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Employee Benefits for Domestic Partners

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C. Legal Compliance Issues

Over time, more and more employers have made the decision to provide benefits to same-sex spouses **8** and unmarried domestic partners that were historically provided only to opposite-sex spouses. The main motivation has been employee satisfaction so that the employer can recruit and retain talented employees. Design choices are also influenced by changing societal and legal views of marriage and relationships. In general (and subject to certain exceptions including, for example, post-*Windsor* spousal rights under qualified retirement plans), **9** there appear to be no federal laws (relating to benefits, employment discrimination, or otherwise) that explicitly require an employer to provide benefits to same-sex spouses. In recent years, however, the Equal Employment Opportunity Commission (EEOC) and certain courts have interpreted the sex discrimination prohibition of Title VII of the Civil Rights Act of 1964 to be broad enough to encompass certain claims of sexual orientation discrimination. **10** (See Section IV.G for more detail.)

At the state and local level, there may be certain relationship recognition (e.g., civil union or registered domestic partnership) laws or employment discrimination laws that can be read to require domestic partner benefits or particular benefit designs. However, these laws are most likely preempted as applied to ERISA benefits (enumerated benefits sponsored by private-sector employers and those church employers that have elected to be covered by ERISA). **11** This means that employers are generally free to provide ERISA benefits to domestic partners (or not) and to design their ERISA plans as they see fit, unless the employer will provide benefits through insurance, in which case the insurance laws of certain states may require domestic partner benefits and impose definitional and documentary requirements that an employer might not otherwise choose. **12**

Even before the Supreme Court's *Windsor* decision in June 2013, certain benefits provided by the federal and state governments to their employees have been extended to domestic partners. This includes, for example, long-term care coverage extended to same-sex partners of federal employees; **13** sick, funeral, and certain other types of leaves extended to both same-sex and opposite-sex partners; **14** and certain other benefits extended to same-sex partners (including child-care services and subsidies for children of domestic partners, EAPs, travel and relocation payments, AD&D insurance, credit union membership, fitness facilities, and planning and counseling services). **15** Since the Supreme Court's

Windsor decision, many federal benefits have been extended to the legally married same-sex spouses of federal employees and annuitants. [16](#)

Employers are generally free to provide domestic partner benefits or not. But, when an employer decides to do so, there are numerous design, documentation, administrative, communications, and systems choices that must be made and tasks that must be accomplished. These issues (along with implementation issues associated with the Supreme Court's *Windsor* and *Obergefell* decisions) are discussed in detail in the remainder of this book. The compliance checklist in Section X.B summarizes these tasks and provides helpful cross-references for the locations of the more detailed discussions.

[8](#) After the *Windsor* decision, certain benefits (e.g., spousal rights under qualified retirement plans) are required under federal law for same-sex spouses. See Section VIII for a discussion of retirement plan benefits.

[9](#) See Section VIII for a discussion of retirement plan benefits.

[10](#) *Complainant v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015) (as visited July 29, 2015). See also *Hall v. BNSF Railway Company*, 2014 WL 4719007 (W.D. Wash. 2014); and *In re Fonberg*, 736 F.3d 901 (9th Cir. 2013) (Judicial Council of the Ninth Circuit held that Office of Personnel Management's decision to deny benefits to employee's same-sex domestic partner amounted to unlawful discrimination on the basis of sex).

[11](#) For a discussion of relationship recognition laws, see Section II.E, and for a discussion of employment discrimination laws and ERISA preemption of state laws, see Sections IV.E and F.

[12](#) For a discussion of state insurance laws, see Sections IV.E and V.C.

[13](#) Absence and Leave; Definitions of Family Member, Immediate Relative, and Related Terms, 75 Fed. Reg. 33491 (June 14, 2010) (as visited July 29, 2015).

[14](#) Federal Long-Term Care Insurance Program, 75 Fed. Reg. 30267 (June 1, 2010) (as visited July 29, 2015).

[15](#) Presidential Memorandum-Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 75 Fed. Reg. 32247 (June 8, 2010) (as visited July 29, 2015).

[16](#) OPM Memorandum for Heads of Executive Departments and Agencies (June 28, 2013) (as visited July 29, 2015); OPM Benefits Administration Letter (July 17, 2013) (describing benefits as "available

to a legally married same-sex spouse of a Federal employee or annuitant, regardless of his or her state of residency") (as visited July 29, 2015).

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