

Health Benefits for Domestic Partners

Review of the Tax and Coverage Rules

2020 Edition

Audio

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Domestic Partners: The Big Picture

What is a Domestic Partner?

It could mean many things!

- Domestic partners may be same-sex, opposite-sex, registered with a state, registered with a locality, or simply meeting a company definition of domestic partner status
- Each form of domestic partnership comes with different coverage, tax, and other compliance issues at the federal, state, and local level

What are the Main Topics Covered?

- When are employers required to offer coverage to domestic partners, and what type?
- How can same-sex or opposite-sex relationships make a difference for what's required?
- What is a company-defined domestic partner, and what are the typical conditions?
- What information can you ask for to verify domestic partner status?
- How does imputed income apply depending on domestic partner type and tax dependent status? What are the differences between state and federal law?
- How does COBRA apply to domestic partners?
- What about account-based plans such as health FSAs, HRAs, and HSAs?
- What rules apply to same-sex spouses after DOMA?

A group of five business professionals (three men and two women) are seated around a conference table in a meeting room. They are looking at documents and laptops, appearing to be in a collaborative meeting. The image is dimly lit and has a dark, semi-transparent overlay.

Required DP Coverage: **Registered Domestic Partners**

CA Registered Domestic Partners

Pre-2020 Rules

In California, a Registered Domestic Partner (RDP) has all of the same rights and obligations (including community property) as those granted and imposed upon spouses. The relationship must meet the requirements set forth in California Family Code §297 and be registered with the Secretary of State.

Same-Sex RDPs

- Neither person married or in an RDP relationship with another
- Not related by blood in a way that would prevent marriage
- Generally must be at least 18 (unless court order permitting younger RDP status)
- Both persons are capable of consenting to the domestic partnership (mentally competent)
- Complete Form NP/SF DP-1 and file with Secretary of State

Pre-2020:

Opposite-Sex RDPs

- Same requirements as same-sex RDPs
- Plus at least one of the partners must be age 62 or older
 - Generally understood as a measure to provide all the state rights and responsibilities of marriage without compromising the ability to claim Social Security benefits based on a former spouse's work record

CA Registered Domestic Partners Rules Effective January 1, 2020

On July 30, 2019, Governor Newsom signed into law SB 30, which took effect January 1, 2020.

The new law eliminates the requirement that at least one of the partners in an opposite-sex RDP relationship be at least age 62 years of age. As a result, the same rules now apply to opposite-sex and same-sex RDP relationships.

<https://www.sos.ca.gov/registries/domestic-partners-registry/>

Domestic Partners Registry

Domestic Partnerships

Important Announcement

Senate Bill No. 30 (Wiener)

Effective January 1, 2020, all couples regardless of age or sexual orientation that are eligible to be married may register with the California Secretary of State as domestic partners.

As a result of this law change, new domestic partnership declaration forms are available now.

For more information, refer to [SB 30](#).

CA Registered Domestic Partners

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Effective January 1, 2020: Same-Sex and Opposite-Sex RDPs

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CA Registered Domestic Partners: Coverage and Documentation

Fully Insured Plans Must Cover Registered Domestic Partners

- Where an employee has entered into a RDP relationship, California requires insurance carriers to provide coverage for RDPs on the same basis as spouses
- This means that for any fully insured plan option, RDPs must have access to the same benefits as spouses
- Note: This requirement does not apply to self-insured plan options because state insurance laws are preempted by ERISA

Fully Insured Plans Must Mirror Spousal Verification Requirements for RDPs

- RDPs must be treated by the employer in the same manner as spouses
- If the employer does not request a marriage certificate to validate that a spouse is eligible, it cannot ask for the Certificate of Registration of Domestic Partnership
- In no case could the employer ever require that an employee in a RDP relationship provide more than the Certificate of Registered Domestic Partnership as a condition for eligibility
- For example, the employer could not require that an RDP complete the same affidavit required for employees to establish DP eligibility for a company-defined domestic partner (non-RDP)

Other State Recognition Laws: List of Comparable State Laws

States with Similar RDP/Civil Union Laws

NCSL: <https://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>

• Registered Domestic Partners

- California
- District of Columbia
- Maine
- Nevada
- Oregon
- Washington
- Wisconsin

• Civil Unions

- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- New Hampshire
- New Jersey
- Rhode Island
- Vermont

A grayscale photograph of five business professionals (three men and two women) sitting around a conference table. They are looking down at documents or laptops on the table. The image is dimly lit and serves as a background for the text.

Required DP Coverage:
Equal Benefits Ordinances
for City Contractors

San Francisco EBO: City Contractors Required Coverage

SF Equal Benefits Ordinance Applies Only to City Contractors

- The EBO applies to all entities that seek to directly enter into a contract or lease with the City and County of San Francisco
- Includes public works or improvements, lease of City property, or services or supplies to be purchased at the expense of the City or County
- Does not apply to entities that do less than \$5,000 worth of business with the City per year, or to subcontractors that indirectly receive payments from City

Must Recognize all RDPs and Local DP Registrations

- Local registrations are generally much looser and typically have no significant legal consequences
- Must use the following definition of domestic partner in all personnel policies and benefits documentation:
 - “Domestic partners are defined as same-sex and opposite-sex couples registered with any state or local government agency authorized to perform such registrations.” (emphasis added)
- The “Chapter 12B Equal Benefits Unit” of the City’s Contract Monitoring Division will review plan documentation to confirm compliance when entering into a City contract

Other City EBOs:

List of Comparable City Ordinances

Cities and Counties with Similar Equal Benefits Ordinance Laws

Human Rights Campaign: <http://www.hrc.org/resources/equal-benefits-ordinances>

- **California**

- San Francisco (1997)
- Los Angeles (2000)
- Berkeley (2001)
- San Mateo (2001)
- Oakland (2002)
- Sacramento (2005)
- State of California (2007)
- Long Beach (2010)

- **Florida**

- Miami Beach (2005)
- Broward County (2011)

- **Washington**

- Seattle (2000)
- Tumwater (2002)
- King County (2004)
- Olympia (2004)

- **Minnesota**

- Minneapolis (2004)

- **Pennsylvania**

- Philadelphia (2012)

A person's hands are shown holding a pen over a document. In the background, a laptop screen displays a bar chart with five bars of varying heights. The overall scene is overlaid with a semi-transparent red filter.

Optional DP Coverage

Company-Defined DPs

Company-Defined Domestic Partner: Typical Affidavit Approach

Many Employers Prefer to Offer Broader DP Coverage

- Registered Domestic Partner coverage is restrictive because of the age limitations for opposite-sex couples and the community property rights
- It may be difficult to recruit and retain employees if the employer does not offer a broader scope of domestic partner coverage based on its own DP policy
- The insurance carrier (or stop-loss carrier for self-insured plans) will almost always defer entirely to the company's definition of domestic partnership

Company-Defined DP Status Typically Established By Affidavit

- Common elements include:
 - Ongoing and committed spouse-like relationship
 - Relationship has existed for a period of [variable (typically 6)] months
 - Both individuals are at least 18 years old and competent to contract
 - Neither individual is married (defined by state law) nor the domestic partner of anyone else
 - Intent to remain domestic partners indefinitely
 - Not related by blood to a degree of closeness that would prohibit marriage under state law
 - Share the same residence [may require for a set number of months prior]
 - Jointly responsible for household finances
 - Have not entered into the relationship solely for purpose of plan coverage for the partner



Tax Issues

**General Imputed Income
Requirements**

Tax Issues:

Compensation Generally Taxable

General Rule Is Compensation Will Be Taxable Unless an Exclusion Applies

- Set forth in Internal Revenue Code §61 and its regulations
- Gross income means all income from whatever source derived
- Unless excluded by law—i.e., all compensation taxable unless exclusion applies
- Includes “income realized in any form” for which no exclusion applies
- Specifically refers to “compensation for services, including...fringe benefits, and similar items”
- Amount included in income must be the “fair market value” of the fringe benefit

Health Benefits Are Generally Excluded from Income

- However, there is no blanket exclusion
- Health coverage must meet certain requirements to qualify for the exclusion
- Where health coverage does not meet those requirements, it is treated as taxable income to the employee in the same manner as cash or any other taxable form of compensation

Tax Issues:

Standard Exclusion from Income Rule

Exclusion from Income for Health Benefits Applies Only for Certain Individuals

- Set forth in Internal Revenue Code §105(b):
 - 1) The employee
 - 2) *The spouse***
 - 3) Tax dependents (with certain modifications)
 - 4) Children through the end of the calendar year in which they reach age 26

Domestic Partner is NOT a Spouse for Tax Purposes

- Spouse status is determined under applicable state law
- **A domestic partner is not a spouse**
- Must have entered into a marriage to be a spouse
- Marriage is typically entered into by the standard formal license and ceremony
- A few states have common law marriage that recognizes a couple as married based on criteria unrelated to a license and ceremony—could apply to a domestic partner situation in those states
 - California is not a common law marriage state

Tax Issues:

Adverse Tax Consequences

There are two potential adverse tax consequences for employees who cover their domestic partner. These taxable amounts are include in gross income, subject to withholding and payroll taxes, and reported as income on employee's Form W-2.

1) After-Tax EE Payment

The employee must pay the employee-share of the premium for the domestic partner's coverage on an after-tax basis.

- Employee pre-tax premium payments are made through the Premium Only Plan (POP) component of the Section 125 Cafeteria Plan
- The Section 125 rules piggyback on the same exclusion from income tax rules as the prior slide
- Therefore (unless the DP is the employee's tax dependent) there is no option to pay for the DP's coverage on a pre-tax basis

2) Imputed Income

The employee must receive imputed income for the employer-share of the premium paid for the domestic partner's coverage.

- Unless the employee's DP is a tax dependent, there is no basis for excluding the cost of the DP's coverage from the employee's income
- Therefore, the fair market value (FMV) of the employer payment for the DP's coverage is included in the employee's income in the same manner as any standard form of wages

Tax Issues:

IRS Imputed Income Guidance

IRS PLR 9717018 Sets Forth Basic Principles

“(3) Medical, hospitalization, dental and prescription drug benefits provided to Domestic Partners and their dependents under the Plan **will not be excludable** under section 106 of the Code, but will be includible in the gross income of the eligible employee as compensation for services under section 61 of the Code.” (emphasis added)”

“(4) Pursuant to the provisions of section 104(a)(3) of the Code, neither the eligible employee, nor the eligible employee's Domestic Partner and dependents will include any amount received as payment or reimbursement of medical, hospitalization, dental and prescription drug benefits under the Plan to the extent that either the coverage for personal injuries or sickness provided to the Domestic Partner and dependent was paid for by employee contributions, or the fair market value of the coverage was included in the gross income of the employee.”

- Reiterated in two recent IRS Information Letters:
 - IRS Information Letter 2016-0008: <https://www.irs.gov/pub/irs-wd/16-0008.pdf>
 - IRS Information Letter 2016-0012: <https://www.irs.gov/pub/irs-wd/16-0012.pdf>

What Does it Mean?

- Domestic partner coverage is taxable to the employee under general tax rules
- Benefits paid from the health plan (i.e., claims paid) are not taxable income to the employee as long as the employee paid for the DP's coverage on an after-tax basis and the employer-share of the premium was imputed income

Tax Issues:

IRS FMV Guidance (Limited)

The general rule is that the imputed income amount is determined by the “fair market value” of the group medical coverage. There are two alternative approaches to determining the plan’s fair market value.

1) COBRA Rate

Employer uses the plan’s COBRA premium (reduced by the 2% administrative fee) for coverage.

- This is the more conservative approach
- Based on self-only COBRA coverage for DP only
- If also covering non-tax dependent DP child(ren), based on employee-plus-one or family coverage, whichever is applicable
- IRS reviewed but refused to specifically endorse this approach in IRS PLR 200108010
 - <https://www.irs.gov/pub/irs-wd/0108010.pdf>

2) Incremental Cost

Employer uses the incremental cost of adding coverage for one individual to the plan.

- Slightly more aggressive position because results in reduced imputed income (but more common)
- For example, if the premium for self-only is \$300 and the premium for employee-plus-one is \$475, the FMV for DP would be \$175
- No IRS guidance addressing whether it’s permitted

A group of five business professionals (three men and two women) are gathered around a table in a meeting room. They are looking at documents and laptops, appearing to be in a collaborative discussion. The scene is dimly lit, with the background showing office partitions and windows.

Tax Issues **Avoiding Imputed Income**

Tax Issues:

Tax-Dependent Domestic Partner

Exclusion from Income for Health Benefits Applies Only for Certain Individuals

- Set forth in Internal Revenue Code §105(b):
 - 1) The employee
 - 2) The spouse
 - 3) Tax dependents (with certain modifications)**
 - 4) Children through the end of the calendar year in which they reach age 26

No Adverse Tax Consequences for Tax-Dependent Domestic Partner

- Two adverse tax consequences for employees covering DPs:
 - 1) After-Tax Payment (Employee-Share of Premium); and
 - 2) Imputed Income (Employer-Share of Premium)
- **Tax-dependent status avoids both of these adverse tax consequences**
- The employee may pay the employee-share of the premium for the DP's coverage on a **pre-tax basis** through the Section 125 cafeteria plan
- **No imputed income** to the employee for the employer-share of the premium for the DP's coverage
- DP must qualify as the employee's tax dependent under Internal Revenue Code §152 (as modified by §105(b))

Tax Issues:

Tax-Dependent Domestic Partner

Internal Revenue Code §152 (as modified by §105(b)) Tax Dependent

- Domestic partner may be the employee's "qualifying relative" under §152
- Summary overview of four tests to qualify as qualifying relative:
 - 1) **Not a Qualifying Child:** DP cannot be a qualifying child tax dependent of any taxpayer
 - 2) **Member of Household Test:** DP must live with you all year as member of your household ("same principal place of abode")
 - 3) ~~**Gross Income Test:** DP's gross income for the year must be less than \$4,300 (indexed)~~
 - 4) **Support Test:** You Must provide more than half of the DP's support during the year
 - 5) **Citizen/Resident Test:** DP must be a U.S. citizen, U.S. resident alien, U.S. national, or resident of Canada or Mexico

§105(b) Modification Important—No Gross Income Test

- Employees may not consider a DP a tax dependent because of the Gross Income Test
- However, for health purposes only, Gross Income Test does not apply under §105(b)
- Certain other rules related to dependent of dependent and marriage status also removed

Employers May Rely on Employee Certification

- Employers typically offer affidavit for employees to confirm DP tax-dependent status

Tax Issues:

California Registered Domestic Partner

California state income tax law treats RDPs the same as spouses for tax purposes. This means no adverse tax consequences at the state income tax level only for RDP coverage.

Federal Income Tax: Unaffected by RDP Status

- Employee must pay the employee-share of the premium for the RDP's coverage on an **after-tax basis**
- The employee must receive **imputed income** for the employer-share of the premium paid for the RDP's coverage.
- RDP status is not relevant for federal income tax purposes
- DP must be a tax dependent to avoid federal adverse tax consequences

California State Income Tax: No Adverse Tax Consequences

- The employee may pay the employee-share of the premium for the RDP's coverage on a **pre-tax basis** for state income tax purposes only
- **No imputed income** to the employee for the employer-share of the premium for the RDP's coverage for state income tax purposes only
- DP must be a tax dependent to avoid federal adverse tax consequences

Tax Issues:

Imputed Income Overview

	<u>Federal Income Tax</u> Consequences	<u>CA State Income Tax</u> Consequences
<u>Company-Defined</u> Domestic Partner	After-Tax Payment Imputed Income	After-Tax Payment Imputed Income
<u>California Registered</u> Domestic Partner	After-Tax Payment Imputed Income	Pre-Tax Payment No Imputed Income
<u>§105(b) Tax-Dependent</u> Domestic Partner	Pre-Tax Payment No Imputed Income	Pre-Tax Payment No Imputed Income

Tax Issues:

Domestic Partners' Children

Exclusion from Income for Health Benefits Applies Only for Certain Individuals

- Set forth in Internal Revenue Code §105(b):
 - 1) The employee
 - 2) The spouse
 - 3) Tax dependents (with certain modifications)
 - 4) Children through the end of the calendar year in which they reach age 26**

Domestic Partner's Child May Not Be Employee's Child

- Same adverse tax consequences for employees covering DP's children:
 - 1) After-Tax Payment (Employee-Share of Premium); and
 - 2) Imputed Income (Employer-Share of Premium)
- **Child status avoids both of these adverse tax consequences**
- "Child" includes natural children, stepchildren, adopted children, foster children
- Applies if the employee has adopted the domestic partner's child
- Applies if the child is the employee's foster child (not just domestic partner's)
- Children of a Registered Domestic Partner are considered to be the employee's stepchildren for federal purposes if treated as such for state purposes
 - IRS FAQ Confirmation (Q/A-8): <https://www.irs.gov/uac/answers-to-frequently-asked-questions-for-registered-domestic-partners-and-individuals-in-civil-unions>

A person's hands are shown holding a pen over a document. The document features a bar chart with several bars of varying heights. The entire scene is overlaid with a semi-transparent red gradient. The text 'COBRA Coverage' is in a light pink color, and 'Domestic Partner Issues' is in white.

COBRA Coverage **Domestic Partner Issues**

COBRA Coverage: DPs Not Qualified Beneficiaries

COBRA Qualified Beneficiaries Do Not Include Domestic Partners

- Must be a COBRA “qualified beneficiary” to have independent COBRA rights
- Qualified beneficiaries include the following individuals covered under the plan as of the date of the qualifying event:
 - 1) **Covered Employee**
 - 2) **Spouse of Covered Employee (Does Not Include Domestic Partners)**
 - 3) **Child of Covered Employee**
 - 4) **Child Born (or Placed for Adoption) with Covered Employee During COBRA Period**

What Happens When Domestic Partner Loses Coverage?

- General rule is that as a non-qualified beneficiary, the domestic partner has no independent COBRA election rights
- DP must therefore be covered as the employee’s dependent to receive COBRA coverage
- Employee has the right to cover DPs if they are eligible dependents for active employees
- If employee dies or drops COBRA coverage, DP has no right to continue COBRA coverage

Employer May Offer “COBRA-Like” Coverage for Domestic Partners

- Treats domestic partners as a qualified beneficiary in the same manner as a spouse
- Confirm with insurance carrier (fully insured) or stop-loss provider (self-insured) if permitted

A person's hands are shown holding a pen over a document. The document features a bar chart with several bars of varying heights. The entire scene is overlaid with a semi-transparent red gradient. The text 'Account-Based Plans' is in a light pink color, and 'Domestic Partner Issues' is in white.

Account-Based Plans **Domestic Partner Issues**

Account-Based Plans: Health FSAs and HRAs

Health FSA

- Employees may be reimbursed for expenses of those individuals listed in §105(b) (employee, spouse, tax dependent, child through year turns age 26)
- This means that an employee can submit expenses for reimbursement from a health FSA only if the domestic partner is a §105(b) tax dependent

Health Reimbursement Arrangement (HRA)

- Tax-free coverage and reimbursement available only for those individuals listed in §105(b) (employee, spouse, tax dependent, child through year turns age 26)
- Failure to properly tax DP HRA coverage/reimbursements results in disqualification of HRA and all reimbursements taxable to all employees
 - IRS Revenue Ruling 2006-36: <https://www.irs.gov/pub/irs-drop/rr-06-36.pdf>
- When including FMV of DP HRA coverage in employees' income, generally assumed to use HRA COBRA rate for valuation (no clear guidance)
- Not clear whether taxation of DP reimbursements (rather than coverage) is permitted, but IRS suggests it may be available as alternative to taxing coverage:
 - IRS PLR 201415011: <https://www.irs.gov/pub/irs-wd/1415011.pdf>

Account-Based Plans: Health Savings Accounts (HSAs)

Tax-Free Medical Expenses Distribution Available Only for Tax-Dependent DPs

- Individuals will be subject to income tax and a 20% additional tax for distributions for non-tax dependent domestic partner
- Tax-free HSA distributions available for medical expenses of a tax-dependent DP in the same manner as for a spouse

Family Coverage Limit Applies for DP HDHP Coverage

- Employees covering a non-tax dependent may DP contribute the family HSA limit
Family coverage is defined as “any coverage other than self-only coverage”

The Domestic Partner Double Family Contribution Loophole

- Normal rule is that employee and spouse have a combined family contribution limit (\$7,100 in 2020) that may be allocated between spouses in any manner (applies where at least one of the spouses has family coverage)
- The combined limit rule doesn't apply to domestic partners because not spouses
- If both the employee and domestic partner are covered by family HDHP coverage and are both HSA eligible, they could each contribute the family HSA limit to their own HSA (\$7,100 to each HSA in 2020)
 - IRS Informal ABA Guidance:
<http://www.americanbar.org/content/dam/aba/migrated/jceb/2010/2010IRSFINAL.authcheckdam.pdf>

The background features a person's hands holding a pen over a document. On a laptop screen in the background, a bar chart is visible with a y-axis labeled 'COUNT' and values 0, 50, and 100. The chart has six bars of varying heights. The text 'Enrollment/Disenrollment' is in a light pink color, and 'Operating Outside §125' is in white. The overall image has a pinkish-red tint.

Enrollment/Disenrollment **Operating Outside §125**

DP Enrollment/Disenrollment: Where Section 125 Rules Don't Apply

General Irrevocable Election Rules Under Section 125

- The employee-share of the premium is paid on a pre-tax basis through the Section 125 cafeteria plan premium only plan component (POP)
- Employees' elections to pay for coverage on a pre-tax basis generally must be:
 - 1) Made prior to the start of the plan year (i.e., prospective); and
 - 2) Irrevocable for the plan year unless the employee experiences a Section 125 permitted election change event (Treas. Reg. §1.125-4)

Section 125 Election Rules Do Not Apply to Non-Tax Dependent DP

- Employees must pay for coverage of a (non-tax dependent) domestic partner on an after-tax basis outside of the cafeteria plan
- Means that there are no §125 rules governing employee DP elections

How to Approach Employee Enrollment/Disenrollment Elections for DPs

- Employer will generally want to follow the Section 125 election rules for DP enrollment even though they don't technically apply
 - Insurance carrier (fully insured) or stop-loss provider (self-insured) will likely require this
 - Terrible adverse selection potential if employees may enroll DPs at any time for any reason
- Generally not problematic to permit DP disenrollment mid-year without experiencing a Section 125 permitted election change event

A person's hands are shown holding a pen over a document. The document features a bar chart with several bars of varying heights. The entire scene is overlaid with a semi-transparent red gradient. The text 'Medicare Secondary Payer Domestic Partner Rules' is centered over the image.

Medicare Secondary Payer **Domestic Partner Rules**

Medicare Secondary Payer: Domestic Partner Rules

General Medicare Secondary Payer (MSP) Rule (20+ Employees)

- In general, the MSP rules require that the employer-sponsored group health plan always pay primary to Medicare (i.e., Medicare pays secondary)
- Applies for individuals in “current employment status” (i.e., active employees)
- Does not apply for individuals covered through COBRA (Medicare pays primary)

MSP Rules Also Apply to Active Employee’s Spouse

- If an active employee’s spouse is enrolled in Medicare and the employee’s group health plan, Medicare will pay secondary for the spouse
- Means employee and spouse GHP coverage treated the same under MSP rules

MSP Rules Do Not Apply to Active Employee’s Domestic Partner

- If an employee covers a domestic partner who is enrolled in Medicare, the employer-sponsored GHP can pay secondary (i.e., Medicare pays primary)
- GHP will often provide that it pays secondary to Medicare for any Medicare-eligible domestic partner—even if the domestic partner is not enrolled!
- In that case, employees will want to ensure that any Medicare-eligible domestic partner enroll in Medicare (not just the GHP)
 - Failure to enroll in Medicare could result in very large uncovered portion of claims for DPs
 - GHP will assume Medicare paid its portion first even if the DP was not enrolled in Medicare



Same-Sex Spouses
Post-DOMA World

Same-Sex Spouses: Identical Tax Treatment

- The Court's 2013 ruling in *U.S. v. Windsor* held that key portions of the Defense of Marriage Act (DOMA) are unconstitutional, and therefore the federal government must recognize same-sex marriage for purposes of federal law.
- In 2015, the Court concluded in *Obergefell v. Hodges* that the 14th Amendment provides a constitutional right to same-sex marriage that:
 - 1) **Requires states to issue same-sex marriage licenses; and**
 - 2) **Requires states to recognize same-sex marriages lawfully entered into outside the state**
- Means that there is nationwide uniformity in same-sex marriage
- For federal *and* state income tax purposes, there is never any requirement for employers to impute income tax in the amount of the employer's contribution toward a same-sex spouse's coverage—nor are employees ever required to pay for a same-sex spouse post-tax
- Same-sex spouses also treated identically for other compliance purposes (COBRA, HIPAA, FMLA, Section 125, HSA, HRA, FSA, etc.)
- In general, unless plan specifies otherwise (rare), same-sex spouses and opposite-sex spouses should be treated identically for all employee benefits purposes

Same-Sex Spouses: Civil Rights Act Title VII Issues

Self-Insured Plans Enjoy ERISA Preemption from State Insurance Mandates

- Self-insured health plans are not subject to state insurance mandates for fully insured plans (such state insurance laws are preempted by ERISA)
- Raises the question of whether a self-insured plan could limit plan eligibility to opposite-sex spouses only
- This is not common anymore, but many employers believed that a same-sex spouse exclusion could still be permitted (even after the DOMA decisions)

Failure to Extend Coverage to Same-Sex Spouse May Violate Civil Rights Act

- Title VII of the Civil Rights Act (CRA) prohibits discrimination on the basis of sex
- Recent CRA interpretations by EEOC and federal courts extend sex discrimination to sexual orientation discrimination, including with respect to employee benefit plan provisions to exclude same-sex spouses from coverage
 - EEOC Guidance re Same-Sex Spouses and Employee Benefit Plans:
https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm
<https://www1.eeoc.gov/eeoc/newsroom/release/10-25-16.cfm?renderforprint=1>
- Result: Expect a legal challenge if you offer coverage to opposite-sex spouses but exclude same-sex spouses from eligibility

A person is writing in a notebook with a pen. In the background, a laptop screen displays a bar chart with five bars of increasing height. The entire image has a pinkish-red tint.

Wrap Up **Takeaways**

Health Benefits

Domestic Partners

Three Key Points to Remember:

A

State and local law may require coverage for domestic partners. The most common example is California Registered Domestic Partners. Fully insured California plans must offer coverage to RDPs on the same terms as spouses.

B

Employees will face adverse tax consequences (typically referred to as imputed income) for coverage of a domestic partner unless an exception applies. Tax-dependent status avoids both federal and state imputed income, RDP status avoids only state imputed income. Make sure payroll is setup correctly!

C

Taxes aren't the only area where domestic partner coverage issues can be tricky. Keep in mind the different status for COBRA, account-based plans, and Section 125 for domestic partners. Lastly, note that same-sex spouses are treated identically to opposite-sex spouses now that DOMA no longer applies.

Content Disclaimer

Health Benefits for Domestic Partners

The intent of this analysis is to provide the recipient with general information regarding the status of, and/or potential concerns related to, the recipient's current employee benefits issues. This analysis does not necessarily fully address the recipient's specific issue, and it should not be construed as, nor is it intended to provide, legal advice. Furthermore, this message does not establish an attorney-client relationship. Questions regarding specific issues should be addressed to the person(s) who provide legal advice to the recipient regarding employee benefits issues (e.g., the recipient's general counsel or an attorney hired by the recipient who specializes in employee benefits law).

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Thank you!

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