

# Employee Benefits in a Same Sex Marriage World

by:

Cynthia L. Barrett  
Attorney at Law  
1500 SW First Avenue  
Portland, Oregon 97201  
503-294-0080  
Fax 503.294.0745  
email: [cindy@cynthiabarrett.com](mailto:cindy@cynthiabarrett.com)

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## 1. Domestic Partners and Same Sex Spouses

Non-traditional couples include unmarried asexual, heterosexual, and gay or lesbian partners, who have committed their futures to each other. Estate planners around the country are developing different planning strategies for these nontraditional couples. The advent of same sex marriages has heightened interest in employee benefits, as newly married same sex couples wonder how their new status affects their job related benefits. Employers are making lists of job benefits which must be extended, benefits which may be extended, and benefits they believe are prohibited for same sex spouses (such as spousal rollovers and Qualified Domestic Relations Orders).

While this sifting and sorting process is going on, what are you to do NOW? Exploring your employee benefit options is the purpose of this article.

Are you married? Your options expand if you are married. But will your new status be recognized at this time? Complex comity and treaty issues are involved in recognition of marriages performed in a foreign country such as Canada (or the European countries now marrying same sex couples) and that subject is beyond the scope of this article. Recognition of marriages in Massachusetts occurs immediately for employers there, but may be delayed in other states. Recognition of marriages in Oregon and California may be delayed while litigation ensues, although the marriages in those states have NOT been invalidated by any court to date.

If not married, do you THINK you are a domestic partner? Some couples have taken steps to affirm a committed relationship by:

- Registering with a city, county, or state public domestic partners registry
- In Hawaii, filing for reciprocal beneficiary status
- In Vermont, entering a civil union
- Signing a private Affidavit of Domestic Partner status with an employer
  - to permit the domestic partner to be covered by the employer or trade association's group health or other employee benefit
- Signing an agreement declaring a domestic partnership or setting out relationship rights and obligations.
- Having a commitment ceremony, inviting friends and family

## 2. **Caution: Transgender and Asexual Couples**

Some individuals may be asexual domestic partners - that is, they may share a household, but not a bed. They may need an agreement to own property together, but make no provisions for each other in their estate plans. Adults sharing a home need not be sexually intimate.

Some individuals with apparently valid marriage licenses may need domestic partner planning. What about transgender spouses? What is Oregon's position on the validity of transsexual marriage? We have no Oregon case law yet on this intriguing transgender issue.

The Kansas Supreme Court invalidated a marriage between a man and a transsexual woman (once male, now female). *In Re Estate of Gardiner*, 273 An. 191, 42 P3d 120 (Kansas 2002); *cert den Gardiner v. Gardiner*, 123 S Ct 113, 537 US 825 (2003). In that case, the decedent Marshall Gardiner died intestate, and his wife of one year, J'Noel, claimed the spousal share of his \$2.5 million dollar estate. *Court Rejects Transsexual Widow's Claim*, New York Times March 16, 2002, at A-28 The decedent's son moved to dismiss the spousal share claim of J'Noel, on the grounds that because J'Noel was male, the marriage was void. The Kansas Supreme Court, in a decision reviewing the case law as of 2002 on transsexual marriage, upheld the dismissal of the spousal share of J'Noel, asking the legislature to address the issue of transsexual marriage and concomitant marital rights. The US Supreme Court denied J'Noel Gardiner's petition for a writ of certiorari.

Planning as if a married transsexual were both married and a domestic partner would be prudent, because the couple may move to a state where transsexual marriage is not recognized, or the Oregon courts may, like in Kansas, void a marriage with a transsexual partner.

## 3. **Oregon Definition of "Domestic Partner" for Income Tax Relief**

The Oregon Department of Revenue adopted an administrative rule defining same sex domestic partners, OAR 150-316.007(B)(1), to explain an Oregon income tax exemption of the imputed value of employer health benefits from state income tax:

### **"150-316.007-(B)**

#### **1. Policy -- Application of Various Provisions of Tax Law to Domestic Partners**

- (1) The imputed value of health insurance benefits provided by an employer to an employee's domestic partner shall be exempt from state income tax.
- (2) As used in this rule, "domestic partner" means a person in a relationship with an employee, each of whom:

- (a) Is under no legal disability to marry the other person, but for the fact that each is of the same sex;
  - (b) Desires a relationship of marriage under Oregon law and would enter into marriage with the other person, and only with the other person, if Oregon law permitted it;
  - (c) Is committed to the care and support of the other person;**
  - (d) Is responsible for the needs of the other person;**
  - (e) Is responsible for financial obligations to others equivalent to such financial obligations that arise within a marriage recognized under Oregon law; and**
  - (f) Is not married and has no similar commitment and responsibility relative to any other individual.
- (3) As used in this rule, "imputed value" means the amount included in federal taxable income of the employee because the premiums provided health insurance benefits to the domestic partner rather than a spouse.
- (4) The provisions of this rule shall apply to:
- (a) Tax years beginning on or after January 1, 2000; and
  - (b) Any tax year for which an overpayment of tax may be refunded or a notice of deficiency may be issued under any law of this state applicable to personal income taxation.

Stat. Auth.: ORS 305.100

Stats. Implemented: ORS 316.007

Hist.: REV 9-1999, f. 12-30-99, cert. ef. 12-31-99; REV 9-2000, f. 8-15-00, cert. ef. 9-1-00"

This Oregon Department of Revenue definition of domestic partner does NOT include heterosexual domestic partners, because the definition was created after same sex couples won the constitutional right to health care benefits from government employers in 1998. Opposite sex couples can marry, and thus have access to pre-tax dollars health care benefits as spouses, and do not need this Oregon state income tax exemption.

#### **4. Declarations of Domestic Partner Status in Public Registry or Private Affidavit**

Same sex couples declare themselves to be domestic partners in a public registry, or sign private affidavits with an employer. By registration or private affidavit declaration, they may be taking on certain obligations of married couples (mutual support, obligations for necessities). Maybe you have elected NOT to be domestic partners to avoid that set of quasi-marital obligations.

Public registry systems, such as Multnomah County's registry, define a domestic partnership as a status. California has a state-wide domestic partner registry, with elaborate rights and privileges for registered same sex partners. **See Multnomah County, Oregon, Certificate of Domestic Partnership, and the California Domestic Partner Declaration, available on the web.**

Employers expect domestic partners to declare their status in an Affidavit of Domestic Partnership, used as a precondition to eligibility for health and other employee benefits. The IRS has approved many employer requests for a private letter ruling about domestic partner status determination. See **PLR 200339001**, released 9/26/2003, regarding the income and employment tax treatment of health benefits for domestic partners of employees, discussing the employer's affidavit certification approach, annual recertification, and the federal Defense of Marriage Act (available on the IRS web site).

In the future, many states may set up statutory schemes like California's to give rights to domestic partners based on registry status, to avoid the contentious issue of same sex marriage.

## **5. Same Sex Spouses May Remain Domestic Partners for Employee Benefits**

The same sex married couple will be treated as a simple spouse for employee benefit purposes **only when the validity of the marriage is accepted by the employer**. The same sex married couple might claim the status of domestic partner if the employer does not recognize the marriage, and offers domestic partner benefits.

There is some concern that by marrying the same sex couple takes themselves out of the category of domestic partner for employee benefit purposes. Some employers will quickly grant spousal benefit rights to the same sex marriage partner, but some employers will flat out reject the spousal right claim, or be constrained by the Federal Defense of Marriage Act (see discussion below). For those employers offering domestic partner, but not same sex spouse, employee benefits in this interim period, the domestic partner category can easily include same sex spouses. The employee benefit plan usually provides, by private declaration, that the employee seeking domestic partner status "is not married to any other individual." See OAR 150-317.007-(B)(2)(f): **"is not married, and has no similar commitment and responsibility, relative to any other individual."**[comma inserted].

The Oregon Department of Revenue should, when the courts complete their review of the constitutionality of same sex marriage, adapt its administrative rule so that those whose marriage is not recognized by state or federal law may have the dual status of domestic partner and spouse, when not married to anyone but each other.

Same sex married spouses have, however, a broader claim to employee benefit rights and claims than simple domestic partners. Choosing to marry opens up a broad array of rights for the same sex spouse.

## **6. Same Sex Couple Legal Developments**

When this was written in July, 2004, same sex spouses and domestic partners should review the federal and state law about employee benefits, to help frame the estate planning and estate administration issues.

### **6.1 Federal Law**

The federal Employee Retirement Income Security Act (ERISA) dominates the area of private employee benefits, pre-empting state law. ERISA legislation and regulations, and the Internal Revenue Code provisions dealing with qualified plan rules, use the term “spouse” and “marriage.” However, the Defense of Marriage Act, 1 U.S.C. §7 (DOMA) enacted in 1996, defines “marriage” in all federal laws and regulations as a legal union between a man and a woman and “spouse” as a person of the opposite sex who is a husband or wife.

Thus, at least until litigation or legislation changes DOMA on the federal level, the terms “marriage” and “spouse” will not include same-sex marriages for ERISA and Internal Revenue Code purposes. Therefore, spousal rights, spousal consents, surviving spouse benefits and the like for ERISA plans will be required only for opposite sex spouses. Because of DOMA, if a state extends marriage to same sex couples, same sex partners will NOT be treated as spouses. But DOMA also gives states the option to recognize, for state law purposes, same sex marriages legally performed in other states.

DOMA “does not specifically outlaw same sex marriage, and states remain free to recognize same sex marriage if they so choose.” State and local government employers are not restricted by the federal DOMA law, although 38 states have adopted state DOMA legislation. Large private employers are regulated by the federal ERISA and DOMA statutes are not required to recognize same sex marriages in employee benefit plan design. However, neither ERISA nor DOMA prevent employers (public and private) from recognizing domestic partners, same sex or heterosexual, for employee benefit plan design. “Facts from EBRI: Domestic Partner Facts and Background” Employee Benefit Research Institute, P. 2 (March 2004)

Many employers regulated by ERISA have voluntarily extended employee benefits, including self-insured health plan benefits, to domestic partners of their employees. Employers NOT regulated by federal law may (as the City of Seattle has already done) extend spousal benefits to same sex spouses married in other states. Employers, whether regulated by ERISA or not, may simply recognize same sex spouses as included in the definition of domestic partner, and extend a spousal-like package of benefits to all domestic partners including the recently married couples.

Cases dealing with domestic partner benefit claims are beginning to reach the appellate courts,

and indicate a trend to expand a broad array of employee benefits to non-traditional couples. In Sally J. Burke v. Kodak Retirement Income Plan, 336 F3rd 103 (7/17/03 2<sup>nd</sup> Circuit) Plaintiff Sally J. Burke lived for eight years as a domestic partner with the deceased Kodak employee, and less than six months after they were married, the employee died of lung cancer.

This case is particularly interesting for same sex spouses because Kodak permitted either domestic partner registration or spousal status to trigger the survivor income benefit. Kodak's pre-retirement Survivor Income Benefits Plan makes payment to spouses (who had been married more than one year), domestic partners, and other dependents upon the death of the employee. The Kodak plan argued that Mrs. Burke was not entitled to survivor income benefits because she and Mr. Burke had been married for less than one year, and had failed to file a joint domestic partner affidavit with the employer. Mrs. Burke argued that the Summary Plan Description was ambiguous about the domestic partner affidavit filing, and the Court of Appeals reversed the trial court dismissal of her claim, and instructed that judgment be entered in her favor. The plan administrators argued, as they may in same sex marriage cases, that the marriage "mooted" her efforts to qualify as a domestic partner after the death of her husband.

In Burke, the Second Circuit's conclusion that a marriage did not "moot" the domestic partner qualification rule is helpful. Advocates will argue that the same sex spouse should qualify as a domestic partner, even if, as in Burke, the marriage is not recognized as valid under plan eligibility criteria.

Multi-state employers will need to develop employee benefit plans that deal with the likelihood that a marriage recognized in one state will not be recognized in another state. Non qualified retirement plans and executive compensation programs are arguably all opened to same sex spouses, as these employment arrangements are not subject to ERISA. However, some states will pass, or have passed, laws preventing recognition of the validity of legally entered same sex marriages. These legal disputes are still ongoing.

## **6.2 Oregon law**

As a result of Tanner v. Oregon Health Sciences University 157 Or App 502 (1998), all state and local government agencies must offer equal health plan benefits to both unmarried gay/lesbian employees and married employees. The Tanner decision did not deal with other employment benefits denied to gay and lesbian couples. But the Tanner decision firmly established the principle that same sex couples would at least be granted health benefits by public employers.

To implement Tanner, the Oregon Department of Revenue established OAR 150-316.007(B) (reproduced in whole above), exempting the imputed value of same sex domestic partner health insurance benefits from state income tax. This state income tax exemption does NOT apply to opposite

sex domestic partners, who can marry.

An Oregon private employer is free to extend health benefits to Oregon domestic partners and same sex spouses, and to extend other job related benefits as well to both domestic partners and to same sex spouses. In fact, many private and public employers do grant a bundle of job benefits to Oregon domestic partners.

Oregon insurance law, Oregon workers compensation spousal rights, Oregon wrongful death law, and any other state right for spouses will apply to the same sex spouse, and those benefits should be claimed during this period of turmoil. Once Oregon courts have confirmed the validity of the marriages, the claims will be recognized also. The spouse should file claims to preserve rights during this interim period.

### **6.3 Washington Law**

Washington, unlike Oregon, has a state Defense of Marriage Act. Therefore, Washington will follow a different legal path towards same sex marriages than Oregon. Persons denied marriage licenses this past year in Washington have sued to force issuance of licenses. The Mayor of Seattle has announced that the City will recognize foreign or out of state same sex marriages, and permit a city employee's same sex spouse to access all spousal employment benefits.

Washington public employers have been successful in extending health benefits to domestic partners despite taxpayer opposition. In Heinsma v. City of Vancouver, 144 Wash 2d 556 29 P3d 709 (2001), plaintiff taxpayer challenged the 1998 decision of the City of Vancouver to extend dependent health benefits to domestic partners and the children of domestic partners. The trial court found the domestic partner plan to be constitutional, and the Washington Supreme Court affirmed. Because of the Heinsma decision, Washington public employers are free to recognize domestic partner relationships for employee benefit purposes.

Washington private employers are free to extend health benefits and other employee benefits to same sex domestic partners, and many undoubtedly do so. But when the same sex marriage spouse seeks spousal rights from a Washington private employer, what will happen?

## **7. Employee Benefit Strategies for Same Sex Couples**

When both partners/spouses are perfectly healthy, and both are working, consider the following employee benefit strategies.

## 7.1 Look for Benefits

### Health Coverage

Can the spouse/partner get health benefits

Can the spouse/partner get long term care group benefits

Before retirement from the company, should the spouse/partner enroll in the plan to permit COBRA and HIPAA like protections? Are prescription drug and retiree coverage available to the spouse/partner? How does that work, exactly, with the particular company?

### Qualified Plan Withdrawal Options

Can the spouse/partner be a beneficiary?

What withdrawal options will exist?

Does a rollover to an IRA permit a better outcome? If so, when can it be accomplished?

### Other Employee Benefits

Review the employer human resources booklets and memos to identify life insurance, long term care group insurance plan, nonqualified compensation and stock option plans, medical leave, bereavement leave, assistance with home purchase, or other benefits that may exist and be extended to domestic partners and same sex spouses.

## 7.2 Do NOT Misrepresent Your Legal Status

It is critical to not misrepresent the status of the same sex spouse or domestic partner to the employer, as claiming benefits without meeting the plan eligibility requirements could lead to civil liability and even to criminal charges. Group health plan administrators are beginning to more strictly audit membership rolls, to remove ineligible members and reduce employer costs.

Oregon State Representative John Mabrey (Republican from The Dalles, Oregon) and his now-wife were charged in 2003 with felony theft for filing medical insurance claims from March, 2000, through January, 2002, on a Regency Blue Cross policy covering Mr. Mabrey and “spouse.” Rep. Mabrey lived with his partner for over 10 years, and married in February, 2002. In his defense, Rep. Mabrey claimed that he was told by an attorney that because he and his woman friend lived together for over ten years, they were legally married in Oregon. “Rep. Mabrey, wife face 10 counts of theft in medical insurance case” The Oregonian, p. B-4 (8/12/03)

### 7.3. Focus on Qualified and Nonqualified Plan Beneficiary Designations

The domestic partner or newly married same sex spouse should review the **qualified and non qualified retirement plans (defined benefit pension, or accounts such as 403(b) and 401(k) plans) and other forms of tax deferred compensation, profit sharing, tax deferred annuities, 457 deferred compensation plans, and employee stock ownership plans** to coordinate the beneficiary designation with the estate plan. Naming “my estate” or “my living trust” as beneficiary will trigger unnecessary income tax at death of the plan participant.

At this time (July, 2004), the same sex spouse beneficiary of a deceased worker is NOT permitted to make a spousal rollover of plan benefits to her own IRA. The Federal Defense of Marriage Act (DOMA) is a barrier to spousal rollover at this time. This is a problem, as many qualified plans provide only a lump sum distribution when the employee dies. If the validly married spouse is the beneficiary, then the spouse rolls the account over to a spousal IRA, and can defer distributions until age 70 and a half.

ERISA mandates that qualified retirement plans offer spousal protections (spousal consent to removal of a spouse as beneficiary, and a spousal survivor annuity payout option for defined benefit plans). Because of DOMA, the employer is not required to offer the same sex spouse these protections (currently). However, an employer can choose to extend these protections to same sex spouses.

Qualified plans can be in the form of an “account” transferrable upon termination or retirement [such as a 401(k)]. The most valuable qualified plan, becoming rarer these days as employers convert to the less costly 401(k) accounts, is a defined benefit plan paying a monthly sum to the plan participant for life. At retirement, the defined benefit plan participant may elect to have the payment be somewhat lower, but paid after his or her death to a surviving second life beneficiary.

In a defined benefit plan, the surviving spouse is entitled to a Qualified Preretirement Survivor Annuity (QPSA) or a Qualified Joint and Survivor Annuity (QJSA) on the plan participant’s death. Some plans permit non-spouses to be named as the second life. The same sex couple should learn whether their employers offer a second life spousal annuity/survivor income benefit.

If the defined benefit plan participant (employee) dies while still an employee, becomes disabled, or loses his or her job, the plan may offer a simple lump sum payout. But look for other more favorable options. The surviving spouse or domestic partner may be entitled to survivor income, as in the Kodak plan available to Sally Burke in the case discussed above.

Upon retirement from a defined benefit plan, the plan participant IS REQUIRED to take a spousal annuity (called a “qualified joint and survivor annuity” QJSA) payout, providing both the employee and spouse with lifetime income, unless the spouse consents to another form of payout. The value of the survivor annuity is not taxed in the estate of the employee spouse. IRC 2323(f)(6). However, a survivor annuity for a non-spouse is subject to estate taxation in the plan participant’s estate (IRC 2539)

Upon the death of a plan participant with a domestic partner or unrecognized same sex spouse, the survivor may qualify only for a lump sum distribution, triggering immediate income tax. Perhaps the survivor can persuade the company to use the lump sum to purchase an annuity, and then distribute the annuity to the unmarried beneficiary. If the employee has poor health, consider whether the employee can separate from the company early, and roll the lump sum plan benefits to an IRA. The IRA will at least permit a lifetime stretch payout for the nonspouse beneficiary. Of course, the same sex spouse will hope the federal income tax law changes to permit a spousal rollover of the lump sum. If the potential tax on the lump sum withdrawal is large enough, the same sex spouse may claim the spousal privilege and pursue a test case in the tax court.

#### **7.4 Report an Irrevocable Election for Survivor Life Benefit as a Gift**

When a defined benefit plan participant retires, and makes an election to permit a non-recognized partner or spouse to have a survivor life annuity, there is no protection from gift or estate tax for that annuity. This is a very practical problem right now in Oregon.

Oregon public employees now retiring have large PERS accounts, and can name their partner/same sex spouse as the second life annuity recipient. A PERS plan election for a second life annuity is irrevocable, once made. Neither the partner nor the same sex spouse can at this time claim the federal marital deduction for gift and estate tax purposes. The value of the survivor annuity can be treated either as an immediate gift, or, if not claimed as a gift, be included in the estate of the PERS retiree at death.

IRC 2523(f)(6) gives automatic gift tax QTIP treatment to spousal joint and survivor annuities, thus removing the concern about an immediate gift for recognized spouses. The Code and regulations are silent about spousal fixed term certain annuity qualified plan elections and gift tax - perhaps because QTIP treatment does not really apply to a term certain situation.

But today the same sex spouse is not, because of DOMA, recognized as a spouse. Same sex spouses or partners with taxable estates choosing a qualified plan term certain or survivor annuity option should consider filing a gift tax return in the year of the irrevocable election, to avoid having the value of the annuity included in the estate of the plan participant. IRC 2039(a) The IRS regulations

provide that a survivor annuity by irrevocable election is a gift by the electing plan participant on the date the election becomes irrevocable. Regs 25.2511-1(h)(10).

IRC 2517(a) (now repealed) used to exempt from gift taxation the election of a survivor life benefit. When the defined benefit plan is put into pay status, and a non spouse is chosen as a second life, an immediate gift results. If the same sex spouse is not recognized as a spouse, then the advisor must choose first, whether to report the gift value - and second, whether to claim the spousal gift deduction. What is the down side of reporting the gift? You burn some of the lifetime \$1,000,000 gift tax exemption. What is the up side? You get an asset out of the estate which, if the marital deduction is not recognized because the marriage is not recognized, would be significant. Adding the value of a second life annuity to an estate will take the client with a home and a few investments over the Oregon taxable estate threshold of \$850,000 (2004). If the client will not be using the entire lifetime gift credit for other purposes, using it for the second life annuity election is a low risk technique to freeze value and keep a potentially huge asset out of the gross estate.

## **7.5 Consider Appealing Spousal Benefit Plan Denials**

You may learn that employee benefits for the partner or opposite sex spouse are available. Should the recently married same sex spouse try a spousal claim, despite the company's failure to explicitly recognize the marriage, and despite the apparent ERISA/DOMA barriers?

I suggest you review the spousal benefits ERISA appeal letter to Prudential Financial ([www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1469](http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=1469)) (Accessed 6/15/04) together with its Press Release on the case. In that case, a retired Prudential employee married her partner in British Columbia in 2003, and then sought to add her new spouse to the Prudential retiree medical benefits program. The Prudential retiree program extended benefits to domestic partners of employees who retired after 2000, but not to employees who retired before that date. With the new marriage status, the Prudential retiree seeks to qualify her erstwhile domestic partner now as a spouse. Prudential has denied the claim, and she is appealing the denial with Lambda Legal's help.

## **7.6 Health Crisis Strategies for Same Sex Couples**

When a health crisis or cognitive decline affects the same sex couple, job benefit access criteria should be evaluated. The ill employee may "separate" from the company by disability retirement, or die, before steps are taken to protect available employee benefits for the spouse/partner. The couple should take steps to protect the survivor's pension, other qualified plan benefits, and health benefits.

### **7.6 A Before death of ill employee partner**

What steps would be useful when an employed partner/same sex spouse falls seriously ill? The steps to take depend on the terms of the ill employee's job benefit plan. But an eight-year domestic partner who married her opposite sex partner six months before he died had to go to federal court to obtain a survivor income benefit, in the Burke case. There, the Kodak plan provided pension payments to both spouses and domestic partners, but the couple had never filed a domestic partner affidavit during their eight year relationship, and the spousal eligibility for the pension benefit was available only if the couple had been married more than one year. Sally J. Burke v. Kodak Retirement Income Plan, 336 F3d 103 (2<sup>nd</sup> Cir. 2003).

In the crisis situation, both partner/spouse employee benefit packages should be examined, and the healthier partner/spouse should consider the risks of financial responsibility for the health care needs of the ill partner/spouse. Spousal/partner health care impoverishment planning may not have been done prior to a partner/spouse's incapacity.

The authority of an incapacity financial manager (usually the agent under power of attorney, but perhaps a court appointed conservator of the estate) to make employment related choices can be critical, in this time of fast changing domestic partner and marriage status law. How exactly might this expanded agency power work with an ill domestic partner/same sex couple?

Employer disability and retirement plans are more and more treating domestic partners like spouses, granting the partner disability or retirement survivor benefits and lifetime health benefits. These job-related benefits are crucial to domestic partners with modest estates, who cannot, under federal law, access Social Security income, disability, Medicare, or retirement benefits on an account of the partner/spouse.

The agent for the ill partner may need to prolong employee status (i.e. running out the vacation and leave) if the healthier partner will gain benefits thereby. What if a health catastrophe struck a University of California teacher 8 months after he or she had registered the partnership with the University? The University of California public retirement benefit system will greatly benefit a surviving partner, if the partnership is registered with the state, or established **for at least one year prior to the date of retirement**. What if an ill Oregon PERS participant had to take disability retirement, and had only seven years into the PERS system? In order for the plan participant and partner/spouse to have a state contribution to health care premiums, the PERS employee needs eight years of creditable service. The agent may want to prolong employee status to gain this important benefit. ORS 238.415-420

When one domestic partner suffers a health catastrophe, the agent can review the employee benefit package available currently, and in the future, for the healthier partner. Before separating the ill California university teacher or Oregon PERS employee from his or her job, the agent would explore ways to keep the ill employee on "current employee status" for the time necessary to secure benefits:

disability retirement benefits, under the University of California system's one-year affidavit rule, and a health insurance premium subsidy under Oregon PERS's eight years of service rule.

### **7.6 B. After death of ill employee partner**

Most qualified retirement plans (QRP) do not permit "life expectancy of the beneficiary" payout on death; rather, the plans often offer a lump sum distribution as the only form of death benefit. Even if the plan says it offers life expectancy payouts for death benefits, that promise is empty if the employer is a small business that will disappear when the owner dies; with no employer, normally, there can be no plan, so once again a lump sum distribution will be the only possible form of death benefit.

A lump sum benefit is no problem if there is a surviving spouse recognized under federal law; if the spouse survives, she can roll the lump sum to her own IRA. In contrast, an unrecognized same sex spouse or domestic partner will have to take the QRP lump sum, paying immediate income tax. How can this unsatisfactory result be avoided?

By having the account owner/plan participant roll over the qualified plan to an IRA during life, the participant assures that the life expectancy of the beneficiary payout will be available for the non-spouse beneficiary. Natalie B. Choate, *The 100 Best and Worst Planning Ideas for Your Client's Retirement Benefits* P. 13 (available from Ataxplan.com 2003). If no rollover was done, and the QRP does not offer the same sex partner/spouse a life expectancy payout, explore whether the plan would purchase a non-assignable fixed or variable annuity contract and distribute that to the named non-spouse beneficiary. Natalie Choate, *Life and Death Planning for Retirement Benefits* (Ataxplan.com, 5<sup>th</sup> Ed. Rev. 2003) P. 439

With an IRA form of retirement account, an unrecognized same sex spouse can, like the domestic partner, at least take advantage of the life expectancy payout method, stretch out his or her minimum distributions, and name a new beneficiary for the inherited IRA. The recognized spouse beneficiary, by contrast, can rollover the account to his or her own new account, whether the account owner dies before or after the owner's required beginning date, and defer withdrawals until age 70 and a half, thus permitting tax free growth for a longer period of time. Some brave same sex spouse will claim that spousal IRA rollover benefit soon, and litigate the matter in tax court.

Some non traditional couples may want to restrict the survivor's ability to name a successor beneficiary, and enter a side agreement, not in the beneficiary designation given to the plan, naming a particular beneficiary of an inherited IRA. Use of an IRA conduit trust is a more sure way to control who will eventually enjoy the benefits of a large IRA, but some clients will not want to pay the costs, both setup and administrative, to obtain estate and gift tax clarity. An irrevocable devise or beneficiary designation agreement is risky, in the taxable estate, because you are making an immediate gift of a hard

to value successor (future) interest. The gift of this future interest does not qualify for the annual exclusion, and its valuation is uncertain. But in nontaxable estates, the client has less concern about gift and estate tax clarity, and it is not uncommon to make a single-asset agreement (about, say, the beach house, or about an IRA successor beneficiary).

A same sex surviving spouse will be able to claim wrongful death benefits, workers compensation survivor benefits, and insurance continuation rights guaranteed under state law. Whether domestic partners can claim wrongful death benefits is an open question, being litigated in several jurisdictions.

During this interim period, while the validity of the same sex marriages is being litigated, advocates should claim these post mortem job benefits for same sex marriage spouses to preserve the client's rights pending final court rulings and legislative action, or constitutional challenges to same sex marriage. Clients might want to claim spousal treatment in estate and gift tax matters which would, should the validity of same sex marriage be upheld, result in substantial tax savings. How practically to advise the client, so that the client can make informed decisions, will be greatly debated in the coming years.

## **7.7 TALKING POINTS Handout on Same Sex Couples and Health Coverage**

When a same sex spouse/partner might separate from an employer, causing loss of group coverage in a health crisis or chronic illness situation, I urge the client to review the following health coverage handout.

### ***Same Sex Couples and Health Coverage***

#### **TALKING POINTS**

*Cynthia L. Barrett*

*Attorney at Law*

*503-294-0080*

*cindy@cynthiabarrett.com*

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*Employment related health coverage comes with a bundle of federal and state law **continuation** (COBRA) of group coverage or **portability** (HIPAA) conversion rights. These health insurance rights are being extended by private employers and public employers to domestic partners of plan participants. The same sex spouse will be extended COBRA-like and HIPAA-like benefits, I predict, in some states, although federal law (the Defense of Marriage*

Act) does not require that same sex spouses have these benefits.

***COBRA and HIPAA health benefits should be actively pursued if one of you is forced to retire, becomes disabled, or laid off from the company.***

*What should the newly married same sex spouses do about health benefits? The newly married same sex spouse should first learn whether his or her employer is already offering same sex spouse or domestic partner benefits.*

*Bring home the health plan Summary Plan Descriptions (SPDs) and compare the coverage.*

- 1. What is the cost of adding on your spouse/partner?*
- 2. What coverage differences are there? Who has the best coverage?*
- 3. Are you uneasy about the job continuation prospects, or the company's viability? Do you anticipate layoffs? Is one of you going to retire soon?*

*If the Oregon employer does not offer coverage to domestic partners or same sex spouses, can you persuade it to do so? Many employers, trying to avoid the same sex spouse issue, may add the domestic partner coverage option. The domestic partner affidavit procedure often works for same sex spouses, because most affidavits have a sentence "Neither of us is married to anyone else." That is, for health plan purposes the same sex couple can be treated as a domestic partners, coverage can be obtained, and employee discontent about that important issue avoided.*

*Many employers (public and private) offer health coverage to domestic partners.*

*Federal law does NOT protect domestic partners explicitly; federal law denies any recognition of same sex marriage. Private employers are being more liberal than the law requires in providing health plan coverage for domestic partners. Employers are market-driven in this respect: to obtain and keep qualified employees, they offer domestic partner coverage as a recruiting incentive.*

*Once the domestic partner is on a group employer plan as a plan participant, then loss of coverage **may be** avoided by close attention to the plan materials, the plan itself, and qualifications for coverage.*

*The domestic partner employee plan rights may include coverage for dependent children of the partner, life insurance, survivor income, qualified plan rights, **retiree** health plan rights, access to long term care insurance, and other employment benefits.*

*Although this is a very unsettled area, I make the following suggestions about health plan coverage:*

1. *Remember that the retiree health plan can be reduced or even go away if the company reserved the right to amend or terminate the plan.<sup>1</sup> Termination of all coverage happens! All Nike Retirees lost their Group Health Plan coverage in June, 2004.*
2. *Time the retirement of plan participant to when the set of desired continuation and portability options are available to wage earner and domestic partner/spouse.*
3. *Get the domestic partner/spouse on the group plan so that he can argue he is an independently COBRA “qualified beneficiary” at time of retirement, to permit him to have options to upgrade during open enrollment periods, do conversion, add dependents.*
4. *Check into whether you can get the domestic partner/spouse on Medicare while actively employed or pre-COBRA and still keep the regular group coverage, as this opens up potential to keep the group private plan and its usually more extensive prescription coverage longer - during a COBRA period at least. Relying on Medicare only is very foolish, because of its lack of prescription drug coverage and low reimbursement rates to providers. Doctors limit, or refuse to accept, additional Medicare patients because the Medicare payment for medical services does not cover the physician office overhead.*
5. *Over-55 Oregon rule - COBRA coverage is guaranteed renewable for 20+ member plans if leave plan [separation = downsize, downshift] after age 55, and coverage is renewable up to Medicare eligibility or eligibility for other group coverage. ORS 743.602(3) However, the entire group plan including COBRA can vanish if the employer goes out of business or drops health coverage altogether.*
6. *Apply for COBRA continuation not less than 60 days after notice from employer, if separating or retiring.*
7. *COBRA monthly premiums are not fixed - they increase on a class basis as the employer cost for the group health plan goes up.*
8. *COBRA group coverage lasts at least 18 months (if the company does not go under!), and up to 36 months for spouses and kids - the rules are very complicated. COBRA coverage ends if the certificate holder’s employer terminates participation under the policy (ORS 743.610(7)(d))*
9. *Review the health coverage choices before you retire or separate from the employer. The plan continuation rights of actively employed plan participants (and their dependents) are quite distinct from the rights of retirees (and their dependents). Domestic partners or spouses of retirees, for example, who are not covered **before** you retire may get no benefits at all.*
10. *Stay on a recently acquired job long enough to get creditable health coverage of at least 180 days to qualify your and family members/partner for the HIPAA portability privilege.*

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<sup>1</sup>Joyce v. Curtis Wright Corp 171 F3d 130 (2<sup>nd</sup> Cir. 1999) - an awful but significant opinion for elderly retirees falsely hoping retiree insurance will remain effective for life.

11. Get your family members/partner onto the group plan before termination of employment, so the family members/partner obtain both COBRA and HIPAA portability rights.
12. Apply for HIPAA portability not less than 63 days after termination of COBRA or other group coverage. ORS 735.616
13. When does your HIPAA portability coverage end? failure to pay portability premiums, eligibility for Medicare [except in Oregon, we can keep Oregon Medical Insurance Pool portability coverage if it commenced before you qualified for Medicare. Do not wait to get on OMIP until after you qualify for Medicare! See ORS 735.616(2)(a)(D) - if on Medicare when applies, get zero portability and its drug coverage. **Note: The portability plan stays in place, even if the former employer drops the group plan altogether, ORS 743.610(7)(d). Transferring to portability from COBRA might be wise if the industry or company might go under, or cut the plan out completely, or be sold to a new owner who would drop the plan. Do you suspect that group (and linked COBRA) health coverage might be terminated completely? OMIP provides health coverage for a medically eligible person and the spouse, by state law. Medicare covers only an individual, not the spouse.**

THERE IS NO CERTAINTY ABOUT THE LAW IN THIS AREA OF EMPLOYEE BENEFITS, AS YOUR RIGHTS DEPEND ON A MIX OF FEDERAL AND STATE LAW, COUPLED WITH THE TERMS OF QUITE VARIABLE PLAN CONTRACTS CONSTANTLY CHANGING AS YOUR EMPLOYER NEGOTIATES PRICE AND CONTENT WITH THE HEALTH PLAN PROVIDER AND PLAN ADMINISTRATOR. THESE TALKING POINTS ARE PROVIDED TO HELP YOU - BUT ARE NOT LEGAL ADVICE APPLICABLE TO YOUR PARTICULAR SITUATION.

### Tracking New Developments:

I also suggest you run an occasional Google search for same sex marriage and employee benefits, and check the web sites of advocacy organizations for new developments:

[www.lambdalegal.org](http://www.lambdalegal.org) Lambda Legal

[www.hrc.org](http://www.hrc.org) - The Human Rights Campaign

[www.basicrights.org](http://www.basicrights.org) - Basic Rights Oregon

Canada - <http://www.egale.ca/equalmarriage.asp>

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