Corporate Domestic Partner Benefits

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DEFENDING SAME-SEX MARRIAGE

Volume 1

"SEPARATE BUT EQUAL" NO MORE

A Guide to the Legal Status of Same-Sex Marriage, Civil Unions, and Other Partnerships

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CORPORATE DOMESTIC PARTNER BENEFITS

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THE BENEFIT OF BENEFITS

Despite the common use of the term domestic partner, it remains unclear what that term means either in identifying a specific individual or in its relationship to the status of marriage. Is it a temporary substitute based on equity, or a challenger looking toward social reform? Because these positions are mutually exclusive, domestic partner benefits activists must clarify what it is they hope to achieve.

Are Domestic Partnerships Passé?

For one moment, society seemed irrevocably poised to commit to the recognition of same-sex marriage. After a series of cliff-hanger setbacks in Hawaii, Alaska, and Vermont, Massachusetts legalized the union of same-sex couples. Thereafter, outbreaks of renegade gay and lesbian marriages occurred in the city of San Francisco, as well as in the states of New York and Oregon. What had only a few years before seemed like an impossible goal now promised to be just around the corner.

Against such a background, any serious need for corporate benefits for domestic partners seemed somehow mooted. If gay men and lesbians could marry, what function would "domestic partnerships" fulfill? While domestic partnerships may have served as a serviceable stopgap in the absence of legally recognized marriages, after marriage became available the old partnerships would ring almost quintessentially old-fashioned. Any interest in the practice would pass to historians rather than social activists, much like the "Boston marriages" of an earlier period.

Then, as we have since witnessed, the cultural backlash set in. One state after another passed constitutional amendments that prohibited not only the marriage of
its own gay and lesbian citizens and the recognition of same-sex marriages legalized in other states but also (depending upon the jurisdiction) “marriage-lite” institutions such as Vermont-style civil unions. Once again the best that most of the nation’s gay and lesbian households could expect would come from business, not government.

The motivation to pursue relationship recognition arguably reduces to the matter of benefits. Exactly what those benefits are, however, is too little understood. The confusion is best seen in claims that any need for marriage could be satisfied by a web of sufficiently comprehensive civil union benefits. Even were the list of benefits associated with civil unions equivalent to those of marriage (which they never are because civil unions are neither portable nor recognized by the federal government), a claimed interchangeability can be supported only by a myopic focus on the “tangible” benefits: tax exemptions, insurance coverage, automatic inheritance, and the like. When same-sex marriage is ultimately attained (it is not a question of if, but when), then these tangibles will become automatically available to gay and lesbian couples just as they are to heterosexual couples—that, at least, is the theory. There will be no need for a relationship “halfway house” for domestic partnerships.

Tangible benefits, however, are not the only reason to pursue relationship recognition. Marriage also comprises the “intangible” benefits incumbent on formally recognized households. These include, for example, the implicit support that couples receive in innumerable ways that help preserve the relationship in times of strain and difficulty. If the community views the couple as an enduring unit, this message becomes a self-fulfilling prophecy. As the famed anthropologist Margaret Mead pointed out, “There is no society in the world where people have stayed married without enormous community pressure to do so.” At some important level, marriage does not simply recognize a relationship, it also supports and preserves it. Without marriage the couple in distress would often find it easier to dissolve and begin anew with others than to commit to the hard work of resolving problems.

Intangible benefits, while most apparent in marriage, are relevant to the pursuit of all degrees of relationship recognition. So, while discussions of the domestic partner benefits available from corporations are framed almost exclusively in terms of the tangible benefits and measured in variables of economic costs, that dimension alone does not fully account for the importance placed on this form of recognition by the gay and lesbian community. As important as those real benefits are, so too is the inference drawn from their availability that the gay couple is valued in itself. Given the amount of time and energy that workers devote to their jobs, the significance of that recognition should not be underestimated.

By this reasoning, it may sound as though civil unions would be an acceptable alternative to full marriage recognition. They are not. Domestic partnerships are an unqualified good because, in recognizing them, corporations are going as far as they are legally empowered to in granting significance to the same-sex couple. By adopting civil unions, in contrast, the state has chosen to withhold its full recognition for something less. The message of that “less” overwhelms whatever positive benefits accrue from the diminished status. To settle for civil unions is to value the tangible benefits measured in money over the intangible ones benefiting the health of the relationship.

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Some activists will insist that domestic partnerships will always have a role, even with the advent of same-sex marriage. Couples, both gay and straight, may simply refuse to marry, and others will still be unable to access the associated rights and benefits. These latter would include households made up of siblings or other nonromantic pairs. The argument is that these families should still enjoy the full cornucopia of tangible benefits traditionally reserved for married couples. That premise, however, involves a willingness to support alternatives that effectively deny marriage a privileged social status, a topic considered in the paragraphs that follow.

Certainly, at the very least, until such time as same-sex marriage becomes an unproblematic reality in American culture, there will remain a place in the discussion for corporate recognition in the form of domestic partner benefits.

What Are the Contested Benefits?

Although the heated debates can make it seem otherwise, providing benefits to gay and lesbian employees is not simply a matter of winning a company’s assent. A raft of legal and administrative issues attach to the provision of same-sex partners. Some of these issues are sketched out in later sections of this chapter. The point that needs to be raised first is that benefits are not “of a piece.” While some are more easily offered based solely on the business’s approval, others depend on the cooperation of actors outside the corporate body, including government regulators and insurers. Even when available, some benefits can come with an unexpected tax liability, one not incurred by employees with heterosexual spouses, which can tarnish their practical desirability while remaining an attractive and meaningful ideal.

In common parlance the great divide in the corporate world is that between the “hard” and the “soft” benefits. Hard benefits are typically cost intensive and often involve outside providers and even government regulation. Examples include insurance coverage for medical, vision, prescription drug, and dental expenses, as well as pension and retirement programs. Soft benefits, on the other hand, generally cost much less, if at all, because they involve resources controlled by the employer itself. These include employee discounts, family and bereavement leave, child care programs, and adoption benefits, as well as job training opportunities, flexible schedules, relocation perks, and gym memberships.

While both types of benefits contribute to the retention of established employees and the attraction of desirable candidates, they do so in different ways. Hard benefits are primarily factored in with the overall compensation package offered to the employee; soft benefits, instead of being compensation, speak more to the corporate culture and are tailored to make the work environment more pleasant and the office demands less stressful. As will be discussed in more detail later, the employer’s freedom to offer these benefits varies with the specific benefit under consideration.

Who Should Get Them?

All discussions concerning domestic partner benefits necessarily begin with some clarification of the idea of the “domestic partner.” The need arises because no corporate or legal standard exists identifying who belongs in this uncertain category. The first question asked by any potential business provider, then, is what relationship
should qualify as a “domestic partnership”? Program administrators will require some standard by which to know when a right to benefits has been triggered.

Defining the term is complicated by its recent coinage. “The New York Times, for example, did not use the term in this sense until 1982, and federal appeals courts waited until 1991.” The recent vintage has prevented a consensus meaning from emerging. In the most generic sense, domestic partners are typically romantically and sexually involved, unrelated adults who share a household and expenses without being married (although others try to extend the term to include nonromantic pairings, such as siblings). In this sense, domestic partnered families are on the rise. Published data from the 2000 census place the number of same-sex partnered households at 594,391, almost evenly split between gay male and lesbian households (301,026 and 293,395, respectively).

Implicit within that broad definition is the expectation that domestic partners—but for legal recognition—are indistinguishable from married couples. Therefore, the identifying criteria used by business administrators are often phrased in terms that seek to capture that ideal. Bank America used a form in which the enrollees were required to assert among other elements that: “We are in an exclusive, committed relationship that is expected to last indefinitely”; “We live together”; and “We are responsible for each other’s welfare on a continuing basis.” Where it is an option, businesses may prefer to accept the couple’s registration in a government domestic partner registry, thereby sparing themselves the embarrassing task of so closely scrutinizing and ultimately passing judgment on the relationships of their gay and lesbian employees.

The reasonable approach to the problem of definition is indirectly influenced by the resolution of the second question, which asks: should these programs be limited to same-sex couples only, or should they include heterosexual unmarried couples as well, or even nonromantic couples of varying configurations? If the first question is primarily administrative, this one demands a more philosophical approach. How one resolves the matter immediately influences how one can reasonably justify at the outset the need for benefits.

The issues at stake have become more clearly discerned in a new problem facing businesses in Massachusetts. After the success of securing same-sex marriage rights in that state, employers in Massachusetts who had offered domestic partner benefits have been placed in a quandary: do they retire the plans now that marriage is a legal option for gay men and lesbians, or should they offer both options?

What one deems the “correct” response to these questions depends heavily on the view of the intended purpose of domestic partner benefits in the first place. To the extent these plans are justified on grounds of fundamental fairness and equity, the answers are these: (1) because “domestic partners” are meant to approximate the married state, required indicators for a valid partnership should be those typical of the ordinary marriage; (2) because domestic partner benefits are intended to rectify the inequities faced by those jurally excluded from marriage, these programs should not be available to those who have that option; and (3) for that same reason, programs for domestic partners should be eliminated after marriage becomes an option for same-sex couples. To claim partner benefits at Oracle, for example, the employee must sign a declaration that “We would legally marry each other if we could, and we intend to do so if marriage becomes available to us in our state of residence.”

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If, however, domestic partnerships and the demand for their corporate recognition are part of a broader objective to undermine the perceived hegemony of the marital condition by offering an alternative, be it to romantic partners or otherwise, then the answers to those questions are fundamentally different: (1) because “domestic partners” represent a new relationship form that is not merely a homosexual imitation of the heterosexual marriage, the defining hallmarks of domestic partnerships should be something other than those found in marriages; (2) for that same reason, a domestic partnership should be a relationship option to both same-sex and opposite-sex couples—and even to couples with no sexual involvements at all—and therefore benefits programs should include all variations; and (3) any new possibility of same-sex marriage alters not at all the need for corporate domestic partnership benefit programs, and thus they should be continued.

How this issue is resolved significantly influences the plausible arguments that can be offered for domestic partnership benefits in contexts where same-sex marriage remains a distant goal. Some would find it disingenuous, to say the least, for activists in one setting to demand domestic partner benefits as an expedient concession arising from the lack of marriage alternatives, while in another to assert that gay and lesbian relationships ought not to be assimilated to the not-entirely-successful heterosexual model, but should instead be valued for their own intrinsic worth. What one typically finds is a hybrid: 1, 2, and a 3/3 split.

In other words, benefits are initially justified by an argument that speaks about equitable compensation for the lack of access to marriage by gay men and lesbians, but actual programs extend access to those who use domestic partnerships as a marriage alternative rather than a marriage substitute. The heaviest users of domestic partner programs, in fact, are heterosexual couples. Complete indecision surrounds what to do when same-sex marriage becomes a reality, not least because the program, as applied, no longer reflects its original justifications.

As a matter of law, companies are not required to include heterosexual unmarried couples within domestic partner benefits programs. While many, even most, programs enroll both same-sex and opposite-sex domestic partners—95 percent of all companies tracked by the HRC Foundation WorkNet project—efforts by excluded heterosexuals to have same-sex-only programs ruled an impermissible discrimination based on sex have failed. The position adopted, therefore, must depend upon factors outside the current requirements of law.

While the gay rights movement is anything but a coherent philosophical effort, its opponents are justified in expecting some measure of intellectual consistency among those who favor partner benefits. The first answer set recognizes the privileged status of marriage, hopes eventually to extend it to same-sex couples, and accepts domestic partnerships only as a temporary solution to present inequities; the second denies the legitimacy of a special status for marriage, and aspires to normalize competitor relationship forms of romantic and nonromantic couples alike. The two cannot be simultaneously asserted because they have different implications for the initial positions on domestic partner benefits. Where one stands relative to the issues should be clarified at the beginning. If proponents activists confuse these positions, they risk being perceived as blatant opportunists in their arguments, blunting their effectiveness in both the short and the long terms.
THE RISE OF CORPORATE BENEFITS FOR DOMESTIC PARTNERS

In the story of the advance of civil rights, the demand for domestic partner benefits marks a discernible transition. Whereas the primary concern before had been on securing the “negative” right not to be discriminated against or targeted for unfair treatment, benefits signaled a new focus on “positive” rights, namely, those that impose a duty upon some other party, in this case the private employer.

A Scheme to Organize the History

We are fortunate that Nicole Raeburn has exhaustively recounted the development of domestic partner benefits. Her work offers the most complete account of the appearance and spread of partner benefits within corporate America.

In addition to providing historical background, Raeburn constructs her own interpretive model to account for those developments. In her view, most companies that relent and offer benefits do so only after internal pressure from employee groups. This analysis is an alternative to other theories attributing that growth to imitation or other factors. Thus, for Raeburn, the history of corporate-offered domestic partner benefits is the history of gay and lesbian employee interest groups: “It is gay employee activists who deserve credit for the entire first wave of corporate adoptions and for a significant proportion of policy extensions even still.”

No subsequent discussion can proceed without responding in some way to Raeburn’s thesis. Although her study turns the reader’s attention to an undercredited variable in the history of gay rights activism generally, and partner benefits specifically, by itself it is incomplete. Although the “first known gay employee network” was formed in 1978, it was not until 1991, with the groundbreaking initiative at Lotus, that a major corporation made available domestic partner benefits to its employees. This delayed impact is sufficiently large to allow us to conclude that employee networks, even if necessary, were hardly sufficient for corporate acquiescence. If gay and lesbian employee networks were the principle agents in this process, the sociohistorical setting in which they worked also influenced corporate receptivity to the request.

The narrative sketched here offers a different interpretive outline than Raeburn’s. Today’s comparative ordinarity of domestic partner benefits rests upon a tripartite foundation. First, society in general, and businesses in particular, engaged in an extensive dialogue about employment nondiscrimination. This initial stage focused on the basic belief that employment should not be conditioned on personal qualities; instead, it should depend solely upon factors relevant to the performance of the job. Not all sectors adopted explicit language guaranteeing that equity principle, but the social dialogue was extensive, and to speak of the right of gays to protection from irrational firings was no longer a shocking breach of propriety.

Second, the response of the gay community to the decimation wrought by the AIDS crisis advanced the cause of employment benefits in two ways. First, in order to provide the vital services that AIDS patients required, new organizations were created, bringing into existence unprecedented networks of community members. These networks, once they existed, had the potential to be directed toward other projects of activism given the proper motivation. At the very least, they offered a model for effective community organizing that generated a sense of social empowerment. If AIDS could be faced and survived, then so too could confrontation with the cold corporate world. At this point the present historical account converges with Raeburn’s emphasis on organized employee groups as the causative agent in the attainment of domestic partner benefits in the workplace.

Second, AIDS stimulated the pressure for benefits in a different way. While the first stage focused on the rights of the gay and lesbian individual, during the AIDS crisis of the 1980s attention was drawn to the broader family unit consisting of a same-sex couple. This new subject of discussion created pressing demands beyond those of the individual’s employment security and into the same workplace issues that mattered to all employees with families, not least being benefits. The value of health and disability insurance, for instance, became obvious. Bereavement leave would unfortunately also become a significant issue.

Although the perception of an acute emergency in the face of AIDS has been greatly softened in the past decade, the public awareness of the disparate and unfair treatment of same-sex families was again driven home in the aftermath of September 11, 2001. Victims’ families were to be compensated from a special fund; in addition, companies often extended payment in the form of the deceased employee’s insurance coverage.

It immediately became apparent, however, that gay and lesbian partners were not consistently included in these programs. While New York was quick to offer assistance on a nondiscriminatory basis, Virginia refused to recognize the needs of the same-sex survivors. At a time when the nation was experiencing a rare moment of unity, the sight of these surviving family members being subjected to gross discrimination aroused sympathy in unaccustomed quarters. The federal fund essentially relies upon state law to identify eligible claimants. As stated in the Federal Register:

The final rule continues to rely upon state law for the determination of the personal representative. Reliance on state law is necessary in part because those who file for recovery under the Fund waive their rights to recover through litigation, in which state law would determine the identity of the appropriate representatives of the decedent, or the decedent’s estate, to bring suit. Thus, if the identity of personal representatives for purposes of this Fund were determined by federal regulation, there could be many situations in which the representative as defined by state law would choose litigation while the personal representative as defined by federal regulation would seek to recover from the Fund. While many have voiced criticisms of some of the potentially applicable state laws, those criticisms are more properly directed toward state officials.

The federal fund did eventually award compensation to at least a few gay families, the first being Peggy Neff, partnered for eighteen years with victim Sheila Hein. Like the AIDS crisis, the September 11 attacks vividly communicated to an often inattentive general public that gay men and lesbians live in a condition of chronic inequality and are not, as often claimed, seeking “special rights” when they press their demands for partner benefits with all due vigor.

The third stage of the history of corporate domestic partner benefits can be described as one of consolidation. The first stage had dealt with individual employment
nondiscrimination, and the second centered on a crisis out of which emerged viable community organizations and a new attention to the value of benefits for one’s partner. The last stage is characterized by the normalization and routinization of domestic partner benefits made possible by the application of the lessons learned from AIDS activism. At this stage, benefits are demanded not out of a desperate need but from a sense of fundamental justice. Although the trauma of AIDS has shown how valuable workplace benefits can be, in the final analysis they are expected not because of an immediate, practical utility but because gay men and lesbians have realized they should be compensated on an equitable basis with their heterosexual coworkers.

These divisions represent themes of narrative emphasis rather than sharp and mutually exclusive historical segments. With that in mind, we can assign general dates to the three periods outlined above. The initial phase, which concentrated on employment nondiscrimination, began in 1978 with the first inclusion of “sexual orientation” in an employer’s nondiscrimination policy. After the first AIDS case was reported in 1981, the organizational activity that characterizes the second phase commenced almost immediately with the founding of the Gay Men’s Health Crisis in 1982. The third phase of consolidation and routinization of domestic partner employee benefits would have begun at a point when the urgency of the AIDS crisis had lessened to the degree that the community could afford to divide its actions between AIDS and the new, family-oriented challenges. AIDS diagnoses rose to a peak in the early 1990s, after which they fell off and stabilized by about 1996. The final phase of the background story for domestic partner employment benefits, therefore, would have commenced approximately that year.

This outline predicts a few trends. Domestic partner benefits are expected to be rare until after the appearance of AIDS as a critical social issue, which is to say no earlier than 1981. This late appearance will be the result as much of an earlier failure to seriously ask for them as to any unwillingness of companies to offer them.

In the second phase, the spread of domestic partner plans will be rapid, as “low-hanging fruit” within the business world responds to the new need. While the rate will be high, so too will be the negative reaction of social conservatives, who view the extension of these benefits as implicit endorsement of the “homosexual lifestyle” and an affront to their ideal society.

In the third and final phase that begins around 1996, the rate of new corporate providers will be lower, but the implementation of these new programs will require less justification and receive less fanfare as their presence becomes an established best business practice.

The Initial Rise of Domestic Partner Benefits

The first domestic partner health care benefits offered by any employer came from the Village Voice in 1982 (or four years after the first workplace nondiscrimination policy, and within the limits of the first prediction). This landmark act was followed in 1989 by the socially conscious ice cream producers Ben & Jerry’s. The trend was slow to catch on in the business realm: by 1990 no more than twenty-four establishments had followed the example. Against this background of little equitable progress splashed the most famous of the gay discrimination cases, that of Cracker Barrel Old Country Stores and Restaurants.

In 1991 Cracker Barrel implemented a new hiring policy stating that it would not employ homosexuals, and fired in its wake at least nine employees. William A. Bridges, at that time Cracker Barrel’s vice president, justified the action by describing the company as one “found[ed] on a ‘concept of traditional American values,’ and that] employment of homosexuals appeared to be inconsistent with those values and the ‘perceived values of our customer base.’” This sentiment is more common than many suppose: Cracker Barrel was exceptional only in its unflinching expression. The termination notice of Cheryl Summerville, who became the symbol of the antigay employment policy, read, “This employee is being terminated due to violation of company policy. This employee is gay.”

Although Cracker Barrel later rescinded the policy, it did not rehire the employees fired under it. The brazenness of the corporate action led to a well-publicized boycott of the restaurants within the gay and lesbian community, and established the model for activism at corporate annual meetings at which stockholders submit ballot initiatives in favor of progay social policies. Feeling the pressure, Cracker Barrel would eventually add “sexual orientation” to its nondiscrimination policy in 2002.

The Cracker Barrel episode exquisitely illustrated the injustices endured by gay men and lesbians in the workplace. With society’s attention turned sympathetically toward this problem, the time was ripe for a major corporation to take positive steps. In September 1991, computer software company Lotus extended the same benefits to employees’ domestic partners as it offered to spouses, becoming the first publicly traded company to do so. With that act the public saw that benefits were viable not only for small, boutique businesses in liberal settings but also for national megacorporations.

With such a showcase example, other corporations moved to adopt similar benefit programs. Raeburn identifies 1993 as marking a sea change in the movement: whereas in the early years the majority of new adopters had been municipalities or universities, after 1993 companies became the biggest providers, and it has remained that way ever since. For most purposes domestic partner benefits have their immediate impact on real people through corporate employees.

To avoid some of the negative reaction from an industry customer base, on a few occasions several major players announce the availability of new domestic partner benefits simultaneously. The most notable such event occurred on June 8, 2000, when all three car manufacturers, along with the United Auto Workers labor union, together announced new partner benefits. The rationale appears to be that by working jointly, there was no first provider to be targeted with boycott or other negative publicity and consumer criticism.

Raeburn divides the forces that move companies to adopt equitable benefits policies into three categories. Coercive isomorphisms are the legislative and other external forces that compel companies to adopt the benefits. Equal benefit ordinances, discussed in the paragraphs that follow, are the best example of this kind of pressure, as is the pressure exerted by gay and lesbian employee organizations. In Raeburn’s model a coercive isomorphism is the single most important force leading to the adoption of benefits plans.
Mimetic isomorphisms refer to the conscious desire of companies to imitate the policies, programs, and management styles of their more successful competitors in hopes of copying their commercial achievements.

Finally, normative and cognitive isomorphisms include the tendencies for companies to try to bring their benefits policies into line with a broader corporate ideology, such as the value of diversity.

These three forces have converged to generate the social momentum that has rendered domestic partner benefits, if not entirely commonplace, at least comparatively uncontroversial. Today, social conservatives tend to react less to corporate domestic partner programs per se than to their adoption by such “family friendly” businesses as Disney. As compared to the possibility of same-sex marriage, domestic partner benefits now strike one as quite conservative. Raeuburn’s own focus bears repeating, however. Even in the most permissive environments, a company can fail to adopt domestic partner benefits if no employee has asked for them.

Reasons for Companies to Offer Benefits

As a rule the public favors health and other benefits for same-sex partners. According to a February 2004 Princeton/Newsweek poll, for example, 60 percent of respondents answered in the affirmative the question: “Do you think there should or should not be...health insurance and other employee benefits for gay spouses?” Despite that latent support, corporations, being profit-generating enterprises, frame significant structural changes in terms of that all-consuming goal. This caution is especially warranted when the action being considered might arouse a negative reaction from the customer base.

The most persuasive arguments—both in terms of convincing the enterprise to offer the benefits, and of explaining to the public the decision to offer benefits—have become known as the “Business Case.” Although variously framed, it typically emphasizes the positive effect a decision to offer domestic partner benefits will have on the business’s bottom line. These factors include:

- **Job satisfaction**: Employees who believe they are being fairly compensated for their efforts will find their work rewarding.
- **Employee morale**: Workers who feel their employer respects and values their lives as people will view the workplace as pleasant and supportive, reducing turnover and absenteeism.
- **Worker productivity**: When employees do not have to expend time and emotional energy defending the dignity of their persons and of their families, those resources can be directed toward task performance.
- **Corporate reputation**: A reputation for fair treatment of a diverse workforce earns positive publicity that can, among other outcomes, lead to recruitment of exceptional employee candidates. Indeed, according to the HRC Foundation WorkNet project, “domestic partner benefits were ranked as the No. 1 most [effective] recruiting incentive for executives and the No. 3 most effective recruiting incentive for managers and line workers.” Alternatively, negative publicity (such as that endured by Cracker Barrel) repels not only customers but also desirable possible workers.

- **Turnover and other costs of discrimination**: Because it can be expensive to replace workers who leave for a more favorable work environment (it can cost as much as seventy-five thousand dollars, according to some studies), the efficient business will seek to retain its current employees, especially when that can be accomplished by a low-cost program such as domestic partner benefits. In addition, a proactive approach to create an equitable workplace reduces the likelihood of expensive (and reputation-damaging) discrimination lawsuits.

- **Attracting a new customer base**: Gay and lesbian consumers are more likely than heterosexuals to consider a company’s diversity-friendly policies when choosing a business or product (47 percent versus 18 percent, respectively). As a rule, then, the potential gain in new customers is more than offset by any loss in offended clients.

These reasons should be understood to be in addition to those based on the principles of fairness, equitable treatment, and “equal pay for equal work,” which remain important because employee benefits can account for more than 27 percent of a worker’s total compensation. These rationales, however, are employed more sparingly because it is not generally seen to be a mission of a publicly held corporation to pursue social justice at the possible expense of shareholder revenues.

**Common Objections to Domestic Partner Benefit Plans**

The primary objection to domestic partner benefit plans—or at least the one that does not argue that their availability undermines society by endorsing the homosexual lifestyle—is that they simply cost too much. The argument has two prongs and correctly assumes that health benefits are the major focus. First, the claim is made that the number of enrollees will be so high that they will overtax the program, and second, that a homosexual partner is more likely to have high-cost illnesses such as AIDS, which the fund cannot absorb.

In the earliest days of benefit program activism these issues may have been reasonable. Because the offer of these programs was an administrative terra incognita, many of the first programs covered the unknown risks by levying a surcharge on insurance premiums. With the hindsight of years of experience, however, we know that both of these fears are unfounded.

A recent analysis begins with the 2000 census figure for same-sex partner households (594,391), and, after applying industry averages, arrives at the conclusion that the universe of potential participants is but 189,746. “Given the size of the American workforce, this seems an insignificant number indeed.

Furthermore, just a small percentage of this number will actually enroll. “On average, employers offering equitable benefits will ‘see an enrollment increase of 1%, even when same-sex and opposite-sex partners are covered,’ which is the practice for 65 percent of adopters.” Sally Kahn attributes this low participation to key factors: a fear of “coming out” in order to take advantage of the new benefit;
an inability to handle the tax liability that domestic partner benefits accrue (see the discussion that follows); and the reality that many partners are already covered under their own health insurance plans.\(^{16}\)

A low enrollment, however, can be offset if the associated claims are very high. At the time of one analysis (1993), Elizabeth Murphy was able to report that “neither this research, nor that conducted by the Bureau of National Affairs turned up a single AIDS claim filed by a domestic partner.”\(^{16}\) While that conclusion is probably no longer true, the general sense of it still applies: not only are domestic partner plans not likely to become a major means of routine provision of expensive AIDS care, such claims as are made are also likely to be lower than those associated with other covered conditions, including childbirth.

Murphy further cites Louis’s reported childbirth costs as high as three hundred thousand dollars, while a single premature birth can run upwards one million dollars. Because same-sex couples are likely to bear fewer children, and tend to be younger than heterosexual couples, many companies have found that covering a domestic partner can be less expensive than covering a spouse. Far from being cost prohibitive, domestic partner benefit plans can be cost-effective, although in most cases the differences wind up being insignificant, adding somewhere in the range of 1 to 2 percent of total benefits costs.\(^{18}\)

THE ROUTINIZATION OF DOMESTIC PARTNER BENEFITS

HRC Foundation WorkNet data show that new providers increased after 1991 by rates of 50 percent or more for every year through 1998 (excepting 1996). These first 2,764 businesses would constitute the low-hanging fruit predicted by the second phase of the historical development of corporate domestic partner benefits.

Thereafter, the movement entered a period of slower growth consolidation. From 1999 to 2003 the growth rate ranged slightly between 18 and 24 percent. Recent increases have slowed even further. As of March 2006, 7,843 private sector companies (and 8,280 companies of all kinds) were offering domestic partner health benefits. Published figures that ended in December 31, 2003, recorded the corresponding private sector figure as 7,149, indicating a mere 9.1 percent increase over more than two years.

Contrary to Raeburn’s emphasis on employee activism for the initial spread of domestic partner benefits, later studies have put the emphasis elsewhere. “In recent years there is strong evidence of mimetic (‘follow the leader’) and normative (‘the right thing to do’) isomorphic processes in explanations of DP benefits policy adoption.”\(^{17}\) The effect of at least the latter can be seen in the annual Corporate Equality Index compiled by the Human Rights Campaign Foundation. The Index rates companies (a total of 402 in the latest edition of 2005) according to how well they treat their gay and lesbian employees. The criteria function as a form of benchmarking of diversity performance against which businesses can compare one another and rank their relative performances.

Despite the steady increase in the number of business providers, it cannot be assumed that the future trajectory to equitable benefits will be smooth. While the general trend is upward, progress is not inevitable. The April 2005 figure of 7,597 is actually lower than the figure (7,618) reported in February of that year, suggesting that some companies have retreated from prior benefits offerings.\(^{17}\) Although such retreats are rare, they do happen, as when a nonprovider buys or merges with a provider of benefits and imposes its discriminatory policy on the new corporate entity. The best-known example is the Exxon-Mobil merger, when, in November 1999, the newly created ExxonMobil “nullified Mobil’s gay-inclusive nondiscrimination policy and stopped any future enrollment in its domestic partner benefits programs.”\(^{17}\)

Easing the adoption of these plans have been laws such as equal benefits ordinances (see text that follows), and that of state laws like New Jersey’s new Domestic Partners Act (New Jersey Public Law 2003, Chap. 246), which went into effect on July 11, 2004. Although the law does not require employers to offer domestic partner health benefits, insurance companies are required to offer plans that extend such coverage. The availability of suitable insurance products removes one obstacle that has prevented willing employers from providing equivalent coverage to their gay and lesbian workers.

At least three variables have proven to be significant in determining retrospectively whether a company has chosen to provide partner benefits. These same variables—the company’s size, geographical region, and industry—can be expected to be similarly predictive.

Unsurprisingly, there seems to be a positive correlation between the economic success of a company and the likelihood that it offers domestic partner benefits. HRC Foundation WorkNet data from 2005 reveal that while 46 percent of Fortune 500 companies provide benefits, these are available from 76 percent of Fortune 50 companies. Larger companies are more insulated from negative public reaction and are more willing to adopt innovative policies, while also having the resources to execute them. It can help, for instance, if a company is large enough to be self-insured, and thus able to craft the kind of benefits program it wishes.

More interesting are the results pertaining to regional variation. According to Mercer Human Resource Consulting, access to domestic partner benefits is not uniformly distributed across the nation. “Large employers in the Northeast and West are significantly more likely to include same-sex domestic partners as eligible dependents (42% and 38%, respectively) than employers in the Midwest and South (14% and 10%, respectively).”\(^{16}\) It is of considerable interest that the regions where domestic partner benefits are most available are not the regions where the numbers of same-sex households are highest. According to the 2000 census, unmarried same-sex couples represent 1 percent of all coupled households in the country. Of the 594,391 reported couples, the numbers for each of the four regions are: Northeast, 119,246; West, 159,653; Midwest, 105,750; and South, 209,742. If a raw abundance of gay and lesbian families were the tipping point for a willingness to extend equitable benefits, the South would be awash in domestic partner plans. The figure that seems to be more determinative of that outcome is not the absolute number but the percentage of coupled households that the number represents. Those regional figures are: Northeast, 1.1 percent; West, 1.2; Midwest, 0.97; and South, 1.0.

A full analysis of the interaction between availability of domestic partner benefits will need to consider the influence of race. White-only same-sex households account for just 0.09 percent of all couples. Rates for black-only same-sex families
(1.4 percent) and mixed race (1.6) are noticeably higher, and in a race-conscious society such as ours, this fact may negatively play a role in whether domestic partnerships are viewed as a social necessity.

Finally, not all industries have proven to be equally amenable to the idea of providing benefits to the partners of their gay and lesbian employees. The 2002 edition of The State of the Workplace includes an intriguing timeline that marks the year in which each major industry type first offered domestic partner benefits. As has already been mentioned, “Printing and Publishing” appears first (Village Voice, 1982). “Computer Software” records a pre- Lotus entry at 1987; “Law Firms” at 1988; “Food, Beverages and Groceries” at 1989; and (somewhat surprisingly) a late appearance of “Entertainment and Electronic Media” and “Health Care” at 1992. The last entry, 2001, reflects the first offering by the tobacco industry.

Prevalence of a benefits program within each industry closely tracks the order of its initial offerings. The first three industry types, accordingly, are “Communications, Technology and Media Firms,” “Law Firms,” and “Insurance and Health Care.” Extrapolating from these data, an employee is most likely to be offered domestic partner benefits when working in a large media company or technology firm in the Northeast, and least likely when working in a small clothing business or hotel in the Midwest.41

SPECIAL ISSUES ASSOCIATED WITH CORPORATE DOMESTIC PARTNER BENEFITS

To the casual observer, the single challenge to gaining access to domestic partner benefits in the workplace is the agreement of the employer. If that can be obtained, then the matter is settled and unproblematic. Things are rarely so simple, however. Both the employer and the employee have additional pressures that might influence the decision either to offer benefits or to take advantage of any plan that is available.

The employer, even if it wishes to offer a domestic partner benefits plan, may not be able to find a provider for the hard benefits. Those that are self-insured will have more flexibility, therefore, than those who must purchase a plan from a commercial provider. Compounding this limitation is the government regulation that makes adding domestic partners more than a matter of adding people to a preexisting program. Management of the plan requires deciding to whom the plan should be offered, monitoring the tax implications for the employee, and structuring the program to comply with the Employee Retirement Income Security Act (ERISA) and other relevant laws. Any one of these, much less all three together, can be a daunting task to any but the larger corporations with dedicated human resources departments and in-house legal counsel.

Beyond these administrative details, the employer can be caught between the current sweep of state and federal laws that deny recognition of gay and lesbian relationships and local laws that require those relationships to be treated equitably. While surmountable, the lesson is that a business is not always free to do what it wishes it could do or knows it ought to do, and the savvy activist will be sensitive to the full financial and administrative significance of what is being asked of the employer.

Corporate Domestic Partner Benefits

From the employee’s perspective, the right to such benefits as health care at some future date may mean an unexpectedly high payment out of today’s paycheck. This fact could diminish enthusiasm for the plans that an employer makes available.

Charybdis and Scylla for the Employer

Even the well-intentioned employer can be frozen into inaction in today’s environment of conflicting social messages. States are ratifying amendments to their constitutions that withhold marriage recognition and, often, even lesser statues. At the same time, municipalities (and at least one state) are requiring businesses to treat domestic partners on an equitable basis. Even when the two dictates are not formally in conflict, their spirits could not be more opposed, leading to a confusing tension of obligations. “The combination of Goodridge and DOMA [Defense of Marriage Act] will translate into greater administrative complexities for...an employer, and expose the employer, as the plan administrator, to greater potential liabilities.”42 Because businesses as a rule tend to be conservative institutions, most would prefer to follow trends rather than to set them. Until the winds of change have settles clearly on one direction, many employers may prefer to do nothing.

Anti-Gay Relationship Laws

Social conservatives have a conflicted relationship with their gay and lesbian fellow citizens. For decades they decried the alleged legendary promiscuous prowess of the ordinary gay male, yet now equally abhor the image of a monogamous, loving gay couple. What could have counted as their greatest cultural triumph—the assimilation of the undomesticated homosexual to the home-and-hearth ideal modeled after the heterosexual nuclear family—instead has provoked their most visceral horror.

Thus the decision of Massachusetts to legalize same-sex marriage initiated a backlash of new amendments to state constitutions banning legal recognition of same-sex marriages. While such a massive expression of popular antigay sentiment could not escape influencing corporate eagerness to treat same-sex couples fairly, this strong adverse reaction impacts the present discussion more directly. As analyzed by the National Gay and Lesbian Task Force, eleven of the fifteen state constitutional amendments passed in 2004 and 2005 “may ban other forms of partner recognition in addition to marriage, like domestic partnership and civil unions.”43

At the very least, the most extensive of the bans present administrative hurdles to businesses in that they can no longer rely on civil registrations to certify a relationship as a valid domestic partnership. In lieu of such documentation, each business will have to face the daunting prospect of establishing, monitoring, and essentially passing judgment on the private lives of its gay and lesbian workers. That prospect will be welcomed by few, and could even potentially increase resistance to new initiatives for partner benefits.

Recent enactments in Virginia illustrate the difficulties these laws present. Like many other states in the wake of the earlier scare that Hawaii might legalize same-sex marriage, Virginia passed a law in 1997 banning such marriages. In 2004 this “Affirmation of Marriage Act” (Va. Code Ann. §20-45.2) was amended by House Bill 751. The new language provides that:
A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.22

The Virginia law, regarded by experts as the country’s most restrictive, passed with a large margin, effectively nullifying the governor’s desire to veto the broad language (Va. Code Ann. §20-45.3). The legislature has since endeavored to make their anti-gay posture even stronger by proposing a new constitutional amendment.

It is the broad language of the law, however, that illustrates the looming problem for domestic partners in this spreading anti-gay backlash. The new law not only forbids governmental entities from establishing and recognizing gay relationships but also prohibits enforcement of any private contracts between individuals that have the effect of “bestowing the privileges or obligations of marriage.” When this new statute went into effect on July 1, 2004, there was yet another oddity within Virginia law. At that time, state law prohibited companies chartered in Virginia from offering health insurance to anyone other than a spouse or dependent child. It was the only state with such a restriction. Hard domestic partner benefits were available strictly to self-insured companies, or those based in another state, using an insurance provider also headquartered outside Virginia.

In the 2005 session, by a margin of one vote, State Code Section 38.2-3525 was amended by Senate Bill 1338 to permit coverage of “Any other class of persons as may mutually be agreed upon by the insurer and the group policyholder.” This change makes the provision of domestic partner benefits in Virginia at least possible, an outcome conservatives fought to prevent.27

This area of the law is in flux, in terms both of what amendments and laws will ultimately be passed and of the meaning courts will attach to them. Still, the Virginia saga demonstrates that the grant of hard benefits, because they are under state and federal regulation, requires more than the willingness of the employer. States eager to write discrimination into their constitutions will hardly balk at borrowing the idea of the law that Virginia narrowly revised, thereby preventing companies who purchase commercial coverage from offering plans that include the partners of their gay and lesbian employees.

Or, conceivably, they could write anti-gay relationship laws as broad as Virginia’s that might be construed to preclude enforcement of agreements to provide such benefits, even where they are technically available, on grounds that they flow from a verboten contractual right that “shall be void and unenforceable.” The enrollee, in other words, may be unacceptably dependent upon the good will of the provider, since he or she would have little legal remedy available to resolve disputes. A generous court might decide that the benefits are enforceable because they represent a contract between the employer and the employee, not directly between “persons of the same sex.”

That outcome, however, is not required, and the surrounding uncertainty would inflict much of the harm. To the extent hard benefits are intended to generate security, that goal is undermined when the employee cannot be assured that the promised benefits are enforceable.

Law students are trained to enjoy the play of imagining possible future legal cases. It therefore bears repeating that none of these speculative scenarios is yet on any docket. By the same token, however, after Kansas adopted a similar broadly worded amendment to its state constitution in April 2005 (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage”), the attorney general found it necessary to explicitly assure Kansas that it would not be used to deny domestic partner benefits.28 That promise, however, is not binding on future incumbents. In the end, it may all come down to what, exactly, jurisdictions consider to be an “incident of marriage,” and how much pressure from the political right the state receives to expend its energy to police their limitation to heterosexual spouses.

In addition to whatever predictive value these suggestions might have, they are germane to the present discussion in another way. Even when no law expressly forbids the grant of domestic partner benefits, the overall sociocultural culture may make such an action prohibitively difficult, if not outright impossible.

An extension of benefits may provoke negative reaction from the same business customer base that has overwhelmingly endorsed the anti-gay relationship laws. Just as boycotts can be directed toward businesses with anti-gay policies—as was the case with Cracker Barrel—they can also be called against those with gay-supportive environments. Most recently, for example, Microsoft, a corporation that instituted same-sex-only domestic partner benefits in 1993, withdrew its support of Washington house Bill 1515, which would have added “sexual orientation” to the list of illegal discrimination in housing and employment, and would have protected the “right to engage in insurance transactions or transactions with health maintenance organizations without discrimination.”29

Microsoft’s retreat was puzzling because of its earlier support for the bill, as well as for similar legislation at the federal level, the Employment Non-Discrimination Act (ENDA).

On April 21, 2005, the senate bill failed by one vote. The motivation for Microsoft to withdraw its support, an act that arguably helped to doom the bill, is unclear, but the pastor of the nearby conservative Antioch Bible Church credibly claims that he threatened Microsoft with a boycott and other retribution if it continued to advocate on behalf of its gay and lesbian employees.30 The amendment to the Washington Civil Rights Act, however, would pass the next year with the support of a chastened Microsoft.

Yet to be mentioned is the effect of a possible federal anti-gay marriage constitutional amendment. Although it is unclear whether such an amendment will ever be submitted for state ratification, and what language such an amendment would contain, some versions are being considered—most notoriously the Musgrave amendment, which would insert into the U.S. Constitution the language that “Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.” This may threaten the availability of domestic partner health benefits through state-regulated plans as arguably barred as “legal incidents” of marriage.

Businesses, especially those answerable to shareholders, cannot ignore such pressures. By the same token, of course, they need not necessarily capitulate to them. But requests for new domestic partner benefits should be presented with an awareness of the larger sociocultural context in which the employer will make its decisions.
Equal Benefits Ordinances

Setting to one side whether anti-gay relationship laws will prohibit the extension of benefits to domestic partners, the current legal situation is that, in the absence of broad non-discrimination laws, corporations are not required to provide benefits of any kind to the domestic partners of their gay and lesbian employees. A few jurisdictions, however, have found an indirect method to compel businesses to offer such benefits. While these “equal benefits ordinances” do not require benefits as a matter of general non-discrimination, they do stipulate that any business seeking to offer a contract to provide goods or services to the municipal government must offer to their employees’ same-sex partners the same benefits given to heterosexual partners.

The list of jurisdictions with equal benefits ordinances is not long. At this writing these include only one state, California. Passed in 2003 yet not going into effect until 2007, the law applies to any state contract exceeding one hundred thousand dollars (see Calif. Public Contract Code §10295.3). It extends not only to the work of the business within California but also to work for the state performed by company employees living outside California.

The remaining equal benefits ordinances have been enacted at the municipal level; these include:

In California:
- Berkeley (Municipal Code §13.29)
- Los Angeles §(10.82.1)
- Oakland (§2.32)
- San Mateo County (§2.93)

In Washington:
- King County (§12.19)
- Seattle (§20.45)
- Olympia (§3.18)
- Tumwater (§3.46)

In Minnesota:
- Minneapolis (§18.200)

In Florida:
- Miami Beach (§2-373)

The Human Rights Campaign WorkNet notes similar laws in other jurisdictions. These differ from equal benefits ordinances in that they do not require equal benefits; instead, they grant small bidding preferences to those that offer equal benefits (as in Broward County, Florida, and Salt Lake City, Utah), target those who receive city funds for their programs rather than contractors (as in Portland, Maine), or require simply that similar unpaid leave benefits be extended (as in Sacramento, California).

The most significant of the equal benefits ordinances, however, are those passed by San Francisco and New York City, the first enjoying unmatchable success, the second being struck down by the courts. These laws have had a far-reaching impact not only in the large number of people affected but also in the litigation they generated. In addition to determining whether these ordinances will remain effective in their original jurisdictions, the court opinions can influence the likelihood that similar laws will be enacted elsewhere.

SAN FRANCISCO

In 1996 the San Francisco Board of Supervisors passed the first equal benefits law (San Francisco Administrative Code Chap. 128). The policy requires that all contracting agencies of the city who do more than five thousand dollars of business adhere to a broad employment non-discrimination provision that had been on the books for several decades. The law also extends new protections that forbid contracts with any business “that discriminates in the provision of bereavement leave, family medical leave, health benefits, membership or membership discounts, moving expenses, pension and retirement benefits or travel benefits...between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees.”

The law requires that, in order to receive this protection, the domestic partnership be registered with “a governmental entity pursuant to State or local law.” If providing to a domestic partner exceeds the costs of providing the same benefit to a marital spouse, the contractor may charge the employee any excess. Also, if after reasonable effort the contractor is unable to provide a certain benefit, it may offer a cash equivalent to the employee.

The ordinance has been enormously influential. In its first year of enforcement 1,228 of the 1,281 new business adopters of domestic partner benefits nationwide did so in response to the San Francisco law. Predictably, the ordinance has been the target of multiple court challenges by contractors invoking various legal theories.

The first and most significant of the lawsuits was filed by the Air Transport Association of America, together with other airline companies. They argued that the ordinance as applied to the airport was preempted by various federal laws, including the Airline Deregulation Act (ADA), the Railway Labor Act (RLA), and ERISA (passed in 1974), in addition to provisions of California law.

Early rulings in the case issued by the federal district court found that the ordinance could not be construed to apply to the contractors’ operations throughout the United States. San Francisco was, however, able to require compliance with the ordinance within the city itself, on any property outside the city that it owned or had a right to occupy (such as the airport), and anywhere in the United States where work pursuant to a city contract was being performed.

The court also held that when the city acts as an ordinary consumer of goods and services in the marketplace, it can require a contractor to provide the full panoply of benefits to the domestic partners of its employees. However, when it acts as a regulator (as it does for the airport), it cannot force the provision of ERISA-protected benefits, including health and pension plans. Even in this latter circumstance, where the city holds more power than the ordinary consumer, contractors can be required to provide non-ERISA covered benefits, or “soft benefits,” such as family medical and bereavement leaves.

On appeal, the United States Court of Appeals for the Ninth Circuit held that the plaintiffs were unable to meet their burden as to the other arguments in their attempt to have the ordinance overturned. First, the ordinance did not “exact or
enforce a law, regulation, or other provision having the force and effect of law related to a price, route or service of an air carrier" in the sense required by the ADA because it did not require the airlines to adopt any specific price, route, or service.

Second, the nondiscrimination requirements of the ordinance did not frustrate the RLA's purpose of fostering collective bargaining agreements "concerning rates of pay, rules, and working conditions." Relying on its earlier rulings, the court concluded that "because minimum labor standards do not affect the collective bargaining process, minimum labor standards do not affect or regulate the right to collective bargaining," and therefore "the Ordinance is not preempted by the RLA."

Other suits repeat in substance the complaints dismissed in that brought by the Air Transport Association. Of the two lawsuits filed by Pat Robertson's American Center for Law and Justice, only one progressed through the court system. S. D. Myers was an Ohio-based electrical corporation that had submitted the lowest bid for a contract with the city of San Francisco. The company refused to comply with the equal benefits ordinance, however, claiming that to do so would violate its religious and moral principles.

Although the Ninth Circuit rejected the corporation's arguments based on the dormant commerce clause and the due process clause, it remanded for consideration one additional argument. Myers had claimed that the city law was preempted by California law, specifically that part of the state Family Code that governed the creation and registration of domestic partnerships (the "Registration Statute").

The California Constitution limits municipal governments to the enacting of only those laws that do not conflict with "general laws." Myers argued that the Registration Statute had "fully occupied" the area of law of domestic partnerships, and thus preempted any local law on the subject. This position was ultimately rejected by the Ninth Circuit as well. The Myers suit stands less for any firm legal proposition than as an example of the creative argument antiharmonists will employ in order to attempt to forestall the attainment of equality for gay men and lesbians.

NEW YORK CITY
The San Francisco ordinance successfully withstood its judicial challenges with only minor and expected limiting clarifications. The ordinance enacted by New York City has suffered an altogether different fate.

The New York Administrative Code was amended to include Section 6-126. To be known as the "Equal Benefits Law," New York City's law was far less inclusive than San Francisco's. Whereas the latter's applied to any contract worth five thousand dollars or more, this law covered just those contracts with a value equal to or greater than one thousand dollars. While both have "sole source" exemptions, New York also exempted religious organizations that claimed that providing these benefits would violate their moral principles.

New York's law, then, was designed to be much narrower in its intended application than was San Francisco's. Despite being comparatively conservative, the new law passed the city council overwhelmingly with a vote of 43-5-2 on May 5, 2004. It was vetoed by Mayor Michael Bloomberg on grounds that "the City does not have the legal authority under State law to impose the requirements of the [Equal Benefits Bill] on its contractors."

On June 28, 2004, the city council overrode the veto and filed a petition to compel the mayor to implement immediately the new antidiscrimination ordinance. After the New York County Supreme Court granted the application, the mayor, in party with the Catholic Archdiocese and other religious entities, appealed.

The Appellate Division invalidated the statute on March 15, 2005. In addition to reaching the opposite result of the Ninth Circuit as regards the issue of conflict between the benefits law and ERISA, the court also reasoned that state law requires "obtaining the best work at the lowest possible price, and [the prevention of] favoritism, improvidence, fraud and corruption in the awarding of public contracts." The Equal Benefits law, however, "expressly excludes a class of potential bidders for a reason unrelated to the quality or price of the goods or services they offer."

The New York Court of Appeals affirmed the lower court's analysis on all reasons why the Equal Benefits law could not be enforced. Some commentators have noted the bitter irony in this outcome. While this New York court approved Bloomberg's refusal to enforce a law he deemed unconstitutional, the California courts criticized San Francisco Mayor Gavin Newsom when he similarly chose to ignore a law against same-sex marriage that he likewise judged unconstitutional.

On one reading, the trumping of civil rights legislation by economic rationale seemingly would forbid the required observance of any nondiscrimination policy that in theory could incur costs. This decision could signal not only the termination of this new advancing line for gay's rights but also a retreat from discrimination principles long thought secure.

In a less apocalyptic interpretation, the decision is draconian but not entirely inexplicable. While contractors could be required to adhere to nondiscrimination laws of general applicability, the Equal Benefits law imposed a higher requirement upon contractors only. Such additional burdens transgressed the intent of the state contracting law, which therefore preempted the local enactment.

IMPLICATIONS FOR THE FUTURE
It is too soon to know what the disparate outcomes of the New York and San Francisco laws portend for the future of equal benefits ordinances. The New York version was overturned largely on state law grounds, which would not have serious repercussions for laws in other jurisdictions.

While Mayor Bloomberg raised ERISA issues, these were not the primary grounds on which the law was overturned. At worst, ERISA preemption reaches only to the hard benefits of health and pension plans. Equal benefits ordinances could still require the offer of soft benefits. When the airlines in San Francisco were compelled to make available soft benefits, carriers such as United decided to concede the point fully and provided hard benefits as well. It may prove the case, then, that being required to offer any benefits at all will lead employers to extend willingly the full array.

If equal benefits ordinances can withstand judicial scrutiny, they may provide the most efficient means for opening employee benefits to a broader group of partners, nudging entire geographical locales toward committing to equal treatment of their gay and lesbian workers. They may even provide effective cover for employers who hesitate solely out of fear of conservative retribution—it should escape no one's notice that religious bodies were instigators of both the San Francisco and
New York suits. If the move to partner recognition can be “blamed” on compliance with local law, the company emerges unscathed.

Tax Factors for the Employee

Employees do not always flock to take advantage of domestic partner benefits even when they become available. Some of the reasons for this low enrollment have been mentioned earlier, such as the likelihood that the partner is already covered by his or her own plan at work. Another factor is the costs of those benefits in current dollars to the employee.

Because the federal government and all but four states do not recognize same-sex couples as “spouses” for tax purposes, employees must pay taxes on the value of benefits provided to a same-sex partner or spouse.3 (The only exception arises under the rare circumstances when the partner meets the IRS definition of a “dependent.”)

While the cost of group insurance coverage for a partner is less than what could be purchased by an individual in the commercial market, other considerations might diminish the economic incentives for participation. According to the IRS, “medical coverage or reimbursements for persons other than an employee, spouse, or dependent is not excludable from income, and would be taxed as compensation or other income under Section 61 of the Code.”4 The employer must “impute income to those employees electing coverage,” and withhold taxes on that imputed income. As a result, the employee not only pays the insurance out of post-tax dollars—spousal premiums are paid out of pretax dollars—but additional monies are withheld from the “wages” covering the value of the policy.

For example, suppose a policy for an employee and partner costs five hundred dollars per month, and the premium charged the employee is one hundred and fifty dollars: one hundred dollars for the employee, and fifty dollars for the partner. The employee’s portion is taken from the pretax dollars, but that for the partner comes from post-tax dollars. Of the employer’s contribution (three hundred and fifty dollars), any excess over what would be paid for the employee alone must be included as wages to the employee, and taxes correspondingly withheld.

Taxation is not the only way in which domestic partner benefits fall short of those offered to spouses. In addition to the already mentioned ERISA complications, COBRA, the federal law that requires most companies to continue medical benefits to spouses and dependent children after events such as the termination of employment, does not apply. An employer, of course, is free to offer this additional protection if it so chooses, but while an employer may wish to treat same-sex partners equivalently with spouses, the tangle of federal and state laws continues to frustrate that goal.

Each employee must consider whether—as compared with policies that can be purchased individually—these taxation and other limitations of employer group benefits make the plans unattractive economically, or ineffective at meeting the intended needs. A private policy might be more expensive but offer more flexibility, and thus be a better value in the long run. Even if more affordable, a group policy with these portability limitations might not offer the security of an individual policy.

NOTES


4. Ibid., A-56.


7. See Nicole C. Raeburn, Changing Corporate America from Inside Out: Lesbian and Gay Workplace Rights (Minneapolis: University of Minnesota Press, 2004): 11. Many of the historical details discussed in this section are drawn from her extensive study.


15. Raeburn, Changing Corporate America from Inside Out, 81 (quoting M. V. Lee Badgett of the Institute for Gay and Lesbian Strategic Studies) (see note 7).


18. “Questions and Answers about Domestic Partner Benefits,” HRfocus 81, no. 7 (July 2004): S2.


21. Raeburn, Changing Corporate America from Inside Out, 130 (see note 7).


23. Similar results are obtained by Davison and Rouse, 40: “A company is more likely to offer DP benefits if that company is a higher ranking Fortune 500 company, being in a DP benefits sector, having headquarters in the Pacific (and not in the east south central), and being recognized as a top minority friendly company. Year founded is not a predictor of DP benefits companies.”


27. The eleven states banning not only same-sex marriage but also other forms of partner recognition are Arkansas, Georgia, Kansas, Kentucky, Louisiana, Michigan, North Dakota, Ohio, Oklahoma, Texas, and Utah.


33. Air Transport Assoc. of America v. City and County of San Francisco, 266 F.3d 1064 (9th Cir. 2001).

34. S. D. Myers, Inc., v. City and County of San Francisco, 253 F.3d 461 (9th Cir. 2001).

35. S. D. Myers, Inc. v. City and County of San Francisco, 336 F.3d 1174 (9th Cir. 2003).


39. The four states extending tax equity to same-sex partners are Vermont (under its civil unions law), Massachusetts (by virtue of the newly acquired right of gay and lesbian couples to enter into legal marriage), Connecticut (within its new civil unions statute, effective October 1, 2001), and California (beginning in 2005).

