

# Domestic Partners

## Overview

This brief review considers several aspects of self-funded plans covering same-sex partners as spouses:

- Prevalence of such practice
- Legal considerations

## Prevalence Or Such Practice

Active promotion of domestic partner benefits has been done by numerous civil rights organization with some notable successes.

For example: California mandated that such benefit be provided to all state employees. Numerous large corporations and universities offer the benefit.

When the benefits are offered, the number and percentage of those who alert such coverage is very small.

## Legal Considerations

### Department of Labor Position

In DOL Adv.Opn. 2001-05A, The Department took the position that the employer's contribution to gross up the employees portion of FICA taxes for those who elect domestic partner coverage did not violate ERISA provided that such are clearly specified as plan benefits in the plan document. Also the position of the Department is that a domestic partner benefit is a legitimate benefit as far as ERISA is concerned. See also DOL Adv. Opn 82-32A.

### Federal Law

The Defense of Marriage Act §3 codified at 1 U.S.C. §7 (1996) clearly states that a marriage may be only with persons of opposite sex.

### Tax Code

Since IRC §152 does not contemplate domestic partners, the IRS in PLR 9850011 and PLR 200108010 held that plan benefits to domestic partners in excess of their *fair value* should be treated as taxable income to the employee and subject to FICA and FUTA taxes.

## **COBRA**

COBRA does not require domestic partners be given COBRA beneficiary status; nor does it preclude it.

## **Relevant Court Decisions**

Notwithstanding a court order that the participant had to provide his former spouse with medical coverage, the employer was not required to do so where the plan clearly precluded such coverage.<sup>1</sup>

## **Internal Revenue Code**

The code defines dependants for health care plan purposes to include a broad range of persons<sup>2</sup> so long as the participant provides 50% of such person's support. A spouse is not a dependent but may be covered as a spouse so long as the participant and spouse relationship is not in violation of local law<sup>3</sup> and that the spouse is a member of the participant's household.<sup>4</sup>

The IRS has taken numerous positions which serve to clarify how persons may meet the residence and support requirements and yet fail to be eligible spouses.

## **IRS Letter Ruling 9034048**

A spouse (same-sex or otherwise) must be recognized as such by local law. As common law spouse in a state making unmarried cohabitation illegal would fail to qualify for plain benefits.<sup>5</sup> Where the local law makes a same-sex union legal, the IRS will treat the domestic partner as dependent (not a spouse) and apply the residence and support requirements of any other dependent.<sup>6</sup> Thus a same-sex partner may have all of the codes tax advantages so long as such relationship is legal, by local law, and meets the residence/support requirements.<sup>7</sup>

## **IRS Letter Ruling 9717018**

This ruling supercedes all prior positions of the IRS in that the Defense of Marriage Act of 1996 provided that domestic partners are not spouses under Federal tax laws.

## **IRS Letter Ruling 9850011 and 200108010**

The IRS took the position that the economic value of the benefits (as opposed to the benefits paid in a self funded plan) should be treated as wages for all tax purposes.<sup>8</sup>

1. *Davis v. Grier*, \_\_ F.Supp\_\_ (W.D. Mo. 1989); *Powers v. Bankers United Life Assurance Co.*, \_\_ F.Supp\_\_ (D. Kans. 1991).
2. Dependents so designated by IRC §152 (a)(1) – (8):
  - Son or daughter
  - Stepson or stepdaughter
  - Brother, sister, stepbrother, or stepsister
  - Father or mother, or ancestor of either (that is, grandparents, great-grandparents)
  - Stepfather or stepmother
  - Niece or nephew
  - Aunt or uncle
  - Son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
3. IRC §152 (b)(5).
4. IRC §152 (a)(9).
5. *Ensminger v. Commissioner*, 610 F.2d. 189 (4<sup>th</sup> Cir. 1979), *cert. denied*, 446 U.S. 941 (1979).
6. IRS Letter Ruling 9111018, 9109060 and 9231062.
7. IRS Letter Ruling 9603011.
8. IRC §§3401 (a), 3402, 3121 (a), 3111, 3301 and 3306; IRS Rev. Proc. 81-48.