Benefits Insights

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Domestic Partner Benefits

Many employers provide health insurance coverage to the domestic partners of their employees. Domestic partner benefits generally include medical and dental insurance, but they may also include disability and life insurance, family and bereavement leave, education and tuition assistance, relocation and travel expenses, and inclusion of partners in company events.

Since same-sex marriage is now legal in every state, some employers have dropped their domestic partner benefits and require that couples get married in order to qualify for employee benefits. However, some employers—especially those that offer same-sex and opposite-sex domestic partner benefits—are continuing to provide domestic partner benefits for a variety of reasons.

Reasons for Offering Domestic Partner Benefits

Companies offer domestic partner benefits for many reasons. Some of the most commonly cited reasons for providing domestic partner benefits include:

- **Hiring and retention—**Domestic partner benefits can have a positive impact on attracting and retaining top talent by recognizing that some people need health benefits for their partners, but prefer not to marry.
- **Improved employee productivity—**One purpose of a benefits program is to provide a safety net for employees and their families, thereby allowing them to better focus on work. Employee morale and productivity improve in environments where employees believe that the employer values them. Offering domestic partner benefits is a way for employers to adapt to the changing needs of their employees by expanding the eligibility of existing benefits programs.
- **Ethical concern for others—**Many employers offer domestic partner benefits for ethical reasons, like to allow non-married couples to have the same rights as married ones.
- **State law requirements—**Some states, such as California, have laws that require health insurance coverage for domestic partners.

Reasons for Not Offering Domestic Partner Benefits

Companies choose not to offer (or to eliminate) domestic partner benefits for many reasons. Some of the most commonly cited reasons for not providing domestic partner benefits include:

- **Availability of same-sex marriage—**Some employers offered same-sex domestic partner benefits because employees did not have the option to legally wed their same-sex partners. Because same-sex marriage is now legal in all 50 states, some employers have decided to require employees to marry their domestic partners within a certain timeframe or risk losing their partners' health insurance coverage.
- **Fraud concern—**Another reason cited for not offering domestic partner benefits is the fear that employees will misrepresent their relationships to obtain benefits for individuals who are not their domestic partners. To address this concern, many employers require employees to sign a legally binding statement attesting to the existence of the partnership.

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- **Adverse selection**—Because domestic partner relationships do not usually have the same legal implications as marriage, employees may be more likely to enter into a domestic partnership just to obtain health benefits.
- **Tax issues**—Administering domestic partner benefits can be complex. These benefits are often subject to different tax rules than benefits for spouses. For example, unless the domestic partner is a tax dependent of the employee under federal tax law, an employee will be taxed on value health benefits provided by an employer to a domestic partner. Such benefits will also have employment tax consequences for the employer.

Definition of a Domestic Partner

There are no uniform rules defining a domestic partner, and not all areas have state or local laws or regulations that define the term. Some employers choose to establish their own definitions, while others reference state or local law domestic partner registration systems. Commonly used plan requirements stipulate that domestic partners:

- Have lived together for a specified period (generally, at least six months);
- Share financial responsibilities;
- Are not blood relatives;
- Are at least 18 years of age;
- Are mentally competent;
- Intend that the domestic partnership be of unlimited duration;
- Register as domestic partners if there is a local domestic partner registry;
- Are not legally married to anyone or engaged in another domestic partnership; and
- Agree to inform the company if the domestic partnership terminates.

Some plans require that affidavits affirming domestic partner status be submitted to plan administrators, and that an employee submit a "termination of domestic partnership" form if the partnership ends.

When drafting plans, employers should clearly state what benefits are available to domestic partners. They should also consider whether the plan will extend eligibility to the dependents of domestic partners. Beyond that, summary plan descriptions (SPDs) must clearly state the eligibility rules for domestic partners and the scope of the benefits provided to domestic partners.

Tax Implications

Couples in domestic partnerships are generally ineligible for the federal benefits provided to spouses. For example, a domestic partner is not a legal spouse for federal tax purposes. An employer is obligated to report and withhold taxes on the fair market value (FMV) of a domestic partner's health coverage to the extent the coverage is paid for by the employer. This is not true for health insurance coverage for legal spouses (including same-sex spouses).

There is no clear rule on what constitutes FMV. The FMV of coverage is determined based on the amount an individual would have to pay for the particular coverage in an "arm's-length" transaction. It does not depend on usage of the coverage or claims actually paid or the cost incurred by the employer. FMV is usually determined by calculating the difference between the cost of employee and employee-plus-one coverage or by using the plan's applicable COBRA premium for the coverage, without the 2 percent surcharge. Also, any amount paid by the employee on an after-tax basis for the coverage should be subtracted from the FMV to determine the taxable amount.

Some employers "gross up" an employee's salary to cover the cost of additional taxes from the imputed income of domestic partner benefits. Employers should disclose the methodology used for imputing employee income to employees. This would allow affected employees to make informed decisions about the cost of coverage and the tax consequences of providing their domestic partners with health coverage through their employers.

Domestic partner benefits may be considered non-taxable only if the domestic partner qualifies as a "dependent" under the definition of a "qualifying relative" pursuant to Internal Revenue Code (IRC) Section 152. To qualify as a dependent, the domestic partner must have the same primary address as the employee/taxpayer for the year and be a member of the

employee/taxpayer's household. In addition, the domestic partner must receive more than half of his or her support for the year from the employee/taxpayer. Traditionally, plans ask that the employee certify the following: that the domestic partner is the employee's tax dependent as of the date that the annual enrollment form is completed; and that the employee expects that the domestic partner will continue to be the employee's tax dependent for the upcoming year.

If an employee's domestic partner qualifies as a tax dependent, the value of the health coverage and benefits paid under the health plan are tax-free to the employee and domestic partner. A domestic partner does not have to be claimed as a "dependent" on the employee's federal tax return in order to be eligible for tax-free health coverage. Furthermore, a domestic partner's child is unlikely to be the employee's dependent because, in most cases, the child will be the qualifying child of another taxpayer, such as the domestic partner or the child's other parent.

Employee Benefit Laws

Some states have laws that address domestic partner benefits, such as laws requiring that any employer that provides health insurance benefits to employees' spouses must offer the same benefits to domestic partners of employees. States may also have laws that allow employees to take job-protected leaves to care for their domestic partners. Employers should stay up to date with applicable state laws impacting domestic partner benefits.

The Employee Retirement Income Security Act of 1974 (ERISA) and the IRC are federal laws that are directly applicable to domestic partner benefits. ERISA governs private sector, employer-sponsored welfare and retirement plans. ERISA generally preempts state laws that relate to employee benefit plans but not state laws that regulate insurance. As such, state insurance law may require coverage of domestic partners in plans that are otherwise regulated by ERISA. However, a fully insured health plan may be treated differently than a self-insured health plan.

The following paragraphs discuss federal employee benefit provisions as they relate to domestic partner benefits:

Flexible Spending Accounts (FSA)

Money contributed on a pretax basis to an FSA can be used to pay for medical expenses not covered by health insurance. Unless a domestic partner qualifies as a tax dependent under the IRS definition, an FSA cannot be used to cover the medical expenses of a domestic partner, even if the employer offers domestic partner health insurance benefits.

Health Savings Accounts (HSA)

Medical expenses incurred by, or on behalf of, a domestic partner are ineligible for tax-free reimbursement from an HSA unless the domestic partner qualifies as a tax dependent.

Group-term Life Insurance

Group-term life insurance on an employee is excludable from income, up to a certain limit. This exclusion does not apply to group-term life insurance for a spouse, another family member or any other person. In terms of this exclusion, domestic partners are treated no differently than spouses.

Specifically, domestic partners cannot obtain group-term life insurance in an employer's group insurance plan on a tax-advantaged basis. Domestic partners can, however, be named as a beneficiary of life insurance purchased by an employee (his or her domestic partner) or by an employer for the employee to the same extent as legal spouse.

HIPAA

Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), special enrollment rights apply when employees gain new dependents or when dependents lose coverage. The extent to which domestic partners are eligible for special enrollment depends in large part on the particular health plan's eligibility rules. However, HIPAA special enrollment rights are not triggered when an employee acquires a domestic partner.

COBRA

The Consolidated Omnibus Budget Reconciliation Act of 1995 (COBRA) requires that a group health plan provide continuation of coverage when certain triggering events cause an employee, the employee's spouse and/or a dependent child to lose coverage under the plan terms. COBRA-triggering events may include termination of employment, divorce or a dependent no longer qualifying as a dependent under the plan terms. Domestic partners cannot

qualify as "spouses" for COBRA purposes and do not have their own COBRA election rights.

Even though an employee's domestic partner has no independent COBRA rights in the instance of a qualifying event, an employer may choose to extend comparable benefits with the approval of the insurance carrier or HMO. If the former employee elects and pays for COBRA coverage in a timely way, he or she can add the domestic partner to the plan during an open enrollment period. The domestic partner's plan coverage will end when the former employee's COBRA coverage ends. If the domestic partner's children are covered as dependents under the plan, they will be qualified beneficiaries in connection with any COBRA qualifying event.

FMLA

The Family and Medical Leave Act of 1993 (FMLA) is a federal policy designed to offer leave annually for certain family or medical reasons. A domestic partner is not considered a spouse for FMLA leave purposes, even if the partner qualifies as a tax dependent. Though many do, an employer is not legally required to extend family and medical leave to an employee to care for a domestic partner.

Also, the Department of Labor (DOL) has recognized the eligibility of same-sex partners, whether married or not, to take FMLA leave to care for a partner's child, provided that they meet the *in loco parentis* requirement of providing day-to-day care or financial support for the child.

Conclusion

Employers need to be aware of the complicated benefits, employment and tax issues that accompany domestic partner benefits. Before extending benefits to domestic partners, an employer should determine the status of the domestic partner rules in each state in which it operates. Employers should also understand the needs and values of their workforce when deciding whether to offer domestic partner benefits.