

Legal Alerts

Voter Approved Domestic Partnership Rights: Are You Prepared for Changes to Your Employee Benefits and Policies?

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Garvey Schubert Barer Legal Update, December 2, 2009.

On November 4, 2009, Washington voters approved Referendum 71, extending to state registered domestic partners all the rights and responsibilities of marriage. As a Washington employer, you should take immediate action to review your employee benefits and policies in light of these domestic partnership rights.

This legal update provides a brief summary of some of the effects of expanded domestic partnership rights on Washington employers. For more information about your responsibilities under this law, contact a labor and employment law attorney.

Effective Date

The domestic partnership rights discussed in this legal alert take effect on December 3, 2009 unless otherwise noted. As a result, employers have little time to review and update their policies and procedures.

Covered Domestic Partners

State registered domestic partners can be *either* persons of the same sex *or* persons of the opposite sex when at least one partner is 62 years old or older. To be recognized, Washington domestic partners must register with the Secretary of State. However, non-marriage legal unions of same-sex domestic partners from other states that are equivalent to Washington State registered domestic partnerships are also recognized. Domestic partners remain registered until they successfully file for dissolution in court, in a process similar to dissolution of marriage.

Domestic Partnership Rights in General

The use of terms including "spouse," "marriage," "husband," and "wife" throughout the Washington State statutes must now be interpreted as applying equally to state registered domestic partners. Therefore, any right or responsibility currently applicable to a spouse, marriage, husband, or wife will now apply to a domestic partner. The only exception is when this expansion of rights would conflict with Federal law, principally the Federal Defense of Marriage Act.

Family Leave

Under Washington Family Leave, Family Care, and Military Family Leave laws, eligible state registered domestic partners will be entitled to the following:

- Take unpaid Family Leave to care for a domestic partner with a serious health condition, and to apply available paid time off where permitted.
- Take accrued paid time off to care for a sick child of a domestic partner needing care or a domestic partner or parent of a domestic partner with a serious or emergency health condition.
- Take up to 15 days of unpaid leave during each deployment of a domestic partner in the armed services, and to apply available paid time off where permitted.

Unlike leave taken for a spouse, however, leave taken for a domestic partner may not be designated as Federal FMLA leave. Employees who take leave to care for a domestic partner are still entitled to their full allotment of FMLA leave for other qualifying reasons.

Employers must amend their policies and notices to reflect these new leave rights and establish procedures to track leave taken for a domestic partner separately from FMLA leave.

Employee Benefits

The expanded domestic partnership rights will also affect employee benefits, particularly group health plans, in a number of ways:

- As of December 3, 2009, group health insurance plans must be administered to provide the same coverage to domestic partners that is provided to spouses. An actual amendment to the group policy is not required at this time. Instead, wherever the policy says "spouse" that term is to be read as meaning "domestic partner" as well.
- Although this is not often seen, some health plans automatically cover employees' spouses without requiring the employees to actually enroll their spouses. Those plans have to automatically cover domestic partners as of December 3, 2009.
- However, most plans actually require employees to enroll their spouses. Typically, this has to be done before the plan year begins. Failure to enroll during this "open enrollment period" will usually mean that the employee has to wait until the next plan year before enrolling a spouse. But the new law takes effect on December 3, which is probably not the beginning of anyone's plan year. This creates some practical implementation problems for which, for the time being at least, there is no clear guidance. For example
 - Can a plan set up a special open enrollment period during which these newly eligible domestic partners have to be enrolled if they want to be covered for the balance of the current plan year? Or must a plan allow employees to enroll their domestic partners at any time during the rest of the current plan year?
 - When domestic partners are enrolled, is their coverage supposed to be retroactive back to December 3, the first day on which they had the legal right to be covered? Or can the plan just follow its normal entry date procedures (e.g, you're actually covered by the plan on the first day of the month after the

enrollment form is turned in)?

- Since domestic partners will be enrolling mid-year, are their enrollments supposed to be treated as regular enrollments? Or, following the language in many plans, would these be late enrollments (which might trigger coverage limitations)?
- Health plans that are fully self-insured (other than governmental and church plans) are covered by ERISA, the federal employee benefits law, and are not subject to state group health insurance law requirements. (Fully self-insured plans pay benefits directly from the employer's general assets, rather than from a group insurance policy.) Federal law does not mandate domestic partner coverage. As a result, fully self-insured health plans do not have to provide coverage to domestic partners (although a self-insured health plan could certainly be written to provide domestic partners with the same coverage given to spouses and these days, many of them do).
- **WARNING!** The Washington domestic partner law does not override the federal tax rules! Coverage provided to domestic partners or the dependents of domestic partners is subject to federal income and employment taxes unless they qualify as dependents for federal income tax purposes. So, if an employer pays some or all of the costs for covering employees' spouses under a health plan and also does this for domestic partners, the employees whose domestic partners are covered will be taxed on the "fair market value" of the employer-paid benefit. And the employer has to withhold taxes on the fair market value of that coverage and report that amount on the employees' W-2s.

Public Employers

Domestic partnership rights for public employees have also been expanded in many ways. Among other changes, domestic partners will be treated equally with spouses under the civil service rules and be granted many pension and retirement account rights currently available only to spouses. However, many of these expanded benefits, including those concerning the retirement of judges, firefighters, law enforcement officers, teachers and others, do not take effect until January 1, 2014.

What You Need to Do

- Review and revise your policies, postings, and procedures to reflect expanded domestic partnership rights.
- Contact your insurance company to understand how they intend to administer your healthcare plan with respect to domestic partners.
- Prepare a notice to your employees concerning amended policies and benefit plan administration.

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[503.553.3181](tel:503.553.3181) vince.cacciottoli@foster.com

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