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Washington's New Domestic Partner Law Causes Headaches for Employers

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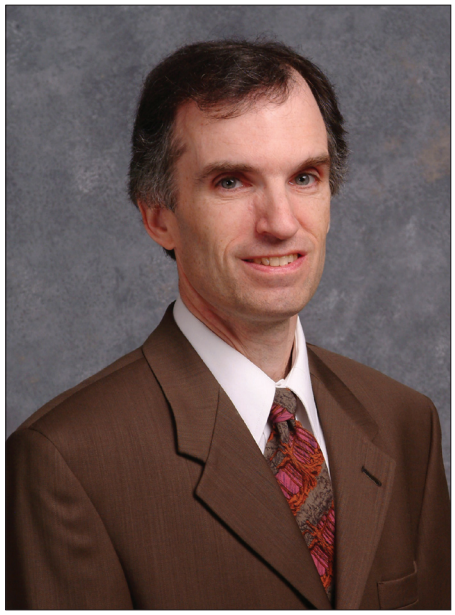

In early December 2009, Washington's "Everything but Marriage" law that expanded its existing domestic partnership law to include any rights available to an opposite-sex married couple under any state law, became effective. The law now provides a number of benefits to domestic partners, like the right to use sick leave to care for a domestic partner, the right to wages and benefits when a domestic partner is injured or dies, and the right to unemployment, disability, or other insurance benefits, such as employer-provided health insurance.

To be registered as partners, same-sex couples must share a home, must not be married or in a domestic partnership with someone else, and be at least 18 years of age. Unmarried opposite-sex couples are also eligible for domestic partnerships if one partner is at least age 62. The couples must register the partnership with the Washington Secretary of State or in another state that registers domestic partnerships.

Employers should note that the law requires them to *offer* health insurance to such domestic partners, but coverage is not automatic. First, it may be necessary to amend the terms of the health plan, since many health plan documents restrict eligibility to "spouses," usually defined as an opposite-sex married person. In addition, like any other non-employee dependent, a domestic partner usually needs to be formally enrolled in the health plan.

If a plan allows a newly acquired spouse to enroll at any time, then it must allow a domestic partner the same right, so an employee wanting to add a domestic partner to a health plan may not need to wait until open enrollment. However, federal law does not recognize a domestic partner as a spouse for benefit or income tax purposes. That means self-insured health plans are not subject to the new state law, and therefore are not subject to the offer of coverage mandate. In addition, adding a domestic partner may make the value of the health insurance taxable to the employee unless the domestic partner meets the federal income tax definition of "dependent."

For purposes of federal income tax-free health plan coverage, a dependent is a citizen or resident of the United States or a resident of Canada or Mexico that:

- Is not a "qualifying child"[1] of the employee or any other taxpayer.
- Is a member of the employee's household other than a spouse *having the same residence as employee for that taxable year*. Note that this requires a shared residence for the entire tax year.
- Receives over one-half their support from the employee.

This definition causes difficulty for both employers and employees. First, when a domestic partner has not shared the employee's residence for the entire year they cannot be a "dependent," making the value of the benefit taxable to

the employee (although the employer may still offer the health insurance to them). Second, enrollment in benefit plans is usually prospective, done late in one year in preparation for the next. The dependent test is historic, since it looks backwards to a completed tax year. Thus, at the time of enrollment neither the employer nor employee knows whether the benefit is going to be federal income tax-free or not for the coming year. Since the key test is the support test, only when both partners know their income for the coming year will they know whether the support test is met.

That causes withholding, tax reporting, and possibly eligibility issues at the end of the year if the domestic partner fails one of the dependent tests. Either the domestic partner is not eligible for the benefit already received (if the health plan restricts eligibility to the employee's "dependents"), or income and employment taxes were over- or under-withheld. Similar difficulties arise in cafeteria plans or with payroll, which may have to pay some employee contributions for benefits on a pre-tax basis (for the employee and "dependents") and some on an after-tax basis (for domestic partners or their children not meeting the "dependent" definition). Employers should address and correct such situations as quickly as possible.

Washington employers also need to review their employment policies and practices for compliance with the new law in such areas as leave policies, health and retirement benefits. For example, a domestic partner now has the right to use sick leave to care for an ill partner. However, the Washington state law does not modify FMLA, which does not consider a domestic partner as a spouse. Washington employers, therefore, must provide benefits under state law that are not required under federal law. Employers will want to consider how they enroll domestic partners and their children to ensure the process is similar to enrolling a traditional spouse and children, and otherwise treat domestic partners the same as traditional spouses.

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[1]Children of a domestic partner may also meet the definition of "qualifying child" and become dependents for income tax purposes. However, it may be necessary for the employee-partner to adopt such a child for them to meet the qualifying child definition.

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