D. How Can a Domestic Partner Qualify as a Federal Tax Dependent for Health Coverage?

1. Satisfying the Qualifying Relative Test

To be a federal tax dependent under Code §105(b), an individual must generally be either a "qualifying child" or a "qualifying relative" of the employee. A domestic partner who qualifies as an employee's Code §105(b) tax dependent typically does so by being the employee's qualifying relative. **12**

a. Conditions of the "Qualifying Relative" Test

The conditions of the qualifying relative test are discussed in greater detail in Section XI.F but, in summary, to be a qualifying relative, a domestic partner must generally meet the following conditions:

- (for the taxable year of the employee) have the same principal place of abode as the employee and be a member of the employee's household (if this does not violate local law); **13**
- receive over half of his or her support from the employee; **14**
- not be anyone's qualifying child; and **15**
- be a (1) citizen or national of the U.S., or (2) a resident of the U.S. or a country contiguous to the U.S.

For most individuals, the taxable year is the calendar year. **16**

Certain Conditions Required to Be a Dependent Under Code §152 Do Not Apply. For purposes of determining wheth individual is a qualifying relative for purposes of receiving employer-sponsored health coverage on a tax-free basis, certai conditions otherwise applicable to a qualifying relative under Code §152 do not apply. These conditions relate to: (1) havi income less than the exemption amount under Code §152; (2) not being a dependent of a Code §152 tax dependent; and being a married dependent filing a joint return. See Section XI for a detailed discussion.

b. Domestic Partners Enrolled for Health Coverage May Be More Likely to Meet the Qualifying Relative Test

As a practical matter, virtually all domestic partners satisfy the residency (place-of-abode/household) condition of the qualifying relative test because they live together with their employee partners. However, many domestic partners are self-supporting and thus will not satisfy the support condition to be a Code §105(b) tax dependent. But it is interesting to note that it is domestic partners who are unable to support themselves-due to disability or unemployment-who are most likely to be enrolled for domestic partner benefits (because self-supporting domestic partners likely have health coverage through their own employers.) As a result, those domestic partners who are actually enrolled for health coverage are more likely to meet the qualifying relative test by reason of meeting both the residency and the support conditions.

Example 1: Domestic Partner Is Employee's Code §105(b) Dependent. Hannah has a full-time job with Largeco. She
domestic partner, Jane, have lived together for many years. Jane does not work outside the home and receives more tha
her support from Hannah. Jane is Hannah's Code §105(b) dependent.

Example 2: Domestic Partner Is Not Employee's Code §105(b) Dependent. John has a full-time job with Smallco. He
domestic partner, Ted, have lived together for many years. Ted works full-time for another employer and does not receive
half of his support from John. Ted is not John's Code §105(b) dependent.

2. Employee Certifications to Verify the Conditions of the Qualifying Relative Test

a. The IRS Has Approved the Use of Employee Certifications

As already noted, the Code §105(b) definition of a dependent requires a domestic partner to meet several conditions, including a residency test and a support test (for more details, see Section XI). How should residency and support be verified? Many plan sponsors require the employee to provide an affidavit or similar document, which indicates whether a domestic partner enrolled for health coverage qualifies as a Code §105(b) tax dependent and which also imposes an affirmative obligation on the employee to notify the employer of any changes. In at least two instances, the IRS has approved an employer's use of employee certifications to establish that domestic partners were tax dependents. In each case, the signed

certification recited the applicable conditions of the Code §105(b) definition of tax dependent and stated that the domestic partner satisfied the conditions. **17**

b. The Look-Back Conundrum

To qualify as a Code §105(b) tax dependent for a given taxable year, an individual must satisfy the applicable conditions of either the qualifying child or qualifying relative tests for the entire year. **18** But at annual open enrollment, how will an employee know whether a domestic partner will be a Code §105(b) tax dependent for the entire upcoming year, when that status requires, among other things, that the employee and domestic partner reside together for the entire period? What if, for example, the domestic partnership terminates during the middle of the year or the domestic partner provides too much of his or her own support to satisfy the qualifying relative test?

To address this issue, plans can ask the employee to certify that the domestic partner is the employee's tax dependent as of the date the annual enrollment form is completed and require the employee to notify the employer as soon as possible if this status changes. If during the upcoming year the domestic partner ceases to be a tax dependent, then the employee would need to notify the employer so that the imputed income implications, discussed in subsection F, can be addressed. In the case of a non-calendar-year plan, it seems reasonable to treat the domestic partner as a Code §105(b) tax dependent during the "stub period" of the plan year that falls within the prior calendar year, and to impute income based on the value of coverage provided during the remainder of the plan year. **19**

c. Must the Employer Substantiate the Accuracy of Employee Certifications?

No formal IRS guidance addresses whether the employer must substantiate the accuracy of employee certifications. However, an example in the IRS regulations regarding permitted election changes under cafeteria plans indicates that analogous employee certifications (in the context of a midyear election change request based on a marriage) are acceptable, so long as the employee certifies certain facts to the employer and the employer has no reason to believe the certification is incorrect. **20** The preamble to these regulations states that, at least with respect to changes of election, "employers may generally rely on an employee's certification that the employee has or will obtain coverage under the other plan (assuming that the employer has no reason to believe that the employee certification is incorrect)." **21** It seems reasonable to apply this standard to employee certifications regarding the tax status of covered domestic partners (or their children), as well. Taking that approach, an employer should be able to rely on an employee certification unless there is reason to believe that it is not correct or is no longer correct. If the employer has reason to believe that an employee's domestic partnership has ended, the employee should be contacted for explanation (and might be reminded of the tax consequences of covering individuals who are not spouses or dependents under the plan). If, after investigation, the employer is still not satisfied, the best approach would be to consult legal counsel as to whether a request for additional information is warranted.

12 It should be noted that the relationship test to be a *qualifying child* is so broad that, in very rare circumstances, an individual who could satisfy that part of the test (e.g., a stepbrother or stepsister) might also be an employee's domestic partner and might qualify on that basis as the employee's Code §105(b) tax dependent (assuming the other conditions of the qualifying child test were met, including the requirement add in 2008 that the qualifying child must be younger than the taxpayer). Full details regarding the qualifying child test can be found in Section XI.E. (Note: many health insurance plans offering domestic partner coverage require that domestic partners not be related by blood closer than permitted by state law for marriage.)

13 A large number of the other relationships that satisfy the qualifying relative test would not be applicable for domestic partners (e.g., parent, stepparent, brother, sister, and similar relationships). (See Section XI.F for a detailed discussion.) With respect to the requirement that there be no violation of local law, while a few states continue to prohibit cohabitation by unmarried adults, the enforceability of such laws is subject to serious question under the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Based on *Lawrence*, for example, a North Carolina court struck down a state law making it illegal for unmarried persons to cohabit. *Hobbs v. Smith*, 2006 WL 3103008 (N.C. Super. Ct.). It should also be noted that someone who at any time during the taxable year was the spouse of the employee (determined without regard to Code §7703) cannot be the employee's qualifying relative for that year. IRS Publication 501 ("If at any time during the year, [a] person was your spouse, that person cannot be your qualifying relative."). So, for example, the former spouse of an employee who continued to live with the employee as a domestic partner could not be claimed as a qualifying relative of the employee for the remainder of that tax year.

14 Note that registered domestic partners in the community property states of California, Nevada, and Washington need to consider the impact of community property laws on the support test. Under these laws, a registered domestic partner's wages may be considered community property that is deemed to be split on an equal basis between the partners, making the separate test more difficult to satisfy. *See* Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions (Sept. 19, 2013) (as visited Mar. 24, 2014).

15 Code §152(d).

16 *See* IRS Publication 538 (Accounting Periods and Methods).

17 *See* Priv. Ltr. Ruls. 200339001 (June 13, 2003) and 200108010 (Nov. 17, 2000). With respect to the requirement that there be no violation of local law, while a few states continue to prohibit cohabitation by unmarried adults, the enforceability of such laws is subject to serious question under the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Based on *Lawrence*, for example, a North Carolina court struck down a state law making it illegal for unmarried persons to cohabit. *Hobbs v. Smith*, 2006 WL 3103008 (N.C. Super. Ct.).

18 *See* ABA Joint Committee on Employee Benefits, Questions and Answers for the IRS, Q/A-7 (May 20-21, 2005) (as visited Mar. 24, 2014) (noting that "[d]ependent status is an 'on or off switch' for the year").

19 See subsection J for a discussion of the election changes issues presented for cafeteria plans.

20 Treas. Reg. §1.125-4, Example 10.

21 Preamble to Treas. Reg. §1.125-4, 66 Fed. Reg. 1838 (Jan. 10, 2001).