



Domestic Partnership Benefits: Equity, Fairness, and Competitive Advantage

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As the American public becomes increasingly supportive of equity and fairness in the workplace, employers are discovering that domestic partner benefits programs make good business sense. Evolving social and economic pressures in support of these programs are contributing to their increased use as a competitive lever to attract a diverse, top-caliber workforce.

Context

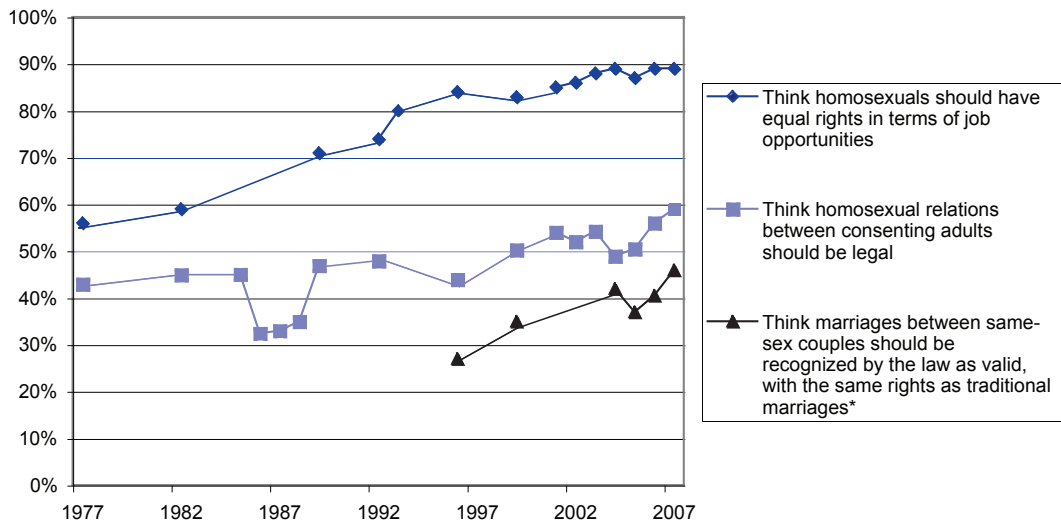
When the *Village Voice* newspaper in New York City first offered benefits to non-married domestic partners of its employees in 1982, this represented a radical departure from tradition. Twenty-five years later, some 9,300 employers in the United States, including many of the nation's largest and most successful companies, have extended their benefits programs to the domestic partners of employees and their dependents. Though such benefits are far from universally available, it is clear that a shift has taken place in American society, moving domestic partner benefits programs from the margins to the mainstream.

This development is consistent with growing public opposition to discrimination on the basis of sexual orientation. It represents a new middle ground in society's culture wars. At one extreme, there are those who wish to preserve the traditional definition of marriage as between one man and one woman

and to deny recognition of any legal status for same-sex couples. At the other extreme, there are those fighting for full marriage equality for same-sex couples. Between them, there is a very large group of individuals who support legal recognition through civil unions or domestic partnerships, but who oppose same-sex marriage. While both sides have intensified their efforts to achieve victories in statehouses, courts, ballot boxes, and Congress, domestic partner benefit programs have grown in popularity as a compromise solution that is acceptable to a large proportion of the American public. The term "domestic partner" itself is still in flux, but in general, it refers to an unmarried couple (same- or opposite-sex) who live together and who are committed to each other, certifying through some formal means that they are financially and legally interdependent.

American businesses have taken the lead in developing domestic partner benefit programs for their employees, believing that it makes good business sense. Employers see this as an inexpensive

Figure 1. Trends in Public Acceptance of Equal Rights for Gays



Source: Gallup Poll News Service.

*Surveys between 1996 and 2005 asked about “marriage between homosexuals.” The 2006 survey asked half of the respondents about “marriage between same-sex couples” and half about “marriage between homosexuals.” The former wording resulted in 3 percent greater support.

way to attract and retain talent and to gain an advantage over the competition. Many of the nation’s most competitive colleges and universities are doing the same, as are a number of states and municipalities. But while private-sector employers cannot be legally prohibited from offering these benefits, the rules governing public entities are much less clear. With the recent passage of many state statutes and constitutional amendments defining marriage, confusion reigns over the extent to which such language affects other legal relationships. New legal ground is continually being charted, and it is likely that the situation will remain volatile for many years to come.

In this context, higher education leaders and state policymakers will benefit from a greater familiarity with the issues surrounding domestic partner benefits programs to better inform policy decisions. This paper describes the key issues and addresses what is at stake for public colleges and universities.

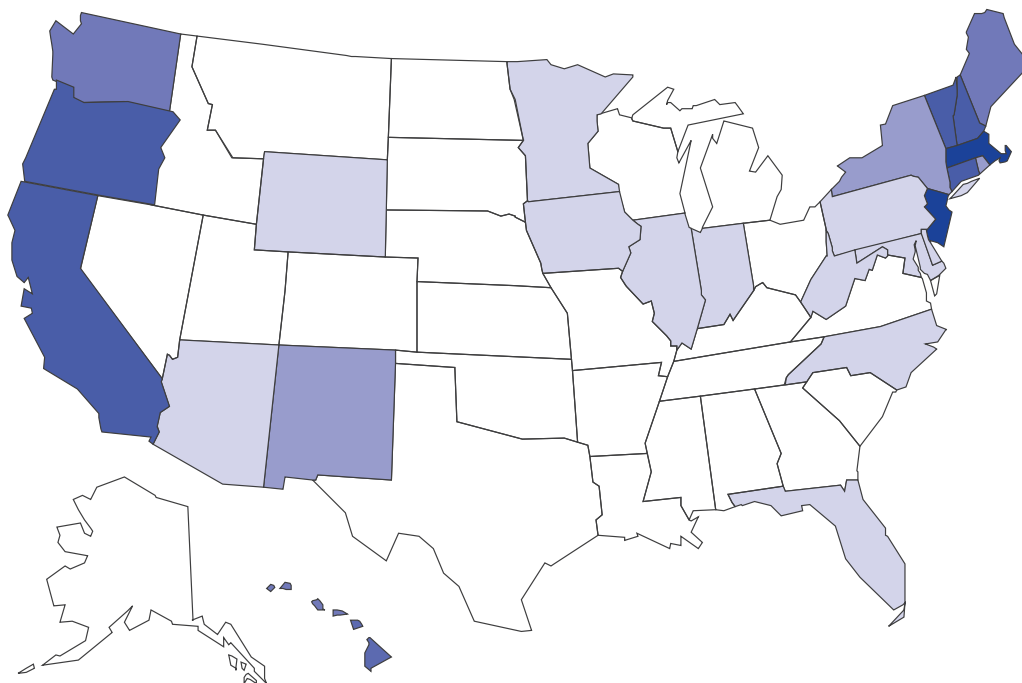
Observations

Over the past three decades, there has been growing public tolerance for gay rights in the country, and growing opposition to discrimination on the basis of sexual orientation. Though the nation remains deeply divided over certain gay-rights issues, there

is overwhelming public support for equality in the workplace. Recent Gallup Poll data indicate that 89 percent of Americans believe “homosexuals should have equal rights in terms of job opportunities,” compared to 56 percent in 1977. There is less, but still growing, tolerance for gay rights in other areas of life (see Figure 1). In the same Gallup Poll, a majority of Americans (53 percent) adhere to the belief that “marriages between same-sex couples should not be recognized by the law as valid, with the same rights as traditional marriages,” but nearly half (46 percent) believe such marriages should be valid. Other polls have reported support for same-sex marriage to be a bit lower, but all are documenting significant change over the past decade.

Evidence suggests some ambivalence on the topic of same-sex relationships. Many people want to be fair-minded, but they are uncomfortable about changing the traditional concept of marriage. Public opinion polls that provide three options—recognition of same-sex marriage, recognition of civil unions but not full marriage rights, or recognition of neither—illustrate this point. Polls taken in 2007 by both the CNN/Opinion Research Corporation and *Newsweek* indicate that one half of all Americans think that either same-sex marriages or civil unions should be recognized as legally valid, with support equally split between those favoring civil unions and those favoring marriage. Fewer Americans (about 44 percent) think that there

Figure 2. State Policies Recognizing Same-Sex Relationships and Restricting Marriage to One Man and One Woman



- state constitutional amendment restricts marriage to one man and one woman; no recognition of same-sex couples
- state law restricts marriage to one man and one woman; no recognition of same-sex couples
- does not recognize same-sex relationships; does not restrict marriage
- recognizes limited spousal rights for same-sex couples, but restricts marriage to one man and one woman
- recognizes civil union or domestic partnership for same-sex couples, but restricts marriage to one man and one woman
- recognizes civil union, domestic partnership, or marriage for same-sex couples and does not restrict marriage to one man and one woman

should be no legal recognition of arrangements between same-sex couples.

Finally, support for gay rights is greatest among younger Americans and decreases as people age. This suggests that the trend toward greater acceptance of differences will continue.

There has been widespread state activity over the past decade prohibiting same-sex marriage, with the majority of states (44) crafting statutes or constitutional language defining marriage as between a man and a woman. A critical question is whether the language in these measures is broad enough to limit other legal rights for same-sex couples, including domestic partner benefits. In 1996, Congress passed the Defense of Marriage Act (DOMA) defining marriage for federal purposes as “only a legal union between one man and one woman” and allowing states to refuse to recognize same-sex marriages performed in other states. This stimulated a flurry of activity at the state level in an area where little legislation had existed before.

The vast majority of states have now enacted laws or constitutional amendments opposed to same-sex marriage (see Figure 2).

- Forty-one states have statutes similar to DOMA that restrict marriage to one man and one woman.
- Twenty-six states have added marriage amendments to their state constitutions to declare marriages between same-sex couples void or invalid. These are seen as stronger measures than state statutes because they prevent courts from ruling that same-sex marriage bans are unconstitutional, and they forbid recognition of same-sex marriages performed in other states. Proposed constitutional amendments are pending in 11 additional states.
- Only six states (Connecticut, Massachusetts, New Jersey, New Mexico, New York, and Rhode Island) and the District of Columbia have no provision against same-sex marriage.

In examining the language of these marriage amendments, the Human Rights Campaign (HRC), an advocacy group working for gay equality, has identified 17 states with broadly written constitutional amendments that might have consequences for other legal relationships such as domestic partnerships. These are now at the heart of controversies in many states as supporters of domestic partner benefits argue that voters were misled; they argue that many citizens voted in support of state constitutional amendments, having been convinced by proponents that the referenda applied only to same-sex marriage. After passage of the amendments, these same proponents have called for a broader interpretation of the new constitutional language.

While some states are restricting recognition of same-sex relationships, a small but growing number have begun to recognize civil unions and domestic partnerships. Seven states offer a full range of spousal rights, and four jurisdictions offer more limited spousal rights to same-sex couples. Just this year, legislatures in three states took action to recognize same-sex relationships, more states to have done so in a single legislative season than ever before. When these laws go into effect in 2008, 20 percent of the U.S. population will be living in states that offer broad-based rights and responsibilities to same-sex couples. Prior to 2000, no states offered such recognition. But unlike traditional marriages, these relationships do not carry the federal protections of marriage (such as Social Security benefits, family medical leave, and so on), and they generally are not recognized outside of a state's jurisdiction.

Currently, Massachusetts is the only state in the nation in which same-sex couples may marry. This is the result of a 2003 Massachusetts Supreme Judicial Court decision that determined that the denial of protections, benefits, and obligations of marriage to same-sex couples violated the due-process and equal-protection clauses of the state's constitution.

Six states provide same-sex couples all or nearly all the rights and responsibilities of married couples through parallel arrangements. Four of these states offer civil unions: Connecticut, New Hampshire (effective 2008), New Jersey, and Vermont. Two offer domestic partnerships: California and Oregon (effective 2008). Four additional jurisdictions offer more limited spousal rights to same-sex couples: the District of Columbia, Hawaii, Maine, and Washington. In several cases, these states prohibit same-sex marriage, but have created a parallel legal structure to grant benefits, protections, and responsibilities.

Motivated by a desire to attract and retain high-quality workers, private businesses have taken the lead in offering domestic partnership benefits to their employees, with public entities following suit. Emerging research is documenting this as a cost-effective strategy for fully harnessing workforce potential. Benefits such as health and dental insurance are a significant component of the total compensation package offered by employers, and research has documented that benefit packages affect employee decisions and job satisfaction. Though benefits have traditionally been extended to the spouse and children of an employee, this has not been an option for same-sex couples, effectively resulting in lesser compensation. Employers have begun to recognize that extending benefits to domestic partners and their children can be a cost-effective way to recruit and retain talent, as well as a way to promote workplace equality. Many organizations have a policy against discrimination on the basis of sexual orientation, and in many jurisdictions, such discrimination is illegal. Offering partner benefits equalizes the compensation package and demonstrates commitment to non-discrimination.

Domestic partner benefits are not limited to same-sex couples. Hewitt Associates, a global human-resources consulting company, has found that 58 percent of organizations that offer domestic partner benefits offer them to both same-sex and opposite-sex couples.

To determine eligibility, employers require documentation of domestic partnership status in one of two ways. Some employers define their own requirements and develop a domestic partnership affidavit. The partners are typically required to certify that they are at least 18 years of age, unmarried, not related to each other, sharing a committed relationship that is exclusive, living together, and financially and legally responsible for each other. More employers are taking a second approach, which is to accept documentation from local or state domestic partner registries, state-level civil unions, or marriages (in Massachusetts). As the number of registries grows, the latter approach is gaining in popularity because it reduces the burden on employers.

Significantly, the largest and most successful companies are the most likely to offer domestic partner benefits, recognizing that they provide a competitive edge in the search for talent. Currently 269 of the Fortune 500 companies provide domestic partner benefits. Of the nation's 100 top-grossing law firms, 88 provide health benefits to same-sex partners of employees.

Thirteen states offer at least some domestic partner benefits to state employees, and at least 145 city and county governments around the country offer them. This is occurring across the nation, even in states that prohibit same-sex marriage.

For both private and public entities, the cost of providing benefits has been a primary concern, at least at the outset, but a growing number of studies are documenting that costs are far less than anticipated. Research suggests that the actual number of people using these benefits has been modest, and the fiscal risks (i.e., costs) associated with these individuals are no greater than those of spouses. In Minnesota, for example, the total cost of providing state employee health benefits increased just 0.05 percent when domestic partner health benefits were added, equivalent to four cents per year per state employee. Studies by the Society for Human Resource Management, KPMG Peat Marwick, and the Employee Benefit Research Institute have similarly concluded that adding health-care benefits for domestic partners generally has a minimal financial impact on overall benefits costs, raising them at most by one to two percent. When looking at cost issues pertaining to statewide employee-benefits programs, studies have actually projected cost savings. This is due to the fact that when same-sex couples assume fiscal responsibility for one another in legally recognized arrangements, they save taxpayers money by reducing dependence on public-assistance programs.

Colleges and universities, led by private institutions, are increasingly extending benefits to domestic partners, but these institutions remain in the minority. Public institutions are proceeding at a slower pace and with greater caution, mindful of the appropriations power wielded by policymakers who may not agree with the policy. The Human Rights Campaign has identified 304 higher education institutions in the United States that offer domestic partner benefits. Mirroring corporate America, the more competitive institutions are at the forefront of efforts to utilize these benefits as a tool in attracting and retaining top faculty and staff. HRC indicates that 60 percent of *U.S. News & World Report's* top 125 colleges and universities offer partner benefits, a proportion higher than that of Fortune 500 companies (54 percent). Of *U.S. News's* top 10 colleges and universities, all offer domestic partner benefits; the same is true for all Ivy League universities. The University of Wisconsin is the only Big Ten conference school that does not offer partner benefits.

Provision of domestic partnership benefits is an issue for all of higher education, not just elite institutions. Approximately 141 public colleges and universities offer domestic partner benefits, and 25 states have at least one public institution that offers these benefits. Sixty-five members of the American Association of State Colleges and Universities (AASCU) do so, representing 15 percent of AASCU institutions. Comprehensive universities, in particular, have much to gain by offering competitive benefits packages since they have less money to offer in salaries. This could make a real difference in attracting talented faculty and staff and improving campus morale and workplace productivity.

In a 1995 resolution, the American Association of University Professors (AAUP) stated its opposition “to discrimination based upon an individual’s sexual orientation in the selection of faculty, the granting of promotion or tenure, and the providing of other conditions and benefits of academic life.” Faculty on campuses across the nation have taken up this cause, and even those who would not directly benefit from domestic partner benefits are calling for equal benefits on their campuses as a symbol of a non-discriminatory and inclusive community.

As to cost, domestic partnership benefits at public universities have not been a drain on state budgets. Data from the College and University Professional Association for Human Resources (CUPA) indicate that only 8 percent of institutions pay all health insurance costs for family coverage; it is far more common for employees to pay for some or all of the costs associated with covering additional family members. Also, in some instances, the employer portion of domestic partner benefits costs is paid for out of private donations so that no state money is used.

Political battles continue to be fought across the nation, and there are a growing number of legal challenges to public colleges’ right to offer benefits to domestic partners. While Attorneys General and the courts in several states have concluded that domestic partner benefits do not violate state bans on same-sex marriage, others are reaching the opposite conclusion. The following state examples illustrate the volatility of the situation, the political and legal struggles being fought in the states, and the uncertainty university leaders are facing.

Wisconsin—Concerned about being at a relative disadvantage in the competition for faculty talent, Governor Jim Doyle proposed a measure to the state legislature in 2005 to provide funding for health insurance for domestic partners of employees. State legislators rejected this proposal.

In 2006, voters passed a constitutional amendment to prohibit same-sex marriage. Many groups, including the Board of Regents of the University of Wisconsin System, expressed concern that it might restrict domestic benefit programs, and the city of Madison, which has had a domestic benefit program since 1990, asked for clarification from the state’s Attorney General. The AG declared that the marriage amendment does not prohibit public or private employers from extending domestic partner benefits to non-married partners of employees, and that “neither the Legislature nor the people intended to invalidate domestic partnerships when they adopted this provision.” UW still does not offer domestic benefits.

“The absence of domestic partner benefits is really a serious recruiting issue for us. We know of instances where we have lost outstanding candidates because of it.”

—University of Wisconsin at Madison’s provost, 2005

Michigan—When Michigan voters approved a state constitutional amendment in 2004 that banned recognition of marriage for same-sex couples or other “similar union for any purpose,” confusion about the legality of domestic partner benefits arose. In a dispute pertaining to the city of Kalamazoo, the University of Michigan, Wayne State University, and the American Association of University Professors filed briefs with the court urging that the marriage amendment did not prohibit domestic partner benefits and arguing that such benefits were “vital to the universities’ ability to recruit and retain the best and the brightest faculty and staff.” In a 2005 decision, the judge backed the universities’ position, arguing that health-care benefits are not a legal part of marriage, but rather part of an employment relationship and that awarding these benefits does not violate the “similar union” language of the constitutional amendment. However, in early 2007, an appeals court reversed that decision, ruling that the marriage amendment “prohibits public employees

“Given the economic crisis our state is in, discouraging an educated workforce from staying in Michigan . . . seems like a step backward instead of forward.”

—Eastern Michigan University staff member, 2007

from recognizing same-sex unions for any purpose.” Though the American Civil Liberties Union (ACLU) will appeal the decision to the Michigan Supreme Court, Michigan State University and the University of Michigan have meanwhile broadened their domestic benefits plans to avoid the language of domestic partnerships. MSU’s pilot program offers benefits to “Other Eligible Individuals,” defined by neutral criteria that do not require documentation of a committed relationship. Similarly, the University of Michigan’s program allows for benefit coverage for “Other Qualified Adults.”

Kentucky—In July 2006, the University of Louisville became the first university in the state of Kentucky to offer domestic partner benefits, and the University of Kentucky followed in April 2007. Members of the state legislature who were opposed to this development asked the state Attorney General to issue an opinion. In June 2007, the AG asserted that these two programs violated the state’s marriage amendment that bars recognition of any same-sex status “substantially similar” to marriage. However, he opened the door to other types of benefits approaches, suggesting a solution similar to what was done in Michigan—broadening the definition of eligible individuals to others who live in the household under circumstances that do not resemble marriage. UK responded by creating a Sponsored Dependent Coverage plan based on sharing a residence for at least a year, but not classifying the dependent as a domestic partner. U of L has developed a similar plan that would provide coverage for one “qualifying adult.” The matter is not settled, however. Governor Ernie Fletcher is pushing for legislation that would ban benefits to domestic partners of state university employees.

“We are not endorsing any lifestyle. We are simply recognizing that people are people. We are recognizing the world we live in.”

—University of Louisville trustee, 2006

Ohio—In 2005, a state representative from Cincinnati filed a lawsuit against Miami University, contending that its domestic partner benefits policy violates the state marriage amendment. That measure prohibits state agencies from creating or recognizing relationships that “approximate the design, qualities, significance or effect of marriage.” His lawsuit stated that he had grounds to sue the institution as both a taxpayer and a tuition-paying parent. A judge dismissed the case in 2006, ruling that the legislator did not have standing

Miami University officials “have thumbed their noses at the Constitution.”

—Ohio lawmaker, 2005

to sue because he was not significantly affected by the university policy, but he added that others might have standing to file such a lawsuit. A 2007 appeals-court decision upheld the lower court's ruling that the legislator did not have standing to sue on either ground: first, taxpayers do not have a general right to challenge any decision by a public entity, and second, tuition funds are not used to pay for the benefits. The legislator could appeal to the state Supreme Court, or other lawsuits could follow.

Conclusion

With public opinion increasingly supporting equity and fair compensation in the workplace, and with full marriage equality for same-sex couples unlikely in the foreseeable future, legal recognition of same-sex couples in the form of domestic partnerships seems here to stay and likely to grow. Leaders of public higher education and state policymakers need to understand what the competition already recognizes: that offering domestic partner benefit programs is a cost-effective strategy to attract and retain faculty, staff, and administrators from a greater pool of talent. And of equal importance, offering these programs is essential if the nation's public institutions are to demonstrate their commitment to social and economic justice, diversity, and inclusiveness.

For many public institutions, adopting policy that allows for the offering of domestic partner benefits may well be a significant public-relations challenge, but, as the experience of 25 states demonstrates, it is not insurmountable. The process can be particularly difficult in states where lawmakers hold conservative views about marriage and have fears about a negative impact on state budgets. It is incumbent upon both higher education leaders and policymakers to learn the facts as they relate to public policy and economic competitiveness, and to make informed decisions.

Resources

American Association of University Professors (AAUP).

Domestic Partner Benefits on Campus (2005) describes AAUP's position and reviews recent domestic partnership litigation involving faculty.

aaup.org/AAUP/protect/legal/topics/partners.htm

American Civil Liberties Union (ACLU).

ACLU's Lesbian Gay Bisexual Transgender (LGBT) Project fights LGBT discrimination and engages in legal and public-education efforts to recognize same-sex relationships. It produces an annual report providing a state-by-state update of political activity and litigation pertaining to LGBT issues.

aclu.org/lgbt

Domawatch.org. Domawatch.org is a project of the Alliance Defense Fund, a conservative Christian organization that supports the preservation of marriage as a union of one man and one woman. It tracks lawsuits related to the issue of same-sex marriage and provides detailed information on state and federal circuit-court cases.

domawatch.org/

Gallup Poll News Service. Gallup's annual Values and Beliefs Survey has collected data for over 30 years on trends in public tolerance for gay rights.

galluppoll.com/content/?ci=27694&pg=1

Human Rights Campaign (HRC). HRC is an advocacy group that works to achieve gay equality. Its resources include a database of employers that offer domestic partnership benefits, analysis of marriage- and relationship-related bills and ballot initiatives, and an annual update on workplace issues for gay Americans.

hrc.org

National Conference of State Legislatures (NCSL).

NCSL tracks state legislative activity pertaining to same-sex marriage, civil unions, and domestic partnerships, including results of the 2006 elections and a timeline of same-sex-marriage political and legal activity since 2003.

ncsl.org/programs/cyf/samesex.htm

Stateline.org. *Same-Sex Marriage Ripe for Decision in 2 Courts* provides excellent background on this issue, including a timeline of key events and a summary of state policies.

stateline.org/live/digitalAssets/9339_Same-sex_marriage.pdf

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