rights, employers may soon find themselves at a competitive disadvantage if they choose not to offer domestic partner benefits.

Although all of the domestic benefit programs adopted to date have met with both applause and criticism, the most highly publicized, and greatly debated program, has been the San Francisco Domestic Partner Ordinance⁴ (Ordinance). San Francisco's Ordinance marks the first time a governmental entity has mandated that private employers provide benefit plan coverage for domestic partners. As of June 1, 1997, the Ordinance requires any entity contracting with the City and County of San Francisco to treat domestic partners the same as spouses for all employee benefit plan purposes.⁵ The Ordinance has implications for even those employers who aren't directly affected by its mandate. Some employers have been inspired by the Ordinance to evaluate the business advantages of offering domestic partner benefits voluntarily, even though they aren't legally required to do so. Other employers have been scared away from offering domestic partner benefits by the legal challenges mounting against the Ordinance. Three such legal challenges have already been filed, asserting that the Ordinance is preempted by the federal Employee Retirement Income Security Act (ERISA),⁶ and more are bound to follow.

Although the judicial fate of the Ordinance and similar laws may not be known for many years, now is the time for employers to consider, or reconsider, the pros and cons of offering domestic partner benefits. Among the disadvantages of offering domestic partner benefits is the risk that some of an employer's employees and customers may voice philosophical or moral objections. This risk, however, can be minimized or eliminated through strategic plan design and communications. Notwithstanding these potential disadvantages, there are many advantages to an employer offering such benefits, including:

- Reinforcing an employer's policy of nondiscrimination;
- Protecting an employer from claims of sexual orientation discrimination; and
- Helping the employer attract and retain both customers and employees who support gay and lesbian rights.

Regardless of how the courts resolve the legal battle over legislatively-mandated domestic partner benefits, employers may be able to profit from these advantages now by voluntarily offering such benefits. However, attempts at evaluating whether to voluntarily offer domestic

3. Leslie Gevitz, *REUTERS N. AM. WIRE*, May 25, 1997. A Maine referendum, however, invalidated this new law on February 10, 1998. Susan Kinzie, *Referendum Election Set for February*, *BANGOR DAILY NEWS*, Nov. 27, 1997.

4. *SAN FRANCISCO, CAL. ADMIN. CODE* §§ 12B.1-12B.5.1 (1996).

5. *Id.* at § 12B.1(b).

6. 29 U.S.C. §§ 1001, *et seq.* (1994).

partner benefits in this time of changing attitudes and laws is a challenge. In order to assist employers, benefit managers and attorneys with this challenge, this article examines: 1) the evolving law of domestic partner benefits; 2) the legal ramifications of San Francisco's Domestic Partner Ordinance; 3) the business advantages and disadvantages of offering domestic partner benefits; and 4) examples of domestic partner benefit programs.

I. The Evolving Law of Domestic Partner Benefits

Gay and lesbian employees often are denied benefits for their domestic partners because they are unable to legally marry, and as such, their partners don't qualify for coverage as "spouses" or "dependents" under their employers' benefit plans. Homosexual employees have responded with legal action, both judicial and legislative. Judicial efforts have focused on challenging the denial of requests for domestic partner benefits and same-sex marriage under state constitutions and state statutes prohibiting employment discrimination on the basis of marital status, sex, or sexual orientation. Legislative efforts have focused on passing statutes that mandate employer-provided domestic partner benefits. Until recently, these efforts have met with limited legal success. However, the legal tides are now beginning to turn. For example, the Hawaiian Supreme Court is on the verge of legalizing same-sex marriage. Also, Hawaii and the City of San Francisco, as noted above, have enacted legislation that requires employers to provide domestic partner benefits.⁷

A. Legal Challenges to the Denial of Domestic Partner Benefits

1. Equal Protection Claims Under State Constitutions

Several different types of equal protection arguments have been adjudicated under various state constitutions by homosexual employees challenging the denial of benefits to their domestic partners.

One form of the equal protection argument has claimed that homosexual employees with same-sex domestic partners are similarly situated to heterosexual employees with spouses. As such, the argument continues, when employers deny benefits to domestic partners while providing benefits for spouses, they treat homosexuals differently than heterosexuals, and thus violate homosexuals' rights to equal protection under the state constitution.

To date, courts have rejected this type of equal protection argument. For example, in *Hinman v. Department of Personnel Administration*,⁸ the California Court of Appeals held that the denial of domestic partner

7. SAN FRANCISCO, CAL. ADMIN. CODE § 12B1.1(b) (1996); HAWAII FAIR EMPLOYMENT PRACTICE LAW, Title 21, Ch. 378, § 378-2(6) (1997).

benefits did not violate the equal protection clause of the California Constitution because:

[Homosexual] plaintiffs are not similarly situated to heterosexual . . . employees with spouses. They are similarly situated to other unmarried . . . employees. Unmarried employees are all given the same benefits; plaintiffs have not found that unmarried homosexual employees are treated differently than unmarried heterosexual employees.⁹

Given that courts have been reluctant to find that homosexual employees with domestic partners are similarly situated to heterosexual employees with spouses, a second form of the equal protection argument has emerged. Assuming *arguendo* that the correct equal protection comparison is between married and unmarried employees, the argument asserts that the denial of benefits to domestic partners violates the equal protection rights of unmarried employees, both homosexual and heterosexual, because there is no rational relationship between the classification upon which benefits are conferred—i.e., marital status—and a legitimate government interest.

To date, courts have also rejected this type of equal protection argument. In *Rutgers Council of AAUP Chapters v. Rutgers State University*, for example, the Superior Court of New Jersey held that a denial of domestic partner benefits is rationally related to a government's interest in efficient administration:

[A] policy of extending health benefits to employees' spouses rather than domestic partners furthers the governmental goal of creating a workable administrative scheme that can be applied in a uniform and objective manner.¹⁰

2. Discrimination Claims Under State Statutes

Many states have passed statutes that prohibit employment discrimination on the basis of various characteristics, including marital status and sexual orientation.¹¹ These state anti-discrimination statutes, like state constitutions, have been used as the legal grounds upon which to attack a denial of domestic partner benefits. Homosexual employees have argued that benefit plans that only provide coverage to the spouses of heterosexual employees, and not to their domestic partners, base a portion of the employees' total compensation on their marital status,

9. *Hinman*, 213 Cal. Rptr. at 416.

10. 689 A.2d 828, at 832 (N.J. Ct. App. 1997).

11. The following legislatures have passed laws that prohibit employment discrimination on the basis of sexual orientation: 1) California (CAL. LAB. CODE § 1102.1) (1997); Connecticut (CONN. GEN. STAT. §§ 46a-81c (1997)); Hawaii (HAW. REV. STAT. §§ 368-1, 378-2 (1996)); Maine (ME. REV. STAT. tit. 5, § 5472 (1996)); Massachusetts (MASS. ANN. LAWS ch. 272, § 98 (1996)); Michigan (MICH. STAT. ANN. §§ 3.548(102), 37.2103(3) (Callaghan 1996)); Minnesota (MINN. STAT. §§ 363.03, 363.12 (1996)); New Jersey (N.J. REV. STAT. §§ 10:2-1, 10:5-4, 10:5-12 (1996)); Rhode Island (R.I. GEN. LAWS §§ 28-5-2-28-5-7 (1996)); Vermont (VT. STAT. ANN. tit. 3, § 495 (1996)); Wisconsin (WIS. STAT. § 111.36 (1995-1996)); and the District of Columbia (D.C. CODE ANN. § 1-2512 (1997)).

or on their sexual orientation, and thus violate various state anti-discrimination provisions. Courts, however, have rejected this argument, because many of the state anti-discrimination statutes contain language exempting benefit plans from the statute's reach. For example, in *Rutgers*, homosexual employees claimed that the denial of benefits to their domestic partners violated the New Jersey Law Against Discrimination by discriminating on the basis of marital status and sexual orientation.¹² The Superior Court of New Jersey held that the plaintiffs' claim was barred because the state anti-discrimination statute specifically excluded benefit programs from its coverage.¹³

In cases where a state's anti-discrimination statute doesn't specifically exempt benefit programs, plaintiffs have been more successful in claiming that a denial of domestic partner benefits is unlawful discrimination. For example, in *University of Alaska v. Tumeo*,¹⁴ unmarried employees claimed that the denial of benefits to their domestic partners violated the Alaska Human Rights Act by discriminating against them on the basis of their marital status. When the cause of action arose, the statute had not yet been amended to exempt benefit plans from its coverage. As such, the Supreme Court of Alaska agreed with the plaintiffs and held that the denial of benefits to their domestic partners violated Alaska's prohibition against marital status discrimination.¹⁵ The victory was short-lived, however, because recently the Alaska Human Rights Act was amended to permit employers to provide "different retirement and health benefits to certain employees by differentiating between the benefits provided to employees with spouses or children and to other employees."¹⁶ As such, claims that a denial of domestic partner benefits brought under the amended Alaska Human Rights Act are likely to follow the analysis of *Rutgers* and fail.

3. Discrimination Claims Under Federal Statutes

Although no federal statute currently bans employment discrimination based on sexual orientation, on June 10, 1997, the 105th Congress moved one step closer to providing such a federal prohibition when it introduced the Employment Non-Discrimination Act of 1997.¹⁷ The bill, modeled after Title VII of the Civil Rights Act of 1964, provides that a covered entity shall not, with respect to employment or employment opportunity, discriminate or retaliate against an individual based on sexual orientation.¹⁸ If enacted, however, this legislation is unlikely to provide much help to homosexuals in their legal efforts to mandate

12. *Rutgers*, 689 A.2d at 829.

13. *Id.* at 837-838.

14. 933 P.2d 1147 (1997).

15. *Id.* at 1156.

16. ALASKA HUMAN RIGHTS LAW, Title 18, Ch. 80, § 18.80.220(c)(1) (1997).

17. H.R. 1858, 105th Cong. (1997).

domestic partner benefits. Like many state anti-discrimination statutes, the bill specifically exempts employee benefit plans from the purview of the statute.¹⁹

B. *Legal Challenges to Prohibitions Against Same-Sex Marriage*

Given that courts have been reluctant to hold that the domestic partners of homosexual employees are equivalent to "spouses" for benefit purposes, gay and lesbian employees have begun to legally attack the problem in a different way. In addition to directly challenging the denial of domestic benefits, they have also attacked the underlying state marriage laws that prohibit same-sex marriage. If homosexuals are allowed to legally marry, then their "domestic partners" become "spouses", who will be eligible for benefits under existing plan language.

1. *Baehr*

In 1993, homosexuals finally achieved long-awaited judicial success in their battle to legalize same-sex marriage. In *Baehr v. Lewin (Baehr I)*,²⁰ the plaintiffs argued that Hawaii's refusal to grant marriage licenses to same-sex couples violated their fundamental and equal protection rights under the Hawaiian Constitution. Although the Supreme Court of Hawaii rejected their fundamental rights argument, it agreed that the state's denial of marriage licenses to homosexual couples was based on their sex.²¹ Departing from precedent under the U.S. Constitution,²² the Hawaiian Supreme Court held that sex-based classifications are subject to strict scrutiny under the Hawaiian Constitution.²³ As such, they remanded the case, with instructions that the lower court overturn the law prohibiting same-sex marriage unless the state could show that the statute furthers a compelling state interest and is narrowly drawn to avoid unnecessary abridgments of constitutional rights.²⁴ On remand, in *Baehr v. Miike (Baehr II)*, the Circuit Court of Hawaii, applying strict scrutiny, held that Hawaii's prohibition against same-sex marriage violates the equal protection clause of the Hawaiian Constitution.²⁵ Although the case is currently on appeal, given its 1993 decision, the Supreme Court of Hawaii is likely to affirm the lower court, and Hawaii will become the first state to legalize same-sex marriage.

19. *Id.* at § 6.

20. 852 P.2d 44 (Haw. 1993) [hereinafter *Baehr I*].

21. *Id.* at 67.

22. *Craig v. Boren*, 429 U.S. 190 (1976) (applying intermediate scrutiny to sex-based classifications).

23. *Baehr I*, 852 P.2d at 67.

24. *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct. 1996) [hereinafter *Baehr II*].

25. *Id.* at *21.

2. Legislative Reactions to *Baehr*

Although the case is still on appeal, the holding in *Baehr II* is already having far-reaching effects across the nation, prompting legislative action from Washington, D.C. to Honolulu.

A. FEDERAL LEGISLATIVE RESPONSE TO *BAEHR*

Congress responded to the possibility that the Hawaiian Supreme Court may legalize same-sex marriage by recently enacting the Defense of Marriage Act (DOMA).²⁶ DOMA attempts to nullify the Full Faith and Credit Clause of the U.S. Constitution²⁷ with respect to same-sex marriages. The Full Faith and Credit Clause provides, in pertinent part, that all states must recognize the public acts, records and judicial proceedings of every other state.²⁸ Thus, Congress feared that if same-sex couples are eventually allowed to marry in Hawaii, then other states may be required, under the Full Faith and Credit Clause, to recognize those marriages, and their attendant legal rights and benefits. As a preemptive strike against the possibility that the Full Faith and Credit Clause may require nationwide recognition of Hawaiian same-sex marriages, DOMA provides:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.²⁹

The constitutionality of DOMA cannot be challenged until the Hawaiian Supreme Court finally decides *Baehr II*. If *Baehr II* is affirmed, then same-sex couples who are married in Hawaii and refused recognition by other states will have standing to attack DOMA's limitations on the Full Faith and Credit Clause.³⁰

When challenged, DOMA is likely to be found unconstitutional under a new analytical framework recently established by the U.S. Supreme Court to review Congressional attempts to legislate changes to the Constitution. In *City of Boerne v. P.F. Flores*,³¹ the Court held that Congress had exceeded its power in enacting the Religious Freedom Restoration Act of 1993 (RFRA).³² In striking down RFRA, the Court stated that Congress only has the power to enforce the Constitution

26. 28 U.S.C. § 1738C (1997).

27. U.S. CONST. art. IV, § 1.

28. *Id.*

29. 28 U.S.C. § 1738C.

30. Mike McKee, *Fights Over Same-Sex Marriage Laws Promised*, THE RECORDER, Dec. 5, 1996, at 1.

31. 117 S. Ct. 2157 (1997).

32. *Id.* at 2158.

through legislation, not to alter its meaning.³³ Congressional changes to the meaning of the Constitution are to be accomplished through the amendment process, not by enacting legislation. In a judicial review of DOMA, the Court is likely to apply a similar analysis. DOMA, by its very language, operates to limit the application of the Full Faith and Credit Clause, and thereby legislatively alters the meaning of a constitutional provision. Under the analytical framework established in *Boerne*, DOMA is likely to be struck down as an excessive exercise of congressional power.

In addition to challenging DOMA as an unlawful abridgment of the Full Faith and Credit Clause, proponents of same-sex marriage are also likely to question DOMA's constitutionality under the equal protection clause, due process clause, right to travel, right to intimate association, and the commerce clause.³⁴

B. HAWAIIAN LEGISLATIVE RESPONSE TO *BAEHR*

The Hawaiian Legislature also legislatively responded to *Baehr II*. In an effort to preserve marriage as a legal institution only between men and women, the Hawaiian Legislature introduced two bills intended to neutralize the effects of a future Hawaiian Supreme Court decision legalizing same-sex marriage.

The first bill proposed that the Hawaiian Constitution be amended to grant the Hawaiian Legislature the power to prohibit same-sex marriage.³⁵ On April 29, 1997, the bill was passed by both houses of the Hawaiian Legislature and currently awaits signature by Hawaiian Governor Ben Cayetano. The constitutional amendment proposal is expected to be placed on the November 1998 state ballot for decision by Hawaiian voters.³⁶ Fearing that many Hawaiian voters may be prompted to vote against the constitutional amendment proposal, not because they support same-sex marriage, but because they support the provision of domestic partner benefits that would accompany same-sex marriage, the Hawaiian Legislature proposed a second companion bill.

The second bill proposed that certain rights and benefits presently available only to married couples of the opposite sex be made available to couples who are legally prohibited from marrying, such as same-sex couples and a widowed mother and her unmarried son.³⁷ Known as the Reciprocal Beneficiaries Act, the bill met with great support, from both

33. *Id.* at 2164.

34. See McKee, *supra*, note 30.

35. H.B. 117, 19th Leg. (Haw. 1997).

36. Bettina Boxall, *A New Era Set to Begin in Benefits for Gay Couples; Domestic Partners: Hawaii Law, Which Takes Effect Tuesday, Will Allow Unmarried People to Qualify for Many Things Typically Reserved for Wedded Couples*, LOS ANGELES TIMES, July 7, 1997, at A3.

37. H.B. 118, 19th Leg. (Haw. 1997) (enacted as: HAWAII FAIR EMPLOYMENT PRACTICE LAW, Title 21, Ch. 378, § 378-1, *et seq.*).

opponents and proponents of same-sex marriage, and became law on July 8, 1997.³⁸ Effective July 1, 1997, any two unmarried adults who are legally prohibited from marrying each other may register with the state of Hawaii as reciprocal beneficiaries.³⁹ As registered reciprocal beneficiaries, such couples become eligible for many legal rights and benefits previously reserved only for spouses, including benefits coverage by employers. As such, although the Reciprocal Beneficiaries Act was intended as a measure to prevent the legalization of same-sex marriage, its enactment is an important step forward for gay and lesbian couples, who now have been granted a degree of legal recognition at a state level.⁴⁰ Prior to Hawaii enacting the Reciprocal Beneficiaries Act, only one other jurisdiction in the nation legally mandated employer-provided domestic partner benefits—the City of San Francisco.⁴¹

II. The San Francisco Ordinance

The San Francisco Domestic Partner Ordinance was the first law in the country to legally mandate employer-provided domestic partner benefits, taking effect June 1, 1997.⁴² The Ordinance prohibits the City or County of San Francisco (City) from entering into contracts or agreements with parties who discriminate in the provision of benefits to domestic partners.⁴³

A. The Ordinance's Broad Coverage

In application, the Ordinance has far-reaching effects. First, it directly affects a large number of employers. Any employer who contracts with San Francisco for public works projects, franchises, concessions, leases of City property, or for goods, services, or supplies purchased with City or County funds, is covered.⁴⁴

Second, the Ordinance applies to all benefits offered by covered employers to their employees and employees' spouses.⁴⁵ The list of benefits affected includes, but is not limited to: 1) medical insurance; 2) disability insurance; 3) life insurance; 4) family leave; 5) bereavement leave; 6) parental leave; 7) use of company facilities, such as athletic facilities and libraries; and 8) discounts and entitlements, such as educational subsidies, merchandise discounts, and travel passes.⁴⁶

38. *Id.*

39. *Id.* at § 77.

40. *All Things Considered* (N.P.R. radio broadcast, July 8, 1997).

41. On September 26, 1997, U.S. District Judge David Ezra held, in an unpublished decision, that ERISA preempted Hawaii's Reciprocal Beneficiary law.

42. SAN FRANCISCO, CAL. ADMIN. CODE §§ 12B.1-12B.5.1 (1997).

43. *Id.* § 121B.1(b).

44. SAN FRANCISCO HUMAN RIGHTS COMMISSION, NONDISCRIMINATION IN BENEFITS, FREQUENTLY ASKED QUESTIONS, at Q&A 3 (May 1, 1997) [hereinafter Q&A].

45. SAN FRANCISCO, CAL. ADMIN. CODE § 121B.1(b).

46. Q&A 6.

Third, the Ordinance applies to all locations throughout the United States where a contracting employer does business.⁴⁷ Thus, a contracting employer is required to provide domestic partner benefits not just in San Francisco, but nationwide.⁴⁸

Fourth, the Ordinance expansively defines "domestic partner" to include both same-sex and opposite-sex couples.⁴⁹ As such, the Ordinance is broader than the Hawaiian Reciprocal Beneficiaries Act, which is limited to couples who may not legally marry.⁵⁰

Lastly, the Ordinance does not provide for meaningful exceptions, even when covered employers can demonstrate that they made reasonable, yet unsuccessful, efforts toward compliance. Rather than exempting such employers from coverage, the Ordinance requires that they pay domestic partners the cash equivalent of benefits provided to spouses, regardless whether these payments cause administrative or economic hardships.⁵¹

B. *Legal Challenges To The Ordinance*

Given its far-reaching affects, employers were quick to legally challenge the Ordinance. Three lawsuits have already been filed against the Ordinance, and more are expected. The first suit was filed on May 13, 1997 by the Air Transport Association of America, on behalf of the seventeen major airlines that fly into San Francisco International Airport (SFO).⁵² Suits by PM & M Electric⁵³ and S. D. Meyers followed shortly thereafter.⁵⁴ The suits have since been consolidated and attack the Ordinance on several legal grounds, including an allegation that the Ordinance is preempted by ERISA.⁵⁵

1. The Validity Of The Ordinance Is Upheld

On April 10, 1998, Judge Claudia Wilken issued an order in *Air Transport Association of America v. City and County of San Francisco (ATA)*,⁵⁶ which provoked both sides to immediately claim "victory." The two San Francisco legal newspapers carried opposing banner headlines

47. SAN FRANCISCO, CAL. ADMIN. CODE § 121B.1(d).

48. Q&A 6.

49. *Id.* at Q&A 8.

50. *See supra* note 37.

51. SAN FRANCISCO HUMAN RIGHTS COMMISSION, *supra* note 44, at Q&A 13.

52. *Air Transport Ass'n v. City of San Francisco*, No. C97-1763-CW (U.S.D.C. filed May 13, 1997). SFO is owned and operated by the City and County of San Francisco.

53. *PM & M Electric v. City of San Francisco*, No. C-97-02250-CW (U.S.D.C. filed June 17, 1997).

54. *S. D. Meyers v. City of San Francisco*, No. C97-4463-CW (U.S.D.C. filed December 9, 1997).

55. *See Air Transport Ass'n v. City of San Francisco*, No. C97-1763-CW (U.S.D.C. filed May 13, 1997). On May 26, 1998, PM&M Electric voluntarily dismissed its action

that stated: (1) "Judge Rules for Airlines in SF Partner Case" and (2) "New Exception to ERISA Created."⁵⁷

Judge Wilken began her decision by stating:

The issue before the Court is whether the City has reached beyond the limits of its power within the federal system of government (1) by applying these nondiscrimination requirements specifically to employee benefits plans, and (2) by attempting to regulate City contractors' conduct throughout the United States. On both counts, the answer largely is yes. Congress has explicitly restricted local governments' ability to regulate employee benefit plans. Moreover, the United States Constitution prevents local governments from regulating commerce that takes place entirely in other States. These two principles largely invalidate the Ordinance.⁵⁸

Judge Wilken's 95-page order reviews six separate challenges to the Ordinance. The four challenges described below were rejected out of hand:

- **The State Constitutional Law Challenge**—The Air Transport Association (Plaintiffs) argued that the City of San Francisco (Defendants) lacked the power under the California Constitution to enact the Ordinance because the Ordinance is impermissibly extraterritorial and because it conflicts with other state laws.⁵⁹
- **City Charter Challenge**—Plaintiffs argued that the Ordinance is invalid because it impermissibly applies to airport-related contracts (under the City Charter, the Board of Supervisors may not interfere with contracting decisions by the Airport Commission).⁶⁰
- **ADA Preemption**—Plaintiffs claimed that the Federal Airline Deregulation Act preempted the Ordinance.⁶¹
- **Railway Labor Act Preemption**—Finally, plaintiffs argued that the Ordinance is preempted by the Federal Railway Labor Act.⁶²

Judge Wilken's decision focused on whether or not the City's use of the Ordinance satisfied the "market participant" exception to preemption under either the Commerce Clause of the U.S. Constitution or ERISA.

2. The "Market Participant" Exception To Commerce Clause Preemption

The Commerce Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial

57. *San Francisco Recorder*, p. 1, April 13, 1998, and *San Francisco Daily Journal*, p. 1, April 13, 1998.

58. April 10, 1998, Order at page 2. The Order now appears at 992 F. Supp. 1149, 1155 (N.D. Cal. 1998).

59. *Id.* at 1159-60.

60. *Id.* at 1160.

61. *Id.* at 1180-88.

62. *Id.* at 1189-91.

burdens on interstate commerce.⁶³ The implied limitation on State and local powers to regulate interstate commerce is referred to as the dormant Commerce Clause.⁶⁴ In *Pike v. Bruce Church, Inc.*,⁶⁵ Justice Potter Stewart described the "market participant" theory as follows:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.⁶⁶

Judge Wilken examined the U.S. Supreme Court's decision in *South-Central Timber Development, Inc. v. Wunnicke*⁶⁷ to determine if the Ordinance fell within the market participant exception. In *Wunnicke*, Alaska had conditioned the sale of state-owned timber on a commitment that the primary manufacturer of the timber take place in Alaska. The plurality held that this law violated the dormant Commerce Clause and could not be saved by the market participant exception:

The limit of the market-participant doctrine must be that it allows a State to impose burdens on commerce within the market in which it is a participant, but allows it to go no further. The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market.⁶⁸

Judge Wilken concluded that the Ordinance is "impermissibly extraterritorial to the extent that the Ordinance is applied to out-of-State conduct that is not related to the purposes of the City contract."⁶⁹ However, both in-state conduct and out-of-state conduct directly related to a City contract were viewed by Judge Wilken as subject to regulation by the Ordinance.⁷⁰ Although the Ordinance was found to be preempted with respect to all the activities of the airlines, the clear inference was that the Ordinance would survive a Commerce Clause challenge with respect to in-state and out-of-state conduct that was not squarely before the court in the ATA litigation.

In the author's view, the U.S. Supreme Court rejected a "market participant" analysis similar to the one employed by Judge Wilken.

63. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 35 (1980).

64. The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, empowers Congress to "regulate Commerce with foreign Nations, and among the several States."

65. 397 U.S. 137, 142 (1970).

66. *Id.* at 142.

67. 467 U.S. 82 (1984).

68. *Id.* at 97.

69. *ATA*, 992 F. Supp. at 1165.

70. *Id.*

The state of Alaska argued in *Wunnicke* that its primary-manufacturer requirement was permissible because Alaska was not regulating the buying and selling of timber, but was instead "a seller of timber, pure and simple."⁷¹ The Supreme Court rejected this assertion:

In the commercial context, the seller usually has no say over, and no interest in, how the product is to be used after sale; in this case, however, payment for the timber does not end the obligations of the purchaser, for, despite the fact that the purchaser has taken delivery of the timber and has paid for it, he cannot do with it as he pleases. Instead, he is obligated to deal with a stranger to the contract after completion of the sale.⁷²

In my view, the City of San Francisco is acting beyond the bounds of an ordinary market participant. For example, in the commercial context, the requirement that a buyer or seller of goods change the eligibility provisions in all of its employee benefit plans in order to enter into a commercial contract is, at best, unusual. Secondly, unlike a normal consumer, the City imposes fines and penalties for failing to comply with the Ordinance. The Commerce Clause simply does not permit the City to restrain interstate commerce in this manner. As the U.S. Supreme Court explained in *Wunnicke*:

The State may not impose conditions, whether by statute, regulation, or contract, that have a substantial regulatory effect outside of that particular market. [Footnote omitted.] Unless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry.⁷³

3. The ERISA Preemption

Judge Wilken easily dispensed with the City's procedural defenses to ERISA preemption. For example, the Court rejected the City's argument that the Air Transport Association lacked standing to assert ERISA preemption;⁷⁴ that the Ordinance was not preempted by ERISA because it relates only to employee benefits rather than employee benefit plans;⁷⁵ that the Ordinance does not "mandate employee benefit structures" because employers can purchase separate insurance coverage for their employees' domestic partners which would not be ERISA plans;⁷⁶ and, finally, that:

[T]he Ordinance has a connection with ERISA plans because it mandates employee benefit structures for City contractors and because the

71. *Wunnicke*, 467 U.S. at 96.

72. *Id.*

73. *Id.* at 97-98.

74. ATA, 992 F. Supp. at 1165-66.

75. *Id.* at 1168-69.

purpose and effect of the Ordinance conflict with ERISA's objective of permitting uniform national administration of employee benefit plans and eliminating the need to comply with conflicting State and local regulations.⁷⁷

4. The Market Participant Exception Under ERISA

Judge Wilken then turned to the City's basic defense to ERISA preemption—the "market participant" exception. The theory underlying the City's "market participant" argument is that ERISA preemption should not apply because the Ordinance is merely an expression of the City's purchasing preferences and is not an attempt to regulate anything. As a purchaser in the marketplace of goods, services and labor, the City has the right to decide the terms upon which it does business. The City has decided to do business only with employers who provide domestic partner benefits. The Ordinance simply communicates these business choices and is, therefore, not an ERISA-preempted regulation.

In *Hydrostorage, Inc. v. Northern California Boilermakers*,⁷⁸ the Ninth Circuit had rejected a "market participant" exception to ERISA preemption, stating:

There are two reasons why we reject the Committee's "market participant" argument. First, as the Supreme Court observed in rejecting a similar argument in a case involving NLRA preemption, *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. 282, 106 S. Ct. 1057, 89 L. Ed. 2d 223 (1986), "the 'market participant' doctrine reflects the particular concerns underlying the Commerce Clause, not any general notion regarding the necessary extent of state power in areas where Congress has acted." *Id.* at 289, 106 S. Ct. at 1062; *see also id.* at 290, 106 S. Ct. at 1063 ("What the Commerce Clause would permit States to do in the absence of the NLRA is . . . an entirely different question from what States may do with the Act in place."). Second, California in this case is not acting merely as a "market participant" rather than a regulator. The state's involvement does not end with the awarding of the contract. Section 1777.5 is aimed at regulating contractors who work on public contracts. The Division, part of a state agency, monitors and enforces violations of section 1777.5. This amounts to regulation, not merely "market participation."⁷⁹

Judge Wilken began her "market participant exception" analysis by stating:

Although the Supreme Court has not ruled on whether a market participant exception exists to ERISA preemption, the Ninth Circuit has twice held that no such exception exists. These decisions predate *Travelers* and *Dillingham*, however, and the Court concludes that under

77. *Id.* at 1176.

78. 891 F.2d 719 (9th Cir. 1989).

current law the Ninth Circuit cases must be interpreted to recognize a narrow market participant exception to ERISA preemption.⁸⁰

Judge Wilken stated that there seemed to be no reason to distinguish between the application of the market participant exception between NLRA and ERISA cases.⁸¹ In the author's view, this is a fundamental flaw in Judge Wilken's decision. While preemption under ERISA is explicit,⁸² preemption under the National Labor Relations Act is implied.⁸³ Under the Supremacy Clause,⁸⁴ states are prohibited from enacting and enforcing laws that conflict with federal statutes or interfere with the accomplishment of their purposes.⁸⁵ Accordingly, the application of a "market participant" exception to an area of law that Congress has identified to be of exclusive federal concern, is simply incorrect.⁸⁶

Judge Wilken ruled that the City failed to satisfy the "market participant" exception *only* in connection with the airport contracts at issue. Relying upon *Alameda Newspapers, Inc. v. City of Oakland*,⁸⁷ Judge Wilken stated that the Ninth Circuit has carved out a new exception to the market participant test set forth in *Building & Construction Trades Council v. Associated Builders & Contractors*.⁸⁸ In *Alameda Newspapers*, the court ruled that a city subscription and advertising boycott of a local newspaper based on its labor policies was not preempted by the NLRA. The court noted that Oakland's boycott amounted

80. ATA, 992 F. Supp. at 1177. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, the Supreme Court had cautioned against extending the meaning of ERISA's "relate to" language found in its preemption provision to "the furthest stretch of its indeterminacy." 115 S. Ct. 1671 (1995). The *Travelers* court noted that there must be some limit to ERISA preemption and concluded:

We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive. *Id.* at 656.

In *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*, the Supreme Court rejected a challenge to the State of California's regulation of apprenticeship programs. 117 S. Ct. 832 (1997).

81. *Id.* at 1178.

82. 29 U.S.C. § 1144(a).

83. *Pacific Gas & Elec. v. State Energy Resources Conservation & Development Comm'n.*, 461 U.S. 190, 203-04 (1983). The Supreme Court has articulated two separate NLRA preemption principles. First is the so-called *Garmon* preemption. See *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The *Garmon* doctrine protects the "primary jurisdiction" of the National Labor Relations Board. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). The second type of NLRA preemption, known as *Machinists* preemption, "protects against state interference with policies implicated by the structure of the [NLRA] itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated." *Id.* at 749.

84. U.S. Const. art. VI, cl. 2.

85. *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 368 (1986).

86. 29 U.S.C. §§ 1001 and 1144(a); *Hydrostorage, supra*, note 78 at 730.

87. 95 F.3d 1406 (9th Cir. 1996).

88. 507 U.S. 218 (1993).

to no more than a "symbolic gesture" because the city had purchased only 13 subscriptions to the paper and there was no evidence that it was a significant advertiser.⁸⁹ The Ninth Circuit concluded that the city's actions were not preempted under the authority of *Boston Harbor*.⁹⁰

In *Boston Harbor*, the Supreme Court had upheld a "market participant" defense to a challenge under the NLRA to a law requiring all contractors to be under a union contract on a public works project.⁹¹ The Supreme Court explained, however, that a marketplace participant defense to federal preemption fails under the Supremacy Clause in three circumstances.⁹² First, a marketplace participant argument is not a defense to federal preemption when Congress has either explicitly or impliedly indicated that federal law is exclusive.⁹³ Second, a marketplace participant argument is not a defense to federal preemption when the local legislation in question conflicts with federal law or frustrates a federal scheme.⁹⁴ Third, a marketplace participant argument is not a defense to federal preemption when the local law in question is really "tantamount to regulation or policy making."⁹⁵

Judge Wilken concluded:

The *Boston Harbor* market participant exception, as applied to ERISA preemption, does not shield the Ordinance except where the City wields no more power than an ordinary consumer in its contracting relationships. Because the City, however, exerts more economic power at the Airport than an ordinary consumer would, due to the City's monopoly position as the Airport proprietor, the Ordinance is largely preempted by ERISA when applied to airport contracts.⁹⁶

According to Judge Wilken, "ordinary consumer" activities of the City thus fall within ERISA's "market participant" exception. The clear inference of Judge Wilken's decision is that the Ordinance is not preempted by ERISA unless the City enjoys a monopoly position in a market (which might not be the case in activities other than where it owns and operates an airport). However, in the author's view, Judge Wilken's analysis ignores the importance of the express preemption provision in ERISA. Moreover, even when the City does not enjoy a monopoly, its use of the Ordinance is not "ordinary consumer" activity. An Ordinance by definition is a law regulating conduct.⁹⁷ "When the State acts as a regulator, it performs a role that is characteristically a governmental

89. 95 F.3d at 1417.

90. *Id.* at 1420.

91. 507 U.S. at 232-33.

92. *Id.* at 227-32.

93. *Id.* at 231.

94. *Id.* at 227-230.

95. *Id.* at 229.

96. ATA, 992 F. Supp. at 1180.

97. *Boston Harbor*, 507 U.S. at 229.

rather than a private role . . .⁹⁸ Moreover, the Ordinance is enforced through penalties.⁹⁹ In my view, the Ordinance fails each prong of the *Boston Harbor* analysis because: (1) Congress has stated employee benefit plans are a matter of exclusive Federal jurisdiction; (2) the Ordinance conflicts with the basic goal of ERISA, which is to provide a uniform set of laws for employee benefit plans; and (3) the Ordinance, because of its fines and debarment penalties, is "tantamount to regulation or policy making."¹⁰⁰

The inference in the ATA case that the Ordinance will be applied as to all non-ATA City contracts cannot be reconciled with ERISA's basic goals.¹⁰¹ Theoretically, this decision would permit each California city to enact an ordinance mandating different employee benefit plan requirements for city contractors. The affected contractors could either eliminate offering employee benefits or could establish a series of different plans to comply with this patchwork regulatory scheme. Either of these results would undermine one of the fundamental purposes of ERISA, which was to eliminate the need to comply with conflicting state and local regulations.¹⁰² Neither the Air Transport Association nor the City and County of San Francisco have appealed Judge Wilken's Order.¹⁰³ Employee benefit practitioners will have to await the outcome of S.D. Meyer's separate legal challenge to the Ordinance to learn if Judge Wilken will take a different approach to the ERISA preemption issues.

C. Other Legal Problems Created By The Ordinance

The Ordinance presents other legal and tax-related problems for employers. The practical application of providing benefits to domestic partners who are not contemplated as beneficiaries under ERISA-regulated plans may cause employers significant administrative and/or financial difficulties. These difficulties may render the Ordinance too burdensome to implement for some employees. In fact, if the Defense of Marriage Act is upheld as constitutional,¹⁰⁴ its definition of "spouse" as only a person of the opposite sex will add an additional layer of difficulty in providing domestic partners with benefits under an ERISA qualified retirement plan.

1. Retirement Plan Issues

The Ordinance requires that retirement plans treat domestic partners the same as spouses for purposes of qualified joint survivor annuit-

98. *Id.*

99. Under the Ordinance, employers who don't offer domestic partner benefits may be penalized through \$50 per day per person fines and a two-year debarment penalty.

100. 507 U.S. at 229.

101. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

102. *Id.*

103. No appeal had been filed at the time this article went to press.

ies and qualified pre-retirement annuities. This requirement poses several problems.

First, most qualified retirement plans offer survivor benefits only to the spouse of a deceased plan participant.¹⁰⁵ The Ordinance, on the other hand, requires employers to pay survivor benefits to domestic partners. Absent a formal amendment to the retirement plan to provide domestic partner benefits, qualified joint survivor annuities are not available to unmarried retirement plan participants.¹⁰⁶

Second, unless duly considered, the Ordinance could undermine the funding of many retirement plans. Retirement plans generally base their funding calculations on the assumption that a certain number of unmarried participants will not live until retirement ("assumed forfeitures"). As such, if the Ordinance forces such a plan to pay out survivor annuities to domestic partners, the plan may be underfunded with respect to both domestic partners and spouses.

Third, the Ordinance could jeopardize the tax qualified status of retirement plans that provide domestic partner benefits that are not first formally amended to so provide. Internal Revenue Code Section 417 does not reference domestic partners.¹⁰⁷ As such, the Ordinance may cause unamended plans to violate the exclusive benefit and the anti-alienation requirements of Internal Revenue Code Sections 401(a) and 401(a)(13), and thereby lose their tax-qualified status. Although the San Francisco agency that administers the Ordinance has stated that employers may adopt parallel retirement plans for domestic partners rather than risking the tax-qualified status of their primary plans,¹⁰⁸ this is not a tax-beneficial alternative. By definition, such "shadow" plans will not be eligible for tax-qualified status under current tax law.¹⁰⁹

Fourth, the Ordinance requires that domestic partners consent in writing when employees elect other retirement plan beneficiaries,¹¹⁰ take loans against the plan,¹¹¹ or take lump sum cash-outs of their vested benefits upon termination. As such, the Ordinance increases employers' administrative efforts by obligating them to track domestic partner relationships.

105. See I.R.C. § 417 (1997).

106. *Id.*

107. *Id.* §§ 401(a)(2), 401(a)(13).

108. Cynthia Goldstein, Contract Compliance Officer for the San Francisco Human Rights Commission, suggested in an April 15, 1997 interview with BNA's Daily Labor Report that it may be a "good idea" for employers to set up parallel retirement plans to comply with the ordinance. DAILY LAB. REP. (BNA) No. 72, at A-3 (April 15, 1997).

109. I.R.C. § 401(a)(1) (1997).

110. I.R.C. § 417(a)(1) (1997).

111. Treas. Reg. § 1.401(a)-20 (1988).

2. Health And Life Insurance Plan Issues

The Ordinance impacts health care coverage in two major ways. First, in the event that an employer's medical plan or insurance carrier refuses to provide domestic partner health benefits, the employer may be compelled to establish a self-funded plan to comply with the Ordinance. Second, the Internal Revenue Service has ruled that when medical or life insurance benefits are provided to an employee's domestic partner, the employee is to be taxed on the value of the premiums as if it were income.¹¹² Accordingly, such premiums must be reported on the employee's W-2 and income tax forms. Additionally, social security contributions must be paid on these premiums, by both the employer and employee.¹¹³ However, because these insurance premiums are taxable to the employee, neither the employee nor the domestic partner are taxed on the value of the plan's reimbursements.¹¹⁴ In contrast, employer-provided medical benefits for the spouse or dependents of an employee are, however, not similarly taxed.¹¹⁵ These tax consequences may be avoidable, however, if an employee's domestic partner qualifies as a "dependent." Under the Internal Revenue Code, domestic partners may qualify as a dependent of an employee for medical benefit purposes if the domestic partner:

- shares his or her principle abode with the employee for the full taxable year;
- is a citizen or resident of the United States;
- receives more than 50% of his or her support from the employee; and
- domestic partner relationships do not violate local law.¹¹⁶

3. COBRA Issues

Under Internal Revenue Code Section 4980B, plan participants and their qualified beneficiaries enjoy the same COBRA rights.¹¹⁷ "Qualified beneficiaries" are defined by COBRA as the plan participant's spouse and dependent children.¹¹⁸ Since domestic partners are not considered the legal equivalent of spouses, they are ineligible for statutory COBRA coverage.¹¹⁹

The Ordinance requires that employers provide domestic partners

112. Priv. Ltr. Rul. 9603011(Oct. 18, 1995); 9717018 (Jan. 22, 1997).

113. Treas. Reg. 1.401(a)-20 (1988).

114. Priv. Ltr. Rul. 9603011(Oct. 18, 1995); 9717018 (Jan. 22, 1997).

115. *Id.*; see also I.R.C. § 105(b) (1997).

116. I.R.C. § 152 (1986).

117. *Id.* § 4980B(g)(1)(a) (1990).

118. *Id.*

119. Again, an employer may contractually provide COBRA coverage to domestic partners if it so desires.

with "COBRA equivalent" coverage.¹²⁰ This poses two problems. First, an employer's insurance carrier may refuse to cover domestic partners and the employer will be forced to establish a parallel self-funded plan in order to offer "COBRA equivalent" coverage. Second, the Ordinance requires that domestic partners receive the same COBRA notices provided to spouses. This provision obligates employers to track domestic partner relationships, thereby increasing the employers' administrative efforts.

4. Family Leave Issues

The Ordinance requires that employers grant the same family leave privileges to employees with domestic partners as they do to employees with spouses.¹²¹ Under the Family and Medical Leave Act (FMLA), employers are required to grant employees up to twelve weeks of leave each year for family or medical reasons. Employees who qualify under the Act are eligible for continued coverage under their employers' medical plan. Although the FMLA provides that employees may take leave to care for an ill spouse, it does not extend such leave to care for an ill domestic partner. According to the U.S. Department of Labor, leave granted to care for an ill domestic partner does not count toward FMLA leave.¹²² As such, an employer will be required to grant up to twelve weeks to employees to care for ill domestic partners under the Ordinance, and up to another twelve weeks for other family or medical reasons under the FMLA. The employer would be required to provide medical insurance during this entire twenty-four week period. In essence, the Ordinance potentially doubles employers' obligations to provide family leave, both in terms of time granted and associated costs for medical coverage.

III. Advantages and Disadvantages of Voluntarily Offering Domestic Partner Benefits

A. Advantages Of Offering Domestic Partner Benefits

There are many business advantages to voluntarily offering domestic partner benefits. These advantages, even though they are difficult to quantify in the short term, may result in long term competitive gains, and therefore should be weighed in any business case analysis of whether to offer domestic partner benefits.

First, the basic pay philosophy underlying most total compensation programs is "equal pay for equal work." Given that approximately one-third of the average employee's total compensation is comprised of benefits, most employees include benefits in the analysis when they compare their pay to the pay of their peers. As such, when

120. SAN FRANCISCO, CAL. ADMIN. CODE § 121B.1(b) (1996).

121. *Id.*

122. See 29 C.F.R. § 825.113.

a single employee, whose domestic partner does not receive benefits, compares his or her total compensation to that of a married employee in a similar job producing similar results, whose spouse does receive benefits, the single employee with a domestic partner perceives inequity. This perceived inequity may lead to reduced employee motivation and loyalty. During these times of intense global competition, when employers require extra effort from all employees, offering domestic partner benefits creates a perception that all employees are compensated fairly based on their contributions.

Second, offering domestic partner benefits, by creating the perception of fairness and equity, may lead to improved employee morale and productivity. Third, offering domestic partner benefits may give an employer a competitive advantage in the labor market.¹²³ Employers that offer domestic partner benefits will be more likely to attract and retain single employees than employers that offer only spousal benefits. In geographic areas with a large population of homosexual employees and in rapidly growing industries, such as high-technology and financial services, offering domestic partner benefits may give employers an extra edge in their staffing efforts. Fourth, offering domestic partner benefits reinforces an employer's stated anti-discrimination policy. Last, by offering domestic partner benefits, an employer projects an image of a business and community leader, a "good employer" that values the diversity of its employees, and by implication, its customers. Such an image may translate into increased revenue and loyalty from customers that prefer to do business with "good employers."

B. Perceived Disadvantages Of Offering Domestic Partner Benefits

Despite the business advantages, employers often are reluctant to offer domestic partner benefits because they perceive three major obstacles to extending benefits beyond their traditional coverage. First, employers fear that offering domestic partner benefits will greatly increase their costs. Second, employers are concerned that they will have difficulties finding an insurance carrier to provide domestic partner coverage. Last, employers struggle with how to define "domestic partner" for purposes of benefits eligibility. In reality, however, employers that have adopted domestic partner benefits have found that these obstacles were less challenging than anticipated.

1. Costs

Costs head the list of employer concerns about extending benefits coverage to domestic partners. After enduring double digit annual increases in health care costs for many years, employers are understand-

123. *Employee Benefits: IBM Extends Health and Other Benefits to Domestic Partners*

ably reluctant to add additional adult dependents to their health care plans.¹²⁴

A. LOWER-THAN-EXPECTED COSTS

The few published reports available suggest that the cost increase to add domestic partner benefits is minimal. For example, the City of Seattle and HBO reported that providing domestic partner coverage was less expensive than covering a spouse.¹²⁵ Similarly, Levi Strauss reported that the cost of providing domestic partnership coverage was the same as providing spousal or other dependent coverage.¹²⁶ Specifically, it has been reported that extending benefits to same-sex couples increases health care costs by only one percent.¹²⁷ Likewise, employers that extend health coverage to both same-sex and opposite-sex couples report experiencing only a three percent increase in health care costs.¹²⁸

Two factors account for the lower-than-expected costs of providing domestic partner benefits. First, there is generally a low rate of participation—less than two to five percent of the workforce.¹²⁹ Four reasons explain the relatively low participation rates. One, if an employee's domestic partner doesn't qualify as a "dependent" under the Internal Revenue Code, then the health care premiums paid for the domestic partner are taxable to the employee as income. Two, many same-sex partners forgo coverage because they already have health care coverage independently. Three, many domestic partners wish to keep their relationships private and fear the stigma that may be associated with registering for the benefits. Last, one or both partners may not want to incur responsibility for a partner's debts that could legally result from signing an affidavit attesting to the nature of the relationship.

Second, employers generally have not experienced the large increase in administrative costs they feared would result from offering domestic partner benefits. Most employers already have in place the systems, personnel, and procedures required to administer domestic partner benefits. Current resources can be adapted to include domestic partners rather than new resources being acquired. For example, employees can report changes in their domestic partner relationships through the same communication channels already established to track updates to their other personnel data. Employee contributions and tax deductions processed for domestic partner benefits can be effectuated

124. Meaningful data on the direct costs of adding health-care coverage for domestic partners is limited and is mostly anecdotal.

125. DAILY LAB. REP. (BNA) No. 96, at C-1 (May 19, 1997). Gradual acceleration expected from 4% to 6%.

126. Sherman & Fadel, *Domestic Partner Benefits Pose New Challenges For Employers*, AMERICAN COMPENSATION ASSOCIATION NEWS, June 1994, at 7-8.

127. *Domestic Partner Benefits Prove to be Rare*, CCH EMPLOYEE BENEFIT MANAGEMENT DIRECTIONS, June 21, 1994, at 7.

128. *Id.*

129. The Segal Company Executive Letter 17, No. 1-2 (1993), at 7.

through existing payroll systems. With advance planning and effective communications, any additional administrative costs associated with extending benefits to domestic partners can be greatly minimized.

B. HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA)

The introduction of the Health Insurance Portability and Accountability Act (HIPAA)¹³⁰ may have an adverse impact on the cost of providing domestic partners with medical benefits. Effective for plan years beginning after June 30, 1997, the maximum period for a health plan's preexisting condition exclusion will be six months.¹³¹ Prior to HIPAA, employee-sponsored health plans could exclude the preexisting conditions of new plan participants. The preexisting-condition exclusion may have precluded many plans from incurring any significant costs in providing health coverage to domestic partners. Under HIPAA, immediate additional costs of adding domestic partners benefits may be a legitimate concern for the employer. However, based on the low rates of plan participation by domestic partners and the increased use of "community rated" HMOs by employers, the increased costs due to HIPAA are likely to be small.

C. LIMITING DOMESTIC PARTNER BENEFITS TO HMO COVERAGE

Employers who maintain multiple health plans sometimes consider limiting domestic partner benefits to HMO coverage in order to minimize costs. Limiting the menu of health insurance options for domestic partner coverage, however, may pose legal problems under the Americans With Disabilities Act (ADA).¹³²

The ADA prohibits employers from making disability-based distinctions in the terms, conditions, and privileges of employment.¹³³ Under the ADA, it is unlawful for an employer to discriminate on the basis of disability in the provision of fringe benefits.¹³⁴ Health insurance plans are considered a fringe benefit under the ADA, and therefore, employees with disabilities must be provided "equal access" to whatever health insurance an employer provides to employees without disabilities.¹³⁵ Equal access means that an employer may not limit, segregate, or classify the health insurance provided to employees on the basis of disability.¹³⁶ Additionally, given the ADA's "association" provision,¹³⁷ "it would violate the ADA for an employer to make an employment decision about any person, whether or not the person has a disability, because of concerns about the . . . disability of someone else with whom that

130. 29 U.S.C. §§ 1171-1177 (1996); 26 U.S.C. §§ 9801-9803.

131. 26 U.S.C. § 9801 (1996).

132. 42 U.S.C. §§ 12101, *et seq.*

133. 42 U.S.C. § 12112(a).

134. 29 C.F.R. § 1630.4(f).

135. 29 C.F.R. § 1630.16(f) App.

136. 29 C.F.R. § 1630.5.

person has a relationship."¹³⁸ Given that AIDS is an ADA-covered disability, health insurance distinctions based on a concern that an employee or his domestic partner has AIDS may violate the ADA.¹³⁹ Thus, if an employer limits the insurance available to domestic partners to HMO coverage, without imposing a similar limitation on married spouses, it may appear as though the employer made the distinction based on a perception that domestic partners, many of whom are homosexuals, are more likely to contract AIDS-related illnesses. Such a limitation is likely to be challenged as a disability-based distinction under the ADA.

If an employer is charged with making a disability-based health insurance distinction in violation of the ADA, then the employer may defend by showing that the distinction is not a "subterfuge" in that it is justified by the risks or costs associated with the impacted disability.¹⁴⁰ An employer may show that a disability-based distinction in health insurance is not a subterfuge in several ways. First, an employer may show that the distinction is justified by legitimate actuarial data.¹⁴¹ To serve as a justification, however, actuarial data must not be outdated or based on fears, myths, stereotypes, or assumptions about a disability.¹⁴² Second, an employer may show that the distinction is justified by actual or reasonably anticipated experience and that conditions with similar actuarial data or experience are treated comparably.¹⁴³ Third, an employer may show that the distinction is justified because no carrier will provide equal coverage or equal coverage will result in plan insolvency.¹⁴⁴ Last, an employer may show that the distinction is justified because equal coverage will result in prohibitive premiums that either make the plan effectively unavailable to a significant number of employees or require a drastic decrease in the benefits provided.¹⁴⁵ If an employer successfully shows that a disability-based health insurance distinction is justified, then the employer will not be found in violation of the ADA.

2. Finding An Insurance Carrier

Many employers are concerned that they may have difficulty finding an insurance carrier to provide domestic partner coverage. However, more and more insurance carriers have begun to underwrite domestic-

138. EEOC INTERIM ENFORCEMENT GUIDANCE ON THE APPLICATION OF THE AMERICANS WITH DISABILITIES ACT OF 1990 TO DISABILITY-BASED DISTINCTIONS IN EMPLOYER PROVIDED HEALTH INSURANCE, at II.

139. *Id.* at III.B.

140. 42 U.S.C. § 12201(c); 29 C.F.R. § 1630.16(f).

141. EEOC INTERIM ENFORCEMENT GUIDANCE, *supra* note 125, at III.C.2.b.

142. *Id.*

143. *Id.*

144. *Id.* at III.C.2.c.

partner health coverage. For example, five of California's health insurance carriers (Kaiser, Blue Cross, Blue Shield, HealthNet, and PacificCare), offer domestic-partner coverage. Given that insurance companies now have little actuarial data on which to base a rate for domestic partners, a common practice is for insurers or HMOs to add a surcharge for domestic partnership coverage ranging from one percent to five percent of the total premium. In reality, however, these surcharges may be reduced or eliminated. In addition, as domestic partner health coverage becomes more popular, insurance companies will have sufficient data upon which to assess rates, and domestic partner premiums are likely to be reduced and surcharges eliminated.

3. Defining "Domestic Partner"

Another reason for employer hesitation in establishing domestic partner benefits is the difficulty of defining who qualifies a domestic partner.

A. COMMON DEFINITION

Many employers require a domestic partner to meet the following five requirements:

- must be at least 18 years of age;
- must have an exclusive and committed relationship;
- must share the same residence and be financially interdependent;
- must *not* be married; and
- must have been each other's sole domestic partner for the past twelve months.

Employers often require proof of the domestic partner relationship, such as proof of registration of the partnership (if available) or written affirmation of the partnership, or other documents that confirm that the partners live at the same address. Employers who require this proof must be mindful that requiring proof for domestic partner status and not for other dependent status may be evidence of sexual orientation discrimination. Employers must also be cautious that their proof requirements do not invade the privacy of the employee or the domestic partner.

B. LIMIT DEFINITION TO SAME-SEX COUPLES OR EXPAND TO ALSO INCLUDE UNMARRIED OPPOSITE-SEX COUPLES?

A basic question employers must answer in defining "domestic partner" is whether to extend benefits only to same-sex couples or also to unmarried opposite-sex couples who may legally marry. In making this decision, employers need to consider both the legal and business implications of such a limitation.

Limiting domestic partner benefits to only same-sex couples is generally legal. No cases have been litigated to date that specifically chal-

ever, if and when such a legal challenge is filed, it is likely to fail. No federal or state laws currently prohibit private employers from making a distinction between same-sex and opposite-sex unmarried couples.¹⁴⁶

First, Title VII of the Civil Rights Act of 1964¹⁴⁷ does not apply. Although Title VII prohibits employment discrimination based on sex, the courts have defined sex as gender, not sexual orientation.¹⁴⁸ Given that both male and female unmarried employees in opposite-sex couples would be excluded from coverage, the exclusion is not gender-based, and therefore not prohibited by Title VII.

Second, the Equal Pay Act¹⁴⁹ does not apply. Although the Equal Pay Act prohibits discrimination on the basis of sex in wages and benefits for equal work, sex is defined as gender for the purposes of this law.¹⁵⁰ Given that both male and female unmarried employees in opposite-sex couples would be excluded from coverage, the exclusion is not gender-based, and therefore not prohibited by the Equal Pay Act.

Third, the proposed Employment Non-Discrimination Act of 1997,¹⁵¹ if enacted, will not apply. It specifically excludes domestic partner benefits from coverage.¹⁵²

Fourth, the equal protection clause of the U.S. Constitution does not apply. Private employers are not state actors, unless they perform public functions.

Fifth, state anti-discrimination laws generally will not apply. Most state fair employment laws do not prohibit discrimination based on sexual orientation.¹⁵³ Additionally, where state laws prohibit discrimination on the basis of sexual orientation, employee benefits are specifically exempted from coverage.¹⁵⁴

Sixth, the equal protection provisions of state constitutions do not apply. An unmarried employee in an opposite-sex relationship can not make a "reverse-*Hinman*" argument against a private employer. Even though state constitutions generally do not contain an express state action provision, courts usually infer such a requirement. As under the U.S. Constitution, private employers are not state actors

146. Note that Hawaii's Reciprocal Beneficiaries Act does not require employers to provide domestic partner benefits to opposite-sex couples that may legally marry.

147. 42 U.S.C. §§ 2000e, *et seq.*

148. *See, e.g.*, *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979); EEOC Dec. 76-75, 19 FEP 1823 (Dec. 4, 1975).

149. 29 U.S.C. § 206(d).

150. 29 C.F.R. § 1620.11(d) (EEOC interpretive regulations).

151. H.R. 1858, 105th Cong. (1997).

152. *Id.* at § 6.

153. *See supra* note 11 (citing state statutes which do prohibit sexual orientation discrimination).

154. *Id.*

under state constitutions, unless they perform a public function.¹⁵⁵ Last, before limiting domestic partner benefits to only same-sex couples, an employer should verify that no local laws make such a limitation illegal.

Even if employers may not be legally required to extend domestic partner benefits to both same-sex and opposite-sex couples, employers should consider the business implications of limiting coverage to only gay and lesbian employees. Although limiting coverage to only same-sex couples may seem less expensive, such a limitation may actually have hidden costs. For example, by limiting coverage to only same-sex couples, employers are more likely to receive negative feedback from employees and customers who believe homosexuality is immoral. Although such negative feedback is likely to be offset by positive feedback from those who support gay and lesbian rights, an employer can minimize controversy by extending coverage to all unmarried employees with domestic partners. As another example, unmarried employees with opposite-sex domestic partners are likely to negatively respond to being excluded from coverage. Their response could take many forms, all of which have costs for an employer. They could legally challenge their exclusion. Even though such legal challenges will likely fail, employers will incur some defense costs. Also, given that benefits are a traditional subject of collective bargaining, they could attempt to unionize. Last, their morale and productivity is likely to suffer. Given these hidden costs, employers considering offering domestic partner benefits may be well-advised to extend coverage to both same-sex and opposite-sex couples.

IV. Choosing the Right Program—Examples of Domestic Partner Plans

As the previous discussion illustrates, an employer must decide many issues in designing a domestic partner benefit program. First, an employer must decide whether to extend coverage to domestic partners at all. Second, if an employer decides to extend benefits coverage to domestic partners, it must decide how to define eligibility and whether to cover only same-sex couples or also opposite-sex couples. Third, an employer must determine what benefits to include and at what level or whether to offer a cash-equivalent in lieu of actual benefits. Fourth, an employer must determine what kind of documentation it will require as proof of domestic partner relationships. Last, an employer must develop an administrative and communications plan to support the program.

^{155.} See, e.g., *Gay Law Student's Ass'n v. Pacific Tel. & Tel. Co., Inc.*, 24 Cal. 3d 458 (Cal. Sup. Ct. 1979).

Rather than recreating the wheel, employers introducing domestic partner benefits may learn from the work already done by the corporate leaders in this area. Toward that end, the following provides an overview of some of the domestic partner benefit programs currently offered. Each of the companies profiled has tailored its domestic partner program to meet specific business needs. The plans range from offering \$1,000 per year in health insurance premium reimbursement benefits to same sex partners to offering all employee benefits to any domestic partner (same and opposite sex).

Apple Computer. Apple provides health care benefits, fitness center privileges, day care center use, family leave, and bereavement leave to employees' domestic partners. Employees must sign affidavits affirming their relationships with a person who is age 18 or older and shares living quarters with the employee in an exclusive, committed relationship in which partners are responsible for each other's common welfare.¹⁵⁶

Bank of America. Bank of America offers health, dental, and vision benefits to one other qualified adult member of the employee's household in addition to any dependent children. The "extended family" benefit program began on January 1, 1998, made Bank of America the first major U.S. bank to provide domestic partner coverage. The linchpin of Bank of America's program is that an employee must show a domestic partner is in a committed relationship for at least six months and that they are responsible for each other's welfare. All others must show they are the employee's dependent as defined by the I.R.S. This means that an employee can get benefits for a domestic partner, spouse, parent, sibling and others who have a significant relationship with the employee.¹⁵⁷

Chevron. Chevron was the first major American oil company to extend domestic partner benefits to most of its 20,000 American employees. As of January 1, 1998, it began offering medical, dental, dependent life insurance, relocation, and leave of absence benefits for domestic partners. The rates Chevron charges for these benefits are the same as those for an employee insuring his/her spouse and family.¹⁵⁸

Pacific Gas and Electric. PG&E began providing domestic partner benefits to employees on January 1, 1998. Unmarried PG&E workers

156. Apple Computer materials (copy in author's files). When Apple first offered health benefits to same-sex partners in 1993, only 42 of 4,700 employees eligible for benefits of any kind signed up. Jonathan Marshall, *SAN FRANCISCO CHRONICLE*, May 31, 1995, at B.1.

157. Ilana DeBare, *BofA Heeds SF Law, Offers Domestic Partner Benefits*, *SAN FRANCISCO CHRONICLE*, March 11, 1997.

158. Larry Hatfield, *Chevron To Offer Partner Benefit*, *SAN FRANCISCO CHRONICLE*, May 1, 1997, at A-1.

with partners (both gay and straight) can sign up for benefits directly with PG&E and will not have to officially register the partnerships with a governmental entity.¹⁵⁹

Ben & Jerry's Homemade, Inc. Since 1989, Ben & Jerry's has offered domestic partners of employees who provide documentation of joint residency with health and dental insurance benefits. There is also a COBRA-like plan for 18 months under which employees may continue insurance. Domestic partners may not pay health or dental premiums with pre-tax dollars.¹⁶⁰

Levi Strauss & Co. As of June 1, 1992, Levi Strauss extended health and dental benefits to domestic partners of its 23,000 U.S. employees. Approximately 1 percent of the total work force has signed up. Unmarried couples are defined as an eligible employee and one other person who share a committed relationship through living together, being financially interdependent and maintain joint responsibility for each other's common welfare, as well as considering themselves life partners. This does not include parents, siblings, roommates, or other relationships. If the domestic partner opts out of his or her employer's plan to participate in the Levi Strauss plan, the Levi Strauss employee will pay a surcharge for the coverage.¹⁶¹

MCA Inc. As of July 1, 1992, MCA extended group health coverage and COBRA benefits to same-sex domestic partners of employees who sign an affidavit about their relationship certifying that they meet the following five criteria: neither partner is married to anyone else; the partners reside together and intend to do so permanently; they are not related by blood; they are both mutually responsible for the costs of basic living expenses; and both partners are at least the minimum age of consent.¹⁶²

Xerox Corp. On April 14, 1995, Xerox said it will offer employees up to \$1,000 a year toward health insurance for domestic partners. Employees can use this \$1,000 per year to purchase health insurance outside the company's health plans for dependent household members.¹⁶³

Stanford University. Since 1993, same-sex partners have been eligible for health insurance and survivor benefits at Stanford. Participating employees must sign an affidavit attesting to the long-term commit-

159. Rachel Gordon, *Domestic Partners To Get Benefits From PG&E*, SAN FRANCISCO EXAMINER, May 2, 1997, at A-3.

160. Ben & Jerry's materials (copy in author's files).

161. Levi Strauss materials (copy in author's files).

162. MCA to offer *Health Coverage* to same-sex partners of employees, 10 Employee Relations Weekly (BNA) No. 26 at 731 (June 29, 1992).

163. *Xerox Extends Some Benefits To Gay Couples*, NEWSDAY, April 15, 1995, Associated Press, at A-15.

ment. The HMO's that cover university employees initially added a rate load charge to the premium, but dropped it after the university challenged the approach.¹⁶⁴

University of Iowa. In January 1993, the University extended health benefits to same-sex partners of nonunion employees. Dependent children are also eligible for benefits. To be considered a spousal equivalent, employees must complete an affidavit that the partners meet at least three of the following five criteria: lived together for one year; have common ownership of a home; have a joint checking account; have a relationship contract; and be each other's primary beneficiary.¹⁶⁵

Viacom. Viacom extended health care benefits under its medical plan to same-sex domestic partners beginning in 1993. The employee's partner must sign an affidavit attesting to the fact that he or she meets the company's definition of spousal equivalency and produce evidence of cohabitation and financial interdependence. Spousal equivalent coverage is paid with after-tax dollars and the value of the employer-provided benefits is treated as imputed income.¹⁶⁶

V. Conclusion

Even though the advantages far outweigh the disadvantages, it is no simple task for an employer to decide whether to provide domestic partner benefits. However, like all other plan sponsor decisions, an employer's decision to provide domestic partner benefits should be driven by its own corporate philosophy and business needs, not compelled by a local government's ordinance.

164. Stanford materials (copy in author's files).

165. University of Iowa materials (copy in author's files).