Domestic Partner Benefits:
Research and Review

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I. Executive Summary

During the January 6, 2009 Strategic Planning Conference, the Board of County Commissioners discussed the feasibility of offering Domestic Partner Benefits to Mecklenburg County employees. Issues raised during the discussion included **(Appendix A)**:

- Impact to recruitment and retention processes;
- Employee response to the offered benefits;
- Definitions used for "Domestic Partners" and "Domestic Partner Benefits";
- Legal implications, and;
- Financial impact to organizations.

The Human Resources department was requested to initiate a study focused on the impact of offering Domestic Partner Benefits to employees. Human Resources (HR) staff gathered national, regional, and local jurisdiction data to determine, document and compare implementation experiences. Resources also included specific study/report information available as comparison data. Research captured critical information as it related to this study.

Utilizing information from the research, staff evaluated current HR processes and documents to determine the impact of this benefits enhancement.

Below are the key findings of the report:

- It is important for the organization to clearly define "Domestic Partner" (same sex, opposite sex, or both), and what criteria may be required for this designation to occur.

- Employers report the primary reason for offering domestic partner benefits is related to recruitment and retention; however, staff was unable to find empirical data to support the actual impact.

- Research shows approximately 1 – 2 percent of eligible employees participate when offered. Participation may be determined by what benefits are offered, how "Domestic Partner" is defined, and the overall cost and tax implications to the employee. The IRS does not allow for premium payments for domestic partners to be pre-taxed. Employer-paid premiums are counted as gross income for the employee. Flexible Spending Accounts will not reimburse expenses incurred by the domestic partner.

- Employers offering Domestic Partner Benefits do not always include medical insurance in this option. It is important for the organization to clearly define what benefits are to be offered for domestic partners.

- Data show an average increase of 1 – 3 percent of the organization's overall benefits cost (for Domestic Partner benefits which include medical insurance). There was no data found to determine cost increases associated with other benefits, such as the use of Bereavement Leave, Sick Leave and FMLA.

- County legal staff, in collaboration with staff from the N.C. School of Government, has concluded there is no legal reason why a N.C. local government cannot adopt policies designed to positively impact the recruitment and retention of a capable and diligent workforce **(Appendix B)**.

- The amount of time needed to revise HR processes and forms is directly related to the defined population to be served and the extent of benefits to be offered. If the Board chooses to include medical insurance in the domestic partners benefits, Human Resources would need to renegotiate current benefits' vendor contracts **(Appendix C)**. The most practical time to include this election is at the beginning of a benefits plan year.

II. Research and Analysis

Research completed on this subject provided data that was sometimes difficult to compare. Asking questions required identifying the adopted definitions for Domestic Partners as well as for Domestic Partner Benefits, prior to investigating documented organizational impact.

Defining Domestic Partner

Typically, domestic partners may be generically identified as "two persons who live together in a long-term relationship of indefinite duration, in which the partners are financially interdependent".

However, "Domestic Partners" must be further defined by the organization as:

- ***Same-Sex Partners***
- ***Opposite-Sex Partners***
- ***Both Same-Sex and Opposite-Sex Partners***

Documentation "establishing" the partnership varies from accepting the employee's statement to requiring documentation of long-standing, financial interconnections. Such documentation may include joint mortgages, health care powers of attorney, the beneficiary of a Will, insurance policies, joint bank accounts, tax records, deeds, utilities accounts, etc.

Documentation may also be required to have been active for specific time frames, determined by the organization.

Defining Domestic Partner Benefits

"Domestic Partner Benefits" is terminology used to acknowledge benefits are offered, but does not always reference what benefits may actually be included.

An organization offering "domestic partner benefits" may offer the full gamut of benefit opportunities with no differences in partnerships recognized. On the other hand, "domestic partner benefits" may be the term utilized when another organization simply allows an employee to take one day of sick leave to

stay home with the child of his/her partner (whose eligibility as "partner" may be specifically defined). Both organizations may truthfully answer, "Yes, we offer domestic partner benefits".
Options which are typically offered as domestic partner benefits include:

- Medical Insurance
- Dental Insurance
- Vision Insurance
- Cancer Insurance
- Accident Insurance
- Life Insurance
- Inclusion of "domestic partner" in the definition of a "family member" within organizational policy for the use of:
  - -Sick Leave
  - -Bereavement Leave
  - -FMLA

Why Offer Domestic Partner Benefits?

Domestic Partner policies can be adopted for the following reasons:

- *Recruitment and Retention of Employees*
  A 2005 Hewitt Associates study found the number one reason for offering DP benefits was for the attraction and retention of employees. This response was received from 71 percent of organizations offering same-sex benefits and 69 percent offering opposite-sex benefits. (***Total number surveyed was not noted.***)[1]

- *Fairness*
  Some employers feel that offering benefits to legally married partners (only) may not be perceived as fair.[2]

Survey data results indicate that most organizations provide domestic partner benefits to improve recruitment and retention. Data was not found to measure the impact on recruitment and retention.

Participating North Carolina Jurisdictions

The Human Resources Department surveyed several local and regional jurisdictions which offer domestic partner benefits. Six jurisdictions providing domestic partner benefits in North Carolina are:

- County of Durham
- County of Orange
- Town of Chapel Hill

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[1] Hewitt Associates, source: EBRI, September 2009 Update. Found online: http://www.ebri.org/pdf/publications/facts/0209fact.pdf

[2] Hewitt Associates, source: EBRI, September 2009 Update. Found online: http://www.ebri.org/pdf/publications/facts/0209fact.pdf

- Town of Carrboro
- City of Greensboro
- City of Durham

From the survey responses **(Appendix D)**, the following information was determined:

- Greensboro and Durham County offer domestic partner benefits to same-sex partners only. The remaining four jurisdictions offer it to both same-sex and opposite-sex partners.

- The total number of employees eligible for insurance coverage in the five (5) jurisdictions that provided data ranged from 700 to 3100. The domestic partner participation ranged from five (5) to twenty-four (24) employees. The average participation was less than one percent of the total number of employees.

- None of the six (6) jurisdictions are tracking the recruitment and retention impact. However, the city of Durham solicits feedback on their Employee Climate Survey and during employee Exit Interviews. No Mecklenburg County survey has specifically addressed Domestic Partner Benefits. However, since 2005 HR has received two documented inquiries from employees. In reviewing the last three years of exit interview data, no mention of domestic partner benefits was found.

Additional Local Participation

The Employers Association surveyed 159 companies in the Charlotte region. Of 155 respondents related to domestic partner benefits (including medical insurance), 9 percent of the responses indicated that same sex benefits were offered by their organization, and 4 percent of the responses indicated that opposite sex benefits were offered by their organization. [3] Based on this data, Mecklenburg County would be taking a lead role in the local area rather than following market trend.

Public Jurisdiction Activity

Additional public jurisdictions providing domestic partner benefits include:

- Baltimore County Public Schools
- Baltimore City Public Schools
- City of Baltimore
- County of Montgomery, Maryland
- County of Travis, Texas
- County of Broward, Florida
- County of Cook, Illinois

From the survey responses **(Appendix E)**, the following information was determined:

[3] The Employer's Association, *2007/2008 Benefits Survey*. Final Report and Analysis (October 2007).

- Baltimore City Public Schools, the City of Baltimore and Cook County, Illinois offer same-sex benefits only.

- Baltimore County Public Schools, Travis County, Texas and Broward County, Florida offer both same-sex and opposite-sex options.

- Montgomery County, Maryland offers both options to Fire and Police, but only the same-sex option to other County employees.

- The total number of employees eligible for insurance coverage in six (6) of these jurisdictions ranged from 4000 to 30,000. The domestic partner participation ranged from thirty (30) to "under 1000" employees.

- Domestic Partner benefits have been offered by these jurisdictions for two (2) to thirteen (13) years.

- In addition to standard domestic partner benefits, Broward County, Florida also offers its own "COBRA-like" policy to domestic partners.

Utilization and Cost

According to survey data available (Deloitte Consulting LLP, *Domestic Partners*, January 2009), 1 percent to 2 percent of eligible employees utilize domestic partner benefits. Staff also conducted a high level review of public jurisdictions throughout the nation. The results of the staff review were largely similar to the findings above.

In North Carolina the six local jurisdictions offering Domestic Partner Benefits have seen 0.1 to 0.9 percent participation. Jurisdictions outside of North Carolina show participation rates within the 1 to 2 percent range. However, there were a few jurisdictions that had heavier participation. The highest was Travis County, TX (Austin) with 8.8 percent of employees participating. The jurisdiction offers both same sex and opposite sex benefits.

Low participation rates were found in Baltimore County Public Schools where approximately ½ of 1 percent of employees participated. The jurisdiction offers both same sex and opposite sex benefits. Possible reasons for this low participation rate may include:

- Employees' domestic partners already have medical insurance benefits through their own employers.
- Cost and tax implications are not affordable for the employee.
- Employees may be unwilling to disclose domestic partner relationships to their employers.

None of the jurisdictions contacted provided costs associated with the addition of domestic partner benefits.

In the 2005 Hewitt Associates study, employers who offered domestic partner medical insurance benefits with an expectation of 10 percent enrollment rate, saw an average of 1 percent of eligible

employees electing to take it. (Hewitt Associates, source: EBRI February 2009 *Domestic Partner Benefits: Facts and Background*)

Most employers are concerned about the additional cost of offering benefits which include medical insurance coverage. According to Deloitte Consulting, LLP, the cost of adding Domestic Partner Benefits to Mecklenburg County benefits can range from $400,000 to $1.2 million per calendar year, depending on participation rates. These numbers are calculated based on Deloitte's Book of Business which includes a client base of nearly one-third of Fortune 500 companies. However, the six local jurisdictions in North Carolina currently offering Domestic Partner Benefits have seen 0.1% to 0.9% participation. If Mecklenburg County's participation is similar to other North Carolina jurisdictions, the projected costs could be less than $400,000.

One study of a small group plan in California found the cost of covering same sex partners increased 17.1 percent compared to opposite sex partners[4] **(Appendix F)**. The jurisdictions contacted for this report were unable to provide any specific cost data related to differences in same sex verses opposite sex benefits claims.

In 2000, Hewitt Associates found the cost of domestic partner medical insurance coverage lower than had been projected. Reasons discovered included:

- Most eligible participants are young and healthy, and;
- There is low enrollment due to most partners already having medical insurance coverage.

<u>Income and Tax Considerations</u>

Unless the employee's domestic partner qualifies as his or her "dependent" under IRC § 152 **(Appendix G)**:

- Employee-paid premiums for domestic partner coverage are not payroll deducted on a pre-tax basis and are deducted from the employee's net pay;
- Flexible Spending Accounts will not reimburse expenses incurred by the domestic partner;
- Employer premium contributions toward domestic partner medical coverage are included in the employee's gross income, therefore taxable as income, and;
- Employer contributions are considered gross income and therefore additional Social Security (FICA) and Medicare taxes will need to be paid by the employer and the employee.

In addition:

- COBRA rights are available only to the employee's spouse and dependent children. There are no COBRA rights for domestic partners, even if they qualify as dependents under IRC § 152. Employers may offer COBRA-like benefits to domestic partners, but are not required to do so.
- The Family & Medical Leave Act (FMLA) does not cover domestic partners. Employers may, but are not required to, offer FMLA protection to employees who take time away from work to care for domestic partners.

[4] Hamrick, Michael (2002). *The Hidden Cost of Domestic Partner Benefits.* Corporate Resource Council. Found online: http://www.corporateresourcecouncil.org/white_papers/Hidden_Costs.pdf

III. Legal Considerations

Dr. Diane M. Juffras from the North Carolina School of Government has published a *Public Employment Law Bulletin* (November 2009) entitled, "May North Carolina Local Government Employers Offer Domestic Partner Benefits?" The Bulletin from Dr. Juffras concluded there is no legal reason why a N.C. local government cannot adopt policies designed to positively impact the recruitment and retention of a capable and diligent workforce. County legal staff has reviewed the work of Dr. Juffras and has concurred with her opinion **(Appendix B)**.

IV. Key Board Considerations

Based on the information provided by the county's legal representatives, benefits changes must be approved by the Board of County Commissioners. As a result, the Board should consider:

- Whether to offer Domestic Partner Benefits;
- How a domestic partner will be defined (i.e. same sex, opposite sex or both), and;
- What benefits will be offered to domestic partners (health benefits or health/leave benefits).

If directed by the Board, County policy would be revised to reflect the decisions made by the Board related to the definition of Domestic Partner and the benefits available for election. Sample policies are included in Appendix H.

With specifics identified, the Human Resources department would incorporate these benefits changes into a benefits package and make necessary adjustments. Changes would require the following:

- Renegotiating current benefit vendor contracts;
- Creating a domestic partner verification process;
- Revising policies and procedures;
- Communicating and implementing outside agency changes (Library, Medic, etc.)
- Updating forms and brochures;
- Implementing payroll and benefit system changes (involving Finance and Information and Services Technology staff), and;
- Completing a County-wide Open Enrollment process.

RESOURCES & INFORMATION

During this project, the Human Resources department utilized multiple resources to obtain data and feedback on Domestic Partner Benefits implementation. Information was reviewed from:

AON Consulting - http://www.aon.com/about-aon/about-aon.jsp

Aon Consulting is among the world's top global human capital and management consulting firms, providing a complete array of consulting, outsourcing and insurance brokerage services. Their professionals possess extensive knowledge and experience in a variety of fields and help companies of all sizes attract and retain top talent.

Aon Consulting works with organizations to improve business performance and shape the workplace of the future through employee benefits, talent management and rewards strategies and solutions. Aon Consulting was named the best employee benefit consulting firm by the readers of Business Insurance magazine in 2006, 2007 and 2008. The organization is among the top global human capital consulting firms, with 2008 revenues of $1.358 billion and more than 6,300 professionals in 229 offices worldwide.

Deloitte - http://www.cisworld.com/profiles/deloitte.htm

Deloitte Consulting, LLP, is a limited partnership, of Deloitte Touche Tohmatsu. Deloitte Consulting serves every major industry including Energy, Communications, Manufacturing, Financial Services, Consumer Business, Health Care and the Public Sector. It has nearly 30,000 people in over 100 cities across the country — twenty-eight of which have Human Capital practitioners and serves more than one-third of the companies in the Global Fortune® 500. Deloitte is the only consulting firm with five straight appearances on Fortune Magazine's list of "100 Best Companies to Work for in America." Deloitte Consulting is one of the world's leading e-Business consulting firms, providing services in all aspects of enterprise transformation from strategy and process to information technology and human resources. Deloitte Consulting has more than 2,500 clients and more than 200 in the public sector which is consistently one of the top two industry segments of its' firm in terms of total revenue.

EBRI (*Employee Benefit Research Institute)* - http://www.ebri.org/

The mission of the Employee Benefit Research Institute (EBRI) is to contribute to, to encourage, and to enhance the development of sound employee benefit programs and sound public policy through objective research and education. EBRI provides credible, reliable, and objective research, data, and analysis. The belief: neither public nor private policy nor initiatives, whether institutional or individual, can be successful unless they are founded on sound, objective, relevant, verifiable information.

EBRI does not take advocacy positions on policy proposals, lobby for or against proposals, or recommend specific approaches/prescriptions. EBRI does provide objective data on, and analysis of, the range of identified options in order to provide others the opportunity to make more informed decisions than might otherwise be possible.

The Employers Association – http://www.employersassoc.com

The Employers Association is a private company located in Charlotte, NC. It is estimated that The Employers Association has annual revenue of $2.5 to $5 million and employs a staff of 20 – 49. The Employers Association has been providing human resources and training services to organizations in the greater Charlotte, NC area for nearly fifty years. It serves more than 850 member organizations of all sizes and industries, both public and private. The Employers Association is a member-based organization serving as a knowledgeable and trusted resource to meet the comprehensive human resource needs of businesses.

Hewitt Consulting - http://www.linkedin.com/companies/hewitt-associates

Hewitt Consulting is one of the largest HR consulting firms in the country. Hewitt represents clients with a few hundred employees to those with several thousand. Their areas of consulting expertise range from Compensation, Talent Management and HR Effectiveness—to Health & Welfare, Retirement and Communication.

Hewitt Associates (NYSE: HEW), a global human resources consulting and outsourcing company, helps leading organizations around the world anticipate and solve their most complex benefits, talent, and related financial challenges. With a history of exceptional client service since 1940, Hewitt has offices in more than 30 countries and employs approximately 23,000 associates.

Appendix A

Minutes to January 6, 2009 BOCC Strategic Planning Conference

2009 Strategic Planning Conference - Board Open Discussion

TOPIC: **Domestic Partner Benefits**

REQUESTOR: **Jennifer Roberts**

BACKGROUND: Domestic partners are defined as two persons who live together in a long-term relationship of indefinite duration, in which the partners are financially interdependent. Private companies have taken the lead in providing domestic partner benefits with several of the County's major regional employers, including Bank of America and Wachovia, offering such benefits.

At present, there are six local governments in North Carolina providing domestic partner benefits: the municipalities of Chapel Hill, Durham, Greensboro, Carrboro, and the counties of Durham and Orange. The benefits offered under policies range from the ability to enroll only in medical/dental benefits (Durham/Greensboro) to the full range of benefits offered by the municipality (Chapel Hill).

Sixty four percent of organizations offering domestic partner benefits experience total financial impact of less than one percent of total benefit costs with 88 percent at less than two percent. Approximately five percent of organizations experience a total financial impact of greater than three percent of total benefit costs.

REQUEST: Direct the County Manager to develop a plan for how providing domestic partner benefits could be implemented, how hard it would be to update Human Resource forms, and how much time it would take before such benefits could be offered to employees.

LINKAGE TO THE BOARD'S DESIRED RESULT(S)

- Enhance Workforce Retention & Recruitment
  - M1: Resignation Rate
  - M2: Workforce Representation

REQUESTED ACTION at the Planning Conference:

- ☒ To have the Board receive this as information
- ☒ To seek input and feedback from other Board members
- ☐ To direct the County Manager to follow up with additional research
- ☐ To refer the matter to a Board committee
- ☒ To direct the County Manager to develop a plan around the goal
- ☐ Other (Please provide additional information below)

ATTACHMENTS:

1. City of Durham
2. Town of Chapel Hill
3. City of Greensboro

Questions from Commissioners as noted by the Clerk to the Board January 6, 2009
(Summarized)

Commissioner Murrey supports the matter. He states it is consistent with what other companies are doing or have done.

Commissioner Dunlap said he would like to see this include unmarried, heterosexual couples who live together.

Commissioner Cooksey did not support the matter. Additional information is needed concerning the cost. In addition, he questions if this will undermine the state constitution's definition of marriage.

Commissioner Leake requested more information on the cost impact.

Commissioner Cogdell supports sending the matter to committee for more discussion and more information. He states this is an access to health issue as well as an equity issue. He further stated that in order to be competitive, it may be necessary to offer this.

Commissioner Clarke said he supports the matter and wanted the issue directed to the County Manager to approve HR's development of a proposed policy for implementation.

Commissioner James requested information from legal staff regarding the legal status of providing these benefits. He requested a definition of "Domestic Partner". He requested information about the legalities, specifically under NC law.

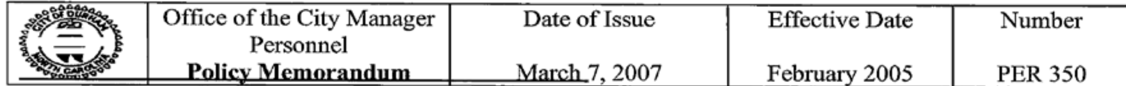
Commissioner Bentley did not support the issue. She stated this will increase cost. She wanted more information on our legal status as NC law does not consider domestic partnership as marriage.

The general consensus was to send the matter to Human Resources for development of a proposal that would include more detail.

Janice S. Paige
Clerk to the Board
(Summary provided by Human Resources)

Information from local jurisdictions attached to January 6, 2009 minutes

Attachment 1: City of Durham



	Office of the City Manager Personnel **Policy Memorandum**	Date of Issue March 7, 2007	Effective Date February 2005	Number PER 350

To: Deputy and Assistant City Managers/Department Directors Signature: Patrick W. Baker, City Manager	Subject: Domestic Partner Coverage

PURPOSE:
To establish a policy allowing eligible employees to enroll as dependents certified domestic partners and the dependents of certified domestic partners in the City health and dental plans.

POLICY:
The City will allow eligible Regular Full-time, Temporary with Benefits and designated Regular Part-time employees to enroll as dependents those who have been determined by this policy to be domestic partners or the legal dependents of that domestic partner.

To the extent allowed under the contract with our insurance carriers, the City will provide benefits to the domestic partners of City of Durham employees on the same basis as they are make available to the spouses and the children of spouses of married employees.

Definition of Terms used in this Policy
Domestic Partner
Two individuals who have reached the age of majority and live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment in which the partners share the necessities of life and are financially interdependent. Also, domestic partners are not married to anyone else, do not have another domestic partner and are not related by blood more closely than would bar their marriage in this State.

Dependent of Domestic Partner
The legal dependents of the City of Durham employee's domestic partner. The dependant of the domestic partner being covered must meet all of the eligibility requirements that are required of other covered dependents of an employee or the dependents of the spouse of an employee.

PROCEDURE:
The City will allow employees to enroll domestic partners and the dependents of domestic partners in the City benefit plans who satisfy the policy and have completed the following requirements.

A. Employees interested in applying for the domestic partner coverage must contact the Benefits Representatives in Human Resources during the initial enrollment period for their employment or when the requirements for domestic coverage are met.

B. The employee must complete and have notarized, the required Affidavit of Domestic Partnership and all enrollment application forms for the requested benefits and provide documentation that the domestic partner relationship has existed for at least six months. The Human Resources Department will determine if the information provided satisfies the requirements to determine eligibility of domestic partner coverage. This

includes documentation for each of the number below and that these relationships have been in place for at least 6 months.

1) Acknowledgment of responsibility for one another's financial welfare. Example:
    a. Affidavit accepting liability for each other's living expenses and debts to third parties
    b. Document indicating the shared responsibility for home mortgage or rental lease.
    c. Document indicating the shared responsibility for property owned or being purchased such as land, car, furniture or personal loan.
2) Agreement to make decisions pertaining to each other's care in time of medical emergency or after death. Example:
    a. Document indicating a executed health care agreement,
    b. Document indicating the appointment of the partner as employee's estate executor
    c. Assignment of inheritance or arrangements. Example: Document of a will, insurance agreement, or pension fund naming the partner a primary beneficiary

C. The Human Resources Department will enroll the employee's domestic partner and if applicable, the dependent/s of the domestic partner in the desired benefit coverage effective on the first day of the month following the date of the completion of the enrollment process.

D. Where required, the change in the coverage level will be made to the City benefits and payroll systems and any premium increases will be payroll deducted from the employees next bi-weekly payroll check. Because the City pays for coverage one month in advance there may include additional premiums that are due for the coverage being provided.

E. The coverage provided for the domestic partner and the dependents of domestic partners is the same coverage that is provided to regular employee and the same guidelines and rules must be followed to insure appropriate benefits and service.

F. It is the responsibility of the employees to contact the Human Resources Department and inform the Benefits Representative within 31 days of the ending of the relationship under which the domestic partner coverage has been extended. Employees wishing to discontinue the domestic partner coverage must complete the Termination of Domestic Partner Coverage Form. It is the responsibility of the employee to inform the domestic partner and the dependents of the domestic partner of the termination of the domestic partner coverage. Following the termination of coverage, the City does not make available COBRA continuation of health and/or dental coverage for the former domestic partner and if applicable the dependent/s of the domestic partner.

G. The employee has the responsibility to provide accurate and current information when enrolling a domestic partner or the dependent/s of a domestic partner. The City may take civil action against any employee for any losses, including medical cost, reasonable attorney fees and court cost, because of any willful falsification of the information contained in the Affidavit of Domestic Partnership. This includes expenses related to premiums paid by the City for the coverage of the domestic partner or the dependent/s of the domestic partner that no longer meet the eligible guidelines of this agreement.

Eligibility Criteria
The City of Durham employee can cover a domestic partner when they meet the following criteria.

Attachment 1: City of Durham

A. The employee and domestic partner are engaged in a committed relationship for mutual support and benefit, and have been in such a relationship for a period of at least six months.

B. Both are jointly responsible for each other's material support as evidenced by joint living arrangements, joint financial arrangements, joint ownership of real or personal property, or similar arrangements.

C. Both are of the age of consent in the jurisdiction in which they reside.

D. Both the employee and the domestic partner are not married to another person.

E. Both are not related by blood closer than permitted under the marriage laws of the jurisdiction in which they reside, and

F. Both are not engaged in any other committed relationship (i.e., neither partner has another domestic partner).

Attachment 2: Town of Chapel Hill

Town of Chapel Hill Ordinance – Domestic Partner Benefits

Sec. 14-58. Eligibility.

Employees of the town shall be eligible for various benefits, as specified in this article or policies developed by the manager. (When used in this article, references to the terms "family or families," "spouse" or "dependent" also include the domestic partners of town employees and the dependents of domestic partners, as defined in Chapter 1 of the Town Code. For purpose of this section, domestic partners must provide documents demonstrating established financial and legal ties, such as a joint mortgage, health care power of attorney, beneficiary of will or insurance policies, or other similar financial and/or legal relationships.)

City of Greensboro Domestic Partner Benefits

I. INTRODUCTION

The City of Greensboro is pleased to offer the opportunity for you to provide medical and dental insurance coverage to your domestic partner. As part of the City's Compensation Goals to attract and retain good employees, it is important to remain competitive with our benchmark employers by offering this coverage.

You now have the ability to extend medical and dental benefits to the significant person in your life, and his or her dependent children based on qualifications as shown in Section II (eligibility). Participation in the program will be held in confidence and not available as a public record.

Important Note: The IRS says that the value of some benefits for unmarried partners is taxable. It's important that you understand the tax implications of providing this benefit for your domestic partner and his/her dependent children. We recommend that you consult your own tax advisor to determine how tax rules may affect you.

II. ELIGIBILITY

You are eligible for domestic partner benefits if you are currently covered under the City health and dental benefit plans, and you submit a signed notarized Affidavit of Domestic Partnership, certifying you and your domestic partner meet the requirements described in this document.

Important Note: Nothing stated in this document expands your eligibility as an employee or retiree. For example, eligibility under the medical and dental plans is still controlled by the eligibility requirements and rules of each plan. For medical coverage, if the domestic partner is covered by another health care plan or dental plan, coordination of benefit requirements will apply to the domestic partner the same as a spouse with coverage under another plan.

III. IMPORTANT DEFINITIONS AND FEATURES

To help you understand domestic partner benefits, it's important for you to know the following terms and definitions as they are used in this document.

Domestic Partners - The City defines domestic partners as two people of the same gender in a long-term relationship who have met **all** of the following requirements for at least the last 12 months:

- Live in a spousal-like relationship and intend to remain each other's domestic partner indefinitely;
- Reside together in the same permanent residence;
- Are emotionally committed to one another and are jointly responsible for the common welfare and financial obligations of the household, or the domestic partner is chiefly dependent upon the employee for care and financial assistance;
- Are not legally married or separated and are not the domestic partner of anyone else;

- Are not related by blood closer than would bar marriage under applicable law; and
- Are both at least 18 years of age and mentally competent to enter into a legal contract.
- Provide Proof of any three of the following financial commitments:
    - Joint mortgage, lease or ownership of real property
    - Designation as beneficiary of a life insurance policy
    - Assignment of durable "Power of Attorney"
    - Joint ownership of a motor vehicle
    - Joint checking account
    - Joint ownership of investments
    - Joint responsibility for debts

Eligible Dependents of Your Domestic Partner - You may also cover the children of your domestic partner if they meet the definition of an eligible dependent. Eligible dependents include your natural, adopted, step and foster children and the children of your domestic partner as long as they meet all of the following criteria:

- Unmarried;
- Receive more than 50%, of their support from you;
- Live in your household as their principle place of residence (unless they live at school, or live elsewhere as a result of divorce or separation);
- Not employed on a full-time basis, except on school vacations; and
- Under age 19 (or under age 25 while a full-time student).

Legal Tax Dependents - Section 152 of the Internal Revenue Code describes when your domestic partner and/or his or her children qualify as tax dependents for the purposes of excluding the value of their City-paid health and dental benefits from your taxable income (that is, when your domestic partner and/or your partner's children are your "legal tax dependents"). To be legal tax dependents, your domestic partner and/or his or her children must meet all of the following criteria:

- Be citizens, nationals or residents of the U.S.;
- Live with you as a member of your household;
- Be in a relationship with you that does not violate local laws; and
- Receive over half of their support from you for the calendar year.

To claim your domestic partner or your partner's child as a dependent on your federal income tax return for any given calendar year, he or she must meet all of the criteria stated above for the entire calendar year and not earn more than the exemption amount determined under Section 151 (d) of the Code for the applicable calendar year. For 2006, this amount is $3,300.

Affidavit - An affidavit is a sworn statement in writing, made before a notary public.

Additional Taxable Income - Under current tax law, if your domestic partner and/or his or her children do not qualify as your legal tax dependents, the value of any health or dental benefits provided to them under the City's plans, and paid for all or in part by the company and/or with your pre-tax dollars, is considered taxable income to you. This means you may have to pay

federal, FICA, state, local and other applicable income or payroll taxes on an additional amount which will be shown on your pay stubs throughout the year and included on your W-2 Form at the end of each year. The calculation of this additional taxable income is described in the Appendix "Illustration of Taxable Income." Note: This additional taxable income will not be included when calculating benefits or contributions under any plan based on compensation (Example - Pension, 401(k), 457 Deferred Compensation, Life Insurance, Longevity and Disability Plans).

IV. AFFIDAVIT OF DOMESTIC PARTNERSHIP

An Affidavit of Domestic Partnership may be obtained by calling Human Resources or go to the HR Benefits intranet website and print a copy of the document.

By signing an Affidavit of Domestic Partnership before a notary public, you and your domestic partner attest to a series of statements, meeting the qualification requirements, which establish your relationship and signify acceptance of the terms.

What It Does...

- Makes you eligible to enroll your domestic partner and your partner's children for benefits; and
- Names your domestic partner or your partner's children as your survivors, making them eligible to receive certain benefits upon your death.

What it Doesn't Do...

- Automatically enroll your domestic partner in benefits; nor
- Automatically name your domestic partner as beneficiary of your life insurance plans, 457 Plan, 401(k) Plan, or Joint and Survivor option under the NC Local Governmental Employee's Retirement System (LGERS).

After carefully reading the Affidavit of Domestic Partnership, you and your domestic partner will need to provide the information requested on the form and sign it in the presence of a notary public (commonly found in banks or often listed in the phone book). Send the notarized original to Human Resources for confidential retention. Please be sure to make a copy and keep for your records. Your Affidavit of Domestic Partnership is considered valid until you tell us otherwise.

If you are vested in the LGERS at the time of your death, and you designated your domestic partner as beneficiary, they are eligible for the Joint and Survivor Pension Benefit, even if you do not enroll your domestic partner in health or dental benefits.

V. CHANGE IN STATUS ELECTIONS

You may change your elections under some benefit plans during the year if you have a change in status and the benefit change you are requesting is consistent with that change. All changes in

benefit status must be made within 30 days of the event. Examples of changes in status include but are not limited to:

- Signing and filing an Affidavit of Domestic Partnership;
- Ending your domestic partnership by filing a Statement of Termination of Domestic Partnership;
- Birth or adoption of a child (yours and/or your partner's);
- A child losing dependent status;
- Your domestic partner gaining or losing his or her job or health care coverage;
- Legal marriage.

Be sure to contact Human Resources following any change in status. Otherwise, you are not able to make any changes for the rest of the year, or until open enrollment.

VI. IF YOUR DOMESTIC PARTNER IS AN EMPLOYEE OF THE CITY OF GREENSBORO

If your domestic partner is also an employee of the City, you cannot be covered at the same time as both an employee and a dependent under health and dental insurance.

If no dependent children, you have three (3) options:

- You can enroll as an employee and cover your domestic partner as a dependent. (Your domestic partner must then drop his/her coverage.)
- You can be covered as a dependent under your domestic partner's coverage. (You must then drop your own coverage.)
- You can each elect single coverage in your respective plans.

Due to the income tax rules, it may be less expensive for you to enroll separately in your respective benefit plans.

If either of you have eligible dependent children, you will qualify for family coverage under the Husband/Wife rates, but only one will make that election.

VII. IMPACT ON YOUR REPORTED INCOME

Under the Internal Revenue Code, the total cost (City and employee portion of insurance premium) of health and/or dental insurance to cover the domestic partner and/or the dependents of the domestic partner which is in excess of the total cost of coverage for the employee only, may be considered taxable income to the employee. This income will be subject to federal tax, FICA, state and local taxes as well as any other applicable payroll tax that may apply. Please see "Illustration of Additional Taxable Income" in the Appendix, which shows how this would be calculated.

In addition, the portion of the health or dental premium paid by the employee, as a result of adding a domestic partner or dependents of domestic partner, which is in excess of the premium

otherwise paid by the employee, will be deducted on an after tax basis from the employee's pay check.

An Exception to the Rule:
If your domestic partner and/or his or her children qualify as your legal tax dependents, you will not be taxed on the money spent for their health and dental insurance premiums. Please read the information in Section III (Definitions and Features) and the following information in Section VIII (Legal Tax Dependents) for more details.

VIII. LEGAL TAX DEPENDENTS

As discussed above, additional income will be imputed as taxable income for the domestic partner benefit throughout the year. As explained in Section III, if your domestic partner and/or their dependents are legal tax dependents, you will not have income attributed to you for their coverage. In order to recapture the taxes under this condition, your W-2 will be adjusted, each year, after receiving a completed Affidavit of Tax Dependency, which must be submitted to the Human Resources Department. Upon receipt of the affidavit, FICA and any other payroll taxes withheld due to the additional income will automatically be adjusted.

If you are eligible for a refund of any income taxes you overpaid as a result of the withholding, you can claim the refund when you file your federal and state income tax returns.

If you have a domestic partner on file, Human Resources will send to you an Affidavit of Tax Dependency in November of each year. If you will be claiming your domestic partner and/or your partner's children as legal tax dependents on this year's tax return, you must complete and return the Affidavit to Human Resources by December 1, in order to have the W-2 adjusted.

IX. IF YOUR RELATIONSHIP ENDS

Should you or your domestic partner no longer meet all the requirements of a domestic partnership as described in Section III, for example, you no longer live together, the two of you are no longer considered to be domestic partners and your former domestic partner and their dependents are no longer eligible for City benefits. You must complete and submit a Statement of Termination of Domestic Partnership. This form will revoke your Affidavit of Domestic Partnership. You will receive confirmation that your affidavit has been revoked. You will have 30 days from the date you signed the Statement of Termination of Domestic Partnership to contact Human Resources to make changes in your coverage.

Remember, you may want to review your designation of beneficiary to determine you have the appropriate person named for your Life insurance and survivor benefit from the pension system.

Once your partnership has been terminated, you must meet all of the requirements again, including the 12 consecutive months, before you can file another Affidavit of Domestic Partnership with the same or different partner.

X. IN THE EVENT OF YOUR DOMESTIC PARTNER'S DEATH

In the event of your domestic partner's death, please notify the Human Resources Department within 30 days.

XI. CONTINUATION OF COVERAGE

Domestic partners and their dependents lose eligibility for coverage when any one of the requirements for domestic partnership is not met. COBRA rights **do not** apply to former domestic partners and/or their dependents.

XII. HOW TO ENROLL

During the Year:
You may obtain a copy of an Affidavit of Domestic Partnership by either contacting Human Resources or going to the HR Benefits website under Forms and print a copy of the affidavit. You may file an affidavit any time during the year when you initially meet the requirements for a domestic partnership. You must enroll in domestic partner benefits within 30-days of signing the affidavit. Otherwise, you will have to wait until the next benefits annual open enrollment. Your elections will be effective through to the end of the year.

During Annual Open Enrollment:
You will have an opportunity to make benefit election decisions during each annual open enrollment as any other employee, as long as the domestic partnership is valid. For 2007 initial coverage, your **deadline** to file your affidavit and the necessary Lawson paper work to make the change in coverage is **December 1, 2006**.

Appendix: Illustration of Taxable Income

When an Employee Adds a Domestic Partner (and Dependents)

	City Share of Premium	Employee Share of Premium			Total Premium Cost of Insurance Coverage
		Emp Only	Emp + Spouse	Family	
		$20	$75	$120	
Family	$300	———	———→	$420	
Employee Plus Spouse	$200	———→	$275		
Employee Only	$80	$100			
Total Paid for Employee Only Coverage		$100	$100	$100	
You will pay taxes on this amount		$0	$175	$320	

(Amounts shown are for example purposes only and do not reflect actual rates.)

Employee Only Coverage

The chart above shows a single employee pays $20 and the City pays $80 toward the cost of health insurance for a total cost of $100. Since the single employee pays his or her $20 on a pre-tax basis under the City's Flex program, this benefit is excludable from the employee's taxable income.

Employee + Spouse Coverage

If an employee signs up a domestic partner, increasing the level of coverage to two persons, the employee pays $75 and the City pays $200 for a total cost of $275. As stated above, the cost of covering the employee only ($100) is not taxable, but the cost of covering the domestic partner ($275 - $100 = $175) is taxable. The employee's pay stub (and W-2) will show his or her cost of the domestic partner's coverage as $175 in additional taxable income.

Family Coverage

When an employee enrolls the domestic partner and chooses family coverage, additional income will be reflected for the cost of covering the domestic partner and any children (whether they are the employee's or the domestic partner's) in the employee's pay stub (and W-2 Form). The cost of employee only coverage is subtracted from the cost of family coverage ($420 - $100 = $320) to determine that $320 dollars that will be added as additional taxable income to the employee.

Note: The additional premium cost to the employee for the domestic partner coverage will be treated as an after tax deduction on the paycheck.

Appendix B

MEMORANDUM

TO: Chris Peek, Human Resources Department Director

FROM: Marvin A. Bethune, County Attorney MAB
Bob Thomas, Assistant County Attorney

DATE: November 30, 2009

SUBJECT: Domestic Partner Benefits

Several months ago you asked us to determine if there was any legal authority for a North Carolina county to offer health insurance to the domestic partners of County employees. As part of doing that research, we determined that Diane M. Juffras, a professor at the North Carolina School of Government, was working on an extensively researched Public Employment Law Bulletin dealing with the question of whether North Carolina local governments could offer domestic partner benefits.

For the past several months we have been in communication with Ms. Juffras and have had the opportunity to review several drafts of her Law Bulletin and to communicate with her about them. A copy of her Public Employment Law Bulletin No. 37, entitled "*May North Carolina Local Government Employers Offer Domestic Partner Benefits?*", recently released, is attached.

The conclusion that she reaches, with which we agree, is that although there is no North Carolina case law on point, and the statutes do not specifically authorize local government employers to offer domestic partner benefits to their employees and their domestic partners, whether of the same or different gender, the General Statutes that give local governments the authority to develop policies that will foster the hiring and retention of a capable and diligent work force ***appear*** to provide cities and counties the authority to offer domestic partner benefits as a recruiting and retention tool.

Please let us know if you have any additional questions with respect to this matter at this time.

MAB
Attachment

RBCWB:164795:11/30/09

UNC
SCHOOL OF GOVERNMENT

THE UNIVERSITY
of NORTH CAROLINA
at CHAPEL HILL

PUBLIC EMPLOYMENT LAW BULLETIN NUMBER 37 | NOVEMBER 2009

May North Carolina Local Government Employers Offer Domestic Partner Benefits?

Diane M. Juffras

More than half of Fortune 500 companies offer domestic partner benefits, including North Carolina–based Lowe's Companies, Progress Energy, Bank of America, Goodrich, Reynolds American, BB&T, and Duke Energy. Other large North Carolina private employers offering domestic partner benefits include Duke University and Wake Forest University.[1] The public sector, by comparison, has been slower to offer domestic partner benefits. As of October 2009, only nineteen states offered domestic partner benefits to state employees.[2] The State of North Carolina is not one of them. Among local governments nationally, over 150 jurisdictions offered domestic partner benefits as of May 2009.[3] In North Carolina, only Durham and Orange counties, the cities of Durham and Greensboro, and the towns of Chapel Hill and Carrboro offer domestic partner benefits.

Employers offer domestic partner benefits in their own self-interest: doing so allows them to recruit and retain good employees who have domestic partners rather than spouses. Why, then, have so few North Carolina local government employers extended benefits to the domestic partners of their employees? One explanation may lie in the confusing set of laws that govern this question. These laws include

- North Carolina marriage law;
- those sections of the General Statutes that govern public personnel administration;
- the U.S. Supreme Court's 2006 decision in the case *Lawrence v. Texas*, which likely makes North Carolina's criminal statutes regulating adult sexual conduct unconstitutional; and
- the federal Defense of Marriage Act and its effect upon the Internal Revenue Code and other federal legislation relating to employee benefits.

Diane M. Juffras is a School of Government faculty member specializing in public employment law.

1. *See* the Human Rights Campaign Foundation, The State of the Workplace 2007–2008, available atwww.hrc.org/documents/HRC_Foundation_State_of_the _Workplace_2007-2008.pdf (last visited October 12, 2009).
2. Source: The National Conference of State Legislatures at www.ncsl.org/Default.aspx?TabId=16315(last visited October 26, 2009). The District of Columbia also offers its employees domestic partner benefits.

3. *See* Human Rights Campaign, The Domestic Partnership Benefits and Obligations Act at www.hrc.org/issues/marriage/5662.htm (last visited October 26, 2009). The federal government does not offer domestic partner benefits to its employees as of October 2009. The Domestic Partnership Benefits and Obligations Act of 2009, which would extend domestic partner benefits to federal employees, is currently pending in both houses of Congress (H.R. 2517 and S. 1102).

This bulletin explains the law governing the ability of North Carolina local government employers to offer domestic partner benefits. The first section discusses the legal status in North Carolina of same-sex marriages and civil unions performed in other states: Must North Carolina public employers recognize out-of-state same-sex marriages and civil unions for employee benefits purposes? The second section discusses the legal authority for North Carolina local government employers to offer domestic partner benefits: May a North Carolina public employer, if it wants to, offer benefits such as health, life, or other insurance coverage, to domestic partners? The third and final section discusses the federal Defense of Marriage Act (DOMA) and its relationship to federal laws governing employee benefits: What limitations does it place on a North Carolina local government employer's ability to offer federally created benefits, such as Family and Medical Leave Act (FMLA) leave and flexible-spending accounts, to domestic partners?

Domestic Partner: A Definition

Just what does the term *domestic partner* mean in the context of employee benefits? There is no single, overriding legal definition. The term is generally used to refer to two persons living together in a long-term, committed relationship without the benefits of marriage. Domestic partners may be either opposite-sex (heterosexual) couples or same-sex (homosexual or gay) couples. Opposite-sex couples choose to live together without getting married for personal reasons. Same-sex couples generally do not have a choice about whether or not to get married, except in a handful of states that either allow same-sex marriages or offer civil unions between same-sex couples. North Carolina does neither. For the purposes of this bulletin, the term *domestic partner* refers to both opposite-sex and same-sex domestic partners. Where the distinction is relevant, the bulletin uses the terms *opposite-sex domestic partner* or *same-sex domestic partner* as appropriate.

Are North Carolina Public Employers Legally Required to Offer Benefits to Same-Sex Spouses Married or Legally Joined in Another State?

> Becky is a long-time employee of the city of Paradise, North Carolina. Her employment records show her status as single, and she has never claimed any dependents for tax-withholding or benefits purposes. Upon returning from a recent vacation in New England, Becky presents the city's human resources director with a notarized marriage certificate recording the legal marriage of Becky and her same-sex partner, Sue, in the state of Connecticut. I've finally gotten married! Becky exclaims. I'd like to enroll my spouse, Sue, for cover age under the city's health insurance plan. This is the first time that the human resources director has gotten such a request. Must the city offer the group health insurance coverage generally available to the husbands and wives of city employees to Sue as well?

The answer is "no." North Carolina public employers do not have to provide the same benefits to same-sex spouses married or joined in civil unions in other states that they provide to married opposite-sex spouses of their employees.

In North Carolina, it is not possible for an employee with a same-sex domestic partner to claim any formal recognition of the relationship. Under North Carolina law, only a man and a woman may marry one another. Section 51-1 of the North Carolina General Statutes [hereinafter G.S.] provides that "a valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry . . . ." Other sections of G.S. Chapter 51 set forth in detail requirements such as age, competency, and family relationship that must be met before a man and a woman may marry.[4] As for marriages performed in other states, the 1996 federal law known as the Defense of Marriage Act allows states to regard marriages legally performed in other states as invalid if they are between two persons of the same gender. Section 2 of the Defense of Marriage Act,

which is codified at 28 U.S.C. § 1738C, says No State, territory, or possession of the United States . . . shall be required to

> give effect to any public act, record, or judicial proceeding of any other State, territory or possession . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, [or] possession . . . or a right or claim arising from such a relationship.[5]

Following passage of the federal Defense of Marriage Act, the North Carolina General Assembly enacted G.S. 51-1.2, which says that "marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."

Some states that limit marriage to a man and a woman have nonetheless created civil unions or domestic partner registries to give formal recognition to committed same-sex domestic partnerships and have amended state insurance laws to mandate inclusion of such partners among those eligible for inclusion in a single insurance policy. These civil unions certainly have a status no greater than marriage, so it seems clear that under G.S. 51-1.2 civil unions recognized in other states are not valid in North Carolina.

Thus, under G.S. 51-1.2, a North Carolina public employer does not legally have to extend the same benefits offered for opposite-sex spouses to an employee's same-sex partner, even if the employee presents a marriage certificate or civil union certificate from a state where such unions are recognized.[6]

1. For an overview of marriage law in North Carolina, see Janet Mason, "Marriage in North Carolina," *Popular Government*, Vol. 71, No.2, Winter 2006 (School of Government: Chapel Hill), pp. 26–36, available online at www.sog.unc.edu/pubs/electronicversions/pg/pgwin06/article3.pdf.
2. Whether or not this section of the Defense of Marriage Act violates the Full Faith and Credit Clause of the United States Constitution is an issue that has not reached the United State Supreme Court or any federal court of appeals. The Full Faith and Credit Clause, Article IV, Section 1, of the U.S. Constitution, says that "full faith and credit shall be given in each state to the public acts, records, and judicial proceeding of every other state."
3. States currently recognizing either same-sex marriages or forms of domestic partnership include Connecticut (marriages); Iowa (marriages); Massachusetts (marriages); Vermont (marriages effective September 2009); California (authorized marriage between June 16, 2008, and November 8, 2008; recognized domestic partnerships both before and after); New Hampshire (civil unions; same-sex marriage effective January 1, 2010); New Jersey (civil unions); District of Columbia (domestic partnerships); New York(domestic partnerships; recognizes same-sex marriages entered into in other states); Oregon (domestic partnerships); Washington (domestic partnerships); Nevada (domestic partnerships); Hawaii (reciprocal beneficiary status for same-sex couples). Source: Human Rights Campaign at www.hrc.org/documents/Relationship_Recognition_Law/Map.pdf (last visited October 12, 2009).

May North Carolina Local Government Employers Offer Domestic Partner Benefits If They Want To?

When Becky requests to enroll Sue as a spouse in the city's group health insurance program, the human resources director tells Becky that under North Carolina law, the Connecticut marriage is not valid, and therefore she cannot enroll Sue as a spouse.

But the human resources director and the city manager are worried that Becky—a talented, energetic employee who has been wooed by other employers before—will leave. They therefore propose to the city council that it amend the personnel policy to allow the domestic partners of city employees to participate in the city's group health insurance plan, and all of its other group insurance plans, on the same basis as husbands and wives of employees. The manager and human resources director stress that the inclusion of domestic partners in the group plan will not increase the city's costs, as spouses of city employees participate on a wholly contributory basis—that is, while the city pays the entire premium for its employees, the employee is responsible for paying the premiums for spouses and dependents.

The council wisely asks the city attorney for her opinion on whether it may open coverage to domestic partners. Whether North Carolina local governments have the authority to offer domestic partner benefits is a complex issue, the city attorney says. The logical place to start, she continues, is by considering where the city gets its authority to provide employee benefits in the first place.

The North Carolina Constitution and Local Governments

The North Carolina Constitution gives the North Carolina General Assembly the authority to create local governments and to give those local government units the powers and duties that it deems fit.[7] Not surprisingly, the General Assembly has granted all local government entities the authority to hire and fire employees. In the case of cities, counties, and mental health authorities (or local management entities—LMEs—as they are now known), the General Assembly has also granted them express authority to determine employee benefits. The General Statutes do not, however, anywhere expressly address whether local government employers may offer benefits to the domestic partners—same-sex or opposite-sex—of their employees. The authority given to local governments to design employee benefits programs is broad, however. The question, then, is whether this broad authority includes authority to offer domestic partner benefits. The answer to this question appears to be a qualified "yes."

The General Statutes and Local Government Employee Benefits

G.S. 160A-162(a) grants to city councils the power to "fix or approve the schedule of pay, expense allowances and other compensation for all city employees . . . ," while subsection (b) gives city councils the authority to "purchase life, health, and any other forms of insurance for the benefit of all or any class of *city employees and their dependents*, and may provide other fringe benefits for city employees" (emphasis added). For counties, G.S. 153A-92(a) and (d) grant similar, but not identical, authority to boards of commissioners with respect to county employees, and G.S. 122C-156(b) does so with respect to area authority (LME) employees—the respective boards are given authority to purchase insurance for employees, but no mention is made of dependents. For whatever reason, the General Assembly has not given other local government employers—water and sewer authorities, public health authorities, local ABC boards, and regional councils of government—the same sort of explicit authority to provide benefits to their employees, but the General Assembly has also granted city and county

7. N.C. Const. art. VII, § 1.

governing boards the authority to adopt policies regarding annual leave, sick leave, hours of employment, holidays, working conditions, "and *any other measures that promote the hiring and retention of capable, diligent, and honest career employees*"[9] (emphasis added). Again, such authority is presumed to be granted to other units of local government by the more general grants of power to hire employees and set their compensation.

For the most part, the General Statutes are permissive, giving local governing boards the power to offer benefits and policies without requiring that they do so. Because these grants of authority are broadly worded, they allow local government employers the discretion to fashion benefits packages that respond to the changing demands of the labor market or to adopt whatever measures they think likely to promote "the hiring and retention of capable, diligent, and honest career employees."

> In summary, the city attorney tells the council, the General Statutes give the city two kinds of authority. The first is the authority to purchase health insurance for employees and their dependents. The second is the authority to take any measure that will help the city hire and retain good employees. Therefore, if Sue qualifies as a dependent of Becky, the city may allow her to participate in the city's group health plan on the same terms as do other dependents. If Sue does not qualify as a dependent within the meaning of G.S. 160A-162, the city has the separate and independent authority to authorize the extension of insurance and other benefits to domestic partners if it believes—as do the manager and human resources director—that this will help retain Becky and other talented employees like her.

A Small, but Potentially Significant, Difference between the Authority Given to Cities and Counties to Purchase Insurance Benefits

As the city attorney has explained to the Paradise City Council, the city has two bases of authority for offering domestic partner benefits. The first derives from G.S. 160A-162(b), which explicitly says that a city council may purchase insurance benefits for city employees and their dependents. Do counties and mental health authority LMEs have the same authority to offer insurance benefits to dependents? The answer is almost certainly "yes," even though the city and county statutes are not quite the same.

G.S. 153A-92(d) and 122C-156(b) differ from their city counterpart in that they do not explicitly mention dependents but instead authorize the purchase of "life insurance or health insurance or both" for the benefit of "all or any class of . . . officers and employees as part of their compensation." In reality, of course, almost all counties and LMEs allow dependents of their employees—spouses and dependent children of employees—to participate in their group health plans. Perhaps we are to assume that authority from the practice of employers generally. Perhaps it is derived from the authority granted to city, county, and mental health authority employers alike in the sentences that follow the grant of authority to purchase insurance: "The council may provide other fringe benefits for city employees" [G.S. 160A-162(b)]; "A county may provide other fringe benefits for county officers and employees" [G.S. 153A-92(d)]; "An area authority may provide other fringe benefits for authority officers

8. For water and sewer authorities, see G.S. 162A-6(a)(11); for public health authorities, see G.S. 130A35.3(a)(7); for local ABC boards, see G.S. 18B-701(3) and (8); for regional councils of government, see G.S. 160A-475(2). For public school systems and community colleges, see the discussion on page 13 of this bulletin.
9. *See* G.S. 160A-164 and 153A-94.

and employees" [G.S. 122C-156(b)]. In any event, the following discussion about the meaning of the term *dependents* in G.S. 160A-162(b) does not apply to counties and mental health authority LMEs. If we interpret the General Statutes strictly, counties and LMEs may only look to the grant of authority to take measures to hire and retain "capable, diligent and honest career employees" for the authority to offer domestic partner benefits.

Does a North Carolina Local Government Employer's Authority to Offer Insurance Benefits Include the Authority to Offer Domestic Partner Benefits?

Interpreting the General Assembly's Intent: Are Domestic Partners Dependents within the Meaning of G.S. 160A-162?

The North Carolina General Assembly's explicit grant of authority to cities to offer employee benefits says that such benefits may be purchased for "employees and dependents."[10] The statute, however, does not define the term *dependents*. In states like North Carolina, where local government derives its power from the legislature, it is the language and intent of the General Assembly that must be interpreted where a term is undefined and ambiguous.[11]

The rule for construing legislative grants of power for cities and counties is set forth in the General Statutes:

> It is the policy of the General Assembly that the cities [*in G.S. 153A-4, read* "the counties"] of this State should have adequate authority to exercise the powers, duties, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of city charters [*in G.S. 153A-4, read* "and of local acts"] shall be *broadly construed and grants of power shall be construed to include any additional and supplementary powers* that are reasonably necessary or expedient to carry them into execution and effect: Provided, that *the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State* [emphases added].[12]

The North Carolina Supreme Court has interpreted this statute to mean that the General Assembly has given the courts a legislative mandate "to construe in a broad fashion the provisions and grants of power contained in Chapter 160A." The court contrasted this directive to construe grants of authority to cities and counties broadly with a more restrictive rule of statutory construction known as Dillon's Rule, which would limit the powers of local governments only to those expressly granted or necessarily and fairly implied by the grant of power and essential to the accomplishment of the declared objects and purposes of the local unit. The North Carolina Supreme Court found that although Dillon's Rule had once been the rule of statutory construction in North Carolina for interpreting municipal powers, it had been replaced by G.S. 160A-4 when the General Statutes relating to municipal powers were revised in 1971.[13]

10. *See* G.S. 160A-162(b) and 153A-92(b).
11. In contrast, local governments that receive their powers through a state constitution are considered to have more latitude in exercising their authority and are known as "home-rule states."
12. *See* G.S. 160A-4 and 153A-4.
13. *See* Homebuilders Ass'n of Charlotte, Inc. v. City of Charlotte, 336 N.C. 37, 43–44 (1994) (this case involved whether a city had the power to impose regulatory user fees). *See also* Bellsouth Telecomms., Inc. v. City of Laurinburg, 168 N.C. App. 75, 79–83 (2005). The more recent case of *Durham Land Owners Association v. County of Durham*, 177 N.C. App. 629, 634, *rev. denied*, 615 S.E.2d 660 (2006), is not

So, the city attorney tells the council, we are told to construe the term dependents broadly and the city's power to offer benefits broadly. But once we have done that, she continues, the General Statutes also tell us to ensure that the way in which the city exercises that power is not inconsistent with federal or state law or with North Carolina public policy. Well, let's get started.

Broadly construing the term *dependent*. As noted earlier, the term *dependent* has no single legal definition, nor is it defined by G.S. 160A-162(b), the statute that grants city councils the authority to purchase health and other insurance products for employees and dependents. North Carolina appellate courts look to dictionary definitions when seeking the plain meaning of a term in the absence of statutory definition, because it is a well-established rule of statutory construction that where "a statute contains a de finition of a word used therein, that definition controls, but nothing else appearing, words must be given their common and ordinary meaning."[14]

For example, the North Carolina Supreme Court turned to *Black's Law Dictionary* to define *base pay*, *pay*, *base*, *base compensation*, and *rate* in the case *Bowers v. the City of High Point*, which required the court to interpret the meaning of the phrase "base rate of compensation."[15] In the case *Knight Publishing Co. v. Charlotte-Mecklenburg Hospital Authority*, the North Carolina Court of Appeals turned to the *American Heritage Dictionary* when interpreting the term *gathered* as used in a statute's definition of *personnel fi le*.[16] In a more recent case, the court of appeals looked to the *American Heritage Dictionary* for the definition of *substantial* and to *Black's Law Dictionary* for the definition of *emotional distress*, because the statute authorizing the issuance of civil no-contact orders used but did not define the term *substantial emotional distress*.[17] In a case involving interpretation of the word *church* in a zoning regulation, the North Carolina Court of Appeals turned to *Webster's Third International Dictionary* for guidance in ascertaining that word's "plain and ordinary meaning" because *church* was not defined in the ordinance in question.[18]

In interpreting the term *dependent* as used in G.S.160A-162, therefore, a North Carolina court would likely look to the plain meaning of the term as defined in a dictionary. The *Random House Dictionary of the English Language* defines the word as meaning "a person who depends on or needs someone or something for aid,

inconsistent with these earlier opinions, as the court in *Durham Land Owners Ass'n* found that G.S. 153A-4 was not implicated since the term at issue (*fees*) was unambiguous when considered in light of other sections of the statute in question.

For a discussion of North Carolina's move away from Dillon's Rule, see Frayda Bluestein, "Do North Carolina Governments Need Home Rule?" *Popular Government*, Fall 2006, pp. 15–24, an abridged version of Frayda Bluestein, *Do North Carolina Governments Need Home Rule?* N.C. L. Rev. 1983 (2006).

14. *See In re* Clayton-Marcus Co., 286 N.C. 215, 219 (1974); Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 492, *rev. denied*, 360 N.C. 176 (2005).

一. *See* Bowers v. the City of High Point, 339 N.C. 413, 419–20 (1994).

一. *See Knight Publ'g Co.*, 172 N.C. App. at 492.

一. 17. *See* Ramsey v. Harman, 191 N.C. App. 146 (2008).

一. 18. *See* Hayes v. Fowler, 123 N.C. App. 400, 406 (1996). For examples of the courts' reliance on dictionary definitions to find the plain meaning of a statutory term in criminal cases, see State v. Ramos, 176

N.C. App. 769 (2006) (unpublished disposition) at *3 (looking to the *American Heritage Dictionary* definition of the terms *lewd* and *licentious* when those words were not defined in connection with the elements of the criminal offense of taking liberties with a child). *See also* State v. Manley, 95 N.C. App. 213, 217, *disc. review denied*, 325 N.C. 712 (1989) (referring to *Webster's Third International Dictionary*); State v. Wilson, 87 N.C. App. 399, 402 (1987), *rev. denied*, 321 N.C. 479 (1988) (same).

support, favor, etc."[19] The *American Heritage Dictionary* defines *dependent* as "one who relies on another especially for financial support."[20] *Merriam-Webster's Online Dictionary* defines *dependent* as one "relying on another for support."[21] *Black's Law Dictionary* has a similar definition—"one who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else."[22] Two points about these dictionaries' definitions of *dependent* are worth noting. First, none of the dictionaries makes financial support a necessary element of the definition of *dependent*.[23] Second, none of the entries defines a *dependent* as a person who is wholly or completely relying on another person for support. In other words, the dictionary definitions of *dependent* allow for interdependency as well as total dependency. The plain, ordinary meaning of *dependent* appears to be someone who relies on another wholly or in part for financial, emotional, physical, or other support.

Returning to the General Statute's grant of authority to city employers "to purchase life, health, and any other forms of insurance for the benefit of all or any class of . . . employees and their dependents,"[24] the best conclusion appears to be that North Carolina city councils may offer health insurance and other benefits to employees and those who rely on them for support of one kind or another, including spouses, children, parents and in-laws, as well as domestic partners and their children.

The grant of authority to local governments to purchase insurance benefits is permissive— that is to say, the statutes allow *but do not require* any local government to offer health insurance and other benefits generally. It allows *but does not require* any city to offer such benefits to employees only, for example, or to employees and spouses but not to unmarried domestic partners, or to employees and spouses and domestic partners, or to employees, spouses, domestic partners, and dependent children (whether the children are related to the employee biologically or not). This interpretation is in keeping with the rule of construction to interpret grants of power to cities and counties broadly. It is also in keeping with the independent and more general grant of authority to local governing boards to take "any other measures that promote the hiring and retention of capable, diligent, and honest career employees."[25]

One of the members of the Paradise City Council asks the city attorney whether the authority of cities to
grant health insurance benefits to domestic partners as dependents of their employees has been an issue in other states. The city attorney replies that the question has reached the courts in several states and that

19. *Random House Dictionary of the English Language*, 2d edition unabridged (1987), under *dependent*.
20. *American Heritage Dictionary of the English Language*, 4th edition (2004), under *dependent*, visited online at http://dictionary.reference.com/browse/dependent (last visited October 26, 2009).
21. *Merriam-Webster's Online Dictionary*, under *dependent*, at www.merriam-webster.com/ dictionary/dependent (last visited October 12, 2009).

22. *Black's Law Dictionary*, 8th edition (2004), under *dependent*.
23. Note, however, that *Black's Law Dictionary* has an additional definition with respect to the word's use in the context of tax law: "a relative, such as a child or parent, for whom a taxpayer may claim a personal exemption if the taxpayer provides more than half of the person's support during the taxable year."The e *Random House Dictionary* also has an additional definition with respect to tax law: "a child, spouse, parent, or certain other relative to whom one contributes all or a major amount of necessary financial support: *She listed two dependents on her income-tax form."*
24. *See* G.S. 160A-162(b).
25. *See* G.S. 160A-164 and 153A-94 (for cities and counties respectively).

the outcome has for the most part depended on whether or not the term *dependents* was defined in the enabling legislation.

Dependents and domestic partners in the statutes of other states. In two states, courts have held that local governments do not have the authority to include domestic partners as covered dependents for employee benefits purposes. In both cases, the state statutes granting local governments the power to establish benefits for employees and their dependents defined the term *dependents* in a way that excluded domestic partners. In the 1995 case *Lilly v. City of Minneapolis*, the Minnesota Court of Appeals held that a Minneapolis ordinance authorizing reimbursement to city employees of health care costs incurred for their domestic partners was *ultra vires*—beyond the city's power—because the Minnesota state statute authorizing cities to extend insurance benefits to their employees and dependents defined *dependent* to mean "spouse and minor unmarried children under the age of 18 years and dependent student under the age of 25 actually dependent upon the employee".[26] Similarly, in the 1999 case *Connors v. City of Boston*, the Massachusetts Supreme Court found that an executive order of the mayor of Boston extending group health insurance benefits to the domestic partners of city employees was invalid because the state statute authorizing the city to pay for the health insurance costs of employees and their dependents defined *dependents* as spouses, children under nineteen years of age, and children over nineteen years unable to provide for themselves.[27]

Where statutes giving local governments authority to purchase health insurance for employees and dependents do not define the term *dependents*, the results have been different. With only one exception, courts in those states have found that statutory authority granting local government power to offer insurance to their employees and dependents includes the authority to offer domestic partner benefits. In the 2001 case *Heinsma v. City of Vancouver*[28] and the 1997 case *City of Atlanta v. Morgan*,[29] the supreme courts of Washington and Georgia both held that in the absence of a legislative intent to limit the definition of the term *dependent*, cities are free to define that term to include domestic partners.

Like G.S. 160A-162(b), the Revised Code of Washington § 41.04.180 authorizes that state's cities to provide medical insurance benefits to employees and their dependents but does not define the term *dependents*. As is the case in North Carolina, under Washington law, grants of municipal power are to be liberally construed.[30] Under this principle, the Washington Supreme Court concluded in the *Heinsma* case that the legislature had delegated authority to cities to determine who should be eligible for benefits.[31] In addition, the court noted the strong interest of cities in retaining qualified employees, the impact of benefit programs on employee retention, and the strong tradition within the State of Washington to treat decisions about employee benefits as matters to be decided at the local level.[32] These factors led the court to conclude (1) that the Washington legislature did not intend to preempt the power of its cities to define the term *dependent* in a reasonable manner, and (2) that the City of Vancouver's

1. *See* Lilly v. City of Minneapolis, 527 N.W.2d 107, 110–11 (Minn. Ct. App. 1995).
2. *See* Connors v. City of Boston, 714 N.E.2d 335, 337–39 (Mass. 1999).
3. Heinsma v. City of Vancouver, 29 P.3d 709 (Wash. 2001).
4. City of Atlanta v. Morgan, 492 S.E.2d 193 (Ga. 1997).
5. *See Heinsma*, 29 P.3d at 712.
6. *See Heinsma*, 29 P.3d at 712.
7. *See Heinsma*, 29 P.3d at 712–13.

definition of *dependent* as including domestic partners was reasonable.[33]

Similarly, in the *Morgan* case, the Georgia statute did not define the meaning of the term *dependents*.[34] When the Atlanta City Council passed a benefits ordinance that extended benefits to domestic partners, it did so by defining the term *dependent* to mean "one who relies on another for financial support." It provided that an employee's domestic partner would be a dependent if the domestic partner was supported in whole or in part by the employee and if the employee and partner were registered as domestic partners in accordance with the city's domestic partners registry ordinance.[35] The Georgia Supreme Court held that the domestic partner benefits ordinance was not a violation of either Georgia's statutes or its constitution, focusing its analysis on whether the city's definition of *dependent* was consistent with Georgia law. The court found that the city's definition of the term as "one who relies on another for support" was consistent both with the common, ordinary meaning of the term as reflected in a number of dictionaries and with the use of the term elsewhere in Georgia's statutes, in decisions of the state's court of appeals, and in opinions of Georgia's attorney general.[36]

> After hearing the city attorney's discussion of the Georgia case, another of the council members speaks up.
> Have you looked at how the term dependent is used elsewhere in the General Statutes? he asks. The city attorney replies that she has.

A North Carolina appellate court looking at the use of the term *dependent* in the General Statutes, in decisions of our courts, or in opinions of the attorney general would find nothing that contradicts the conclusion that the General Assembly meant *dependent* to be understood in its broad, dictionary definition sense. The term *dependent* turns up in numerous places in the General Statutes but is defined only in a few. In the statutory sections creating the State Health Plan for Teachers and State Employees, the General Assembly says that the plan has been created to provide health insurance benefits to state "employees, retired employees and certain of their dependents."[37] The State Health Plan statutes do not contain a definition of *dependent* but instead talk of persons eligible to participate on a noncontributory basis (generally employees, for whom the state pays the cost of the premium) and those eligible to participate on a fully contributory basis (premiums paid by the employee or participating member). The General Assembly has expressly chosen to limit fully contributory participation in the State Health Plan to the "spouses and eligible dependent children" of its noncontributory members, indirectly defining *dependents* as spouses and children.

Similarly, in G.S. 58-50-110, the definitions section of the Small Employer Group Health Insurance Reform Act, the term *dependent* means "the spouse or child of an eligible employee, subject to applicable terms of the health care plan covering the employee." In G.S. 58-50-175, the definitions section of the North Carolina Health Insurance Risk Pool, *dependent* means "a resident spouse, an unmarried child under the age of 19 years, a child

1. *See Heinsma*, 29 P.3d at 713.
2. *See* O.C.G.A. § 36-35-4(a).

35. *See* City of Atlanta v. Morgan, 492 S.E.2d 193, 195 (Ga. 1997), *citing* Atlanta Ordinance 96-O1018(a)(1)(B).

36. *See Morgan*, 492 S.E.2d at 195. *See also* Slattery v. City of New York, 686 N.Y.S.2d 683, 688–90 (N.Y. Sup. 1999), *appeal denied*, 727 N.E.2d (2000); Lowe v. Broward County, 766 So. 2d 1199, 1209 (Fla. App. 4. Dist. 2000), *rev. denied*, 798 So. 2d 346 (2001) (legislative failure to define the term *dependent* leaves flexibility for local governments to develop insurance policies to meet local needs; court looks to dictionary definition of term).

37. *See* G.S. 135-40(a).

who is a full-time student under the age of 23 years and who is financially dependent upon the parent or guardian, a child who is over 18 years of age and for whom a person may be obligated to pay child support, or a child of any age who is disabled and dependent upon the parent or guardian." Nowhere else in G.S. Chapter 58, which regulates insurance, is the term *dependent* defined—most significantly, not in the sections governing health insurance generally (Articles 50 and 51) and not in those sections regulating health maintenance organizations (Article 67).

It is reasonable to conclude, therefore, that where the General Assembly wants to restrict the persons who could qualify as dependents for health insurance purposes, it has directly done so. That is what it has done in the case of the State Health Plan for Teachers and State Employees, small businesses, and the state's health risk pool. In each of those instances, it expressly defined the term's meaning for that statutory section. Where the General Assembly has not chosen to define the term, it is reasonable to conclude that it intended for the relevant parties to do so for themselves.

A case with a different result. It is interesting to compare the *Heinsma* and *Morgan* cases with the Virginia case *Arlington County v. White*. The Code of Virginia authorizes that state's local governments to provide "group accident and sickness insurance coverage" for dependents of employees without defining the term *dependents*.[38] The Virginia Supreme Court recognized that a county has the "fairly and necessarily implied" power to determine who qualifies as a dependent, but it held that inclusion of a domestic partner within the definition of that term was unreasonable.[39] The defendant, Arlington County, had defined *dependent* as one "relying on . . . the aid of another for support," as set forth in the *American Heritage Dictionary*. The Virginia Supreme Court instead relied on a 1997 opinion of the Virginia attorney general which maintained that in the absence of any affirmative legislative intent to include domestic partners within the meaning of the term *dependents*, the "established definition" of the term *dependent* was that of the Internal Revenue Service as one who "must receive from the taxpayer over half of his or her support for the calendar year."[40]

In short, the argument was centered on whether the term dependent meant financially interdependent, as the county maintained, or financially fully dependent, as the attorney general's opinion and the court concluded. Logically, however, a requirement that a dependent be fully financially dependent upon the employee to qualify for health insurance through the county would leave working spouses out in the cold. The Virginia court acknowledged this problem but brushed it away by noting that "including a spouse as a dependent for coverage such as this is of such long standing that, even in the absence of financial dependence, there can be no dispute that the General Assembly contemplated that a spouse would be included for coverage under local benefit plans."[41]

Does the Authority to Adopt Measures That Promote the Recruiting and Retention of Good Employees Include the Authority to Offer Domestic Partner Benefits?

The statutes authorizing cities and counties to adopt personnel policies—G.S. 160A-164 and 153A-94, respectively—expressly authorize those employers to adopt "any other measures that promote the hiring and retention of capable, diligent, and honest career employees." The two statutes do not give examples of what

1. *See* Code of Virginia § 51.1-801.
2. *Arlington County v. White*, 528 S.E.2d, 706, 712–13 (Va. 2000).
3. *See Arlington County*, 528 S.E.2d at 712–13.
4. *See Arlington County*, 528 S.E.2d at 713–14.

might be included in such other measures, and there are no cases that define the boundaries of this grant of power. Does it include the authority to grant domestic partner benefits? Given the lack of any limiting language and given that the rule of construction that says that grants of authority to local governments are to be construed broadly, it seems likely that "any other measures" includes offering domestic partner benefits.

This is consistent with the conclusions the courts have reached in other states that have addressed the question of whether domestic partner benefits may be considered as part of a strategy to retain good employees. In a Maryland case, employees and residents trying to stop the extension of domestic partner benefits to county employees argued, in part, that offering domestic partner benefits involved an illegal use of state funds. The Maryland Court of Appeals, however, found that the county was authorized to extend domestic partner employee benefits where doing so served a "valid public purpose." Since the purpose of offering domestic partner benefits was "recruiting and retaining qualified employees and promoting employee loyalty," the court found that it did indeed serve a valid public purpose.[42] Similarly, in two Colorado cases involving domestic partner benefits, courts have recognized that the authority to define the scope of employee compensation, including benefits, is of particular importance to a local government because of its impact on a city's ability "to both hire and retain qualified individuals." [43] An Illinois court concluded that a domestic partner employee benefits ordinance was a valid exercise of a city's "function pertaining to its government and affairs" under the Illinois Constitution and noted that "[t]he competition in the job market involving employees from laborers to professionals must be dealt with by an employing municipal entity on a practical and realistic level if it is to possess the ability to hire and retain qualified individuals to serve the community." [44]

> One question, a council member interjects. When the courts find that offering domestic partner benefits can help local governments hire and retain good employees, are they doing so on the basis of specific, local findings? What kind of evidence would the city have to show about Paradise and the demographics of our applicant and employee pools to support this proposition?

None of the courts citing the need to recruit and retain good employees as a basis for the reasonableness of providing domestic partners benefits have required local governments to show specific evidence linking domestic partner benefits to better recruitment and retention. Human resource management experts agree, however, that, as a general matter, offering domestic partner benefits does help employers' recruitment and retention efforts.[45]

> In conclusion, the city attorney tells the council, the General Assembly has told us to construe grants of power to local governments broadly. It has expressly given you the power to provide employees and dependents with insurance benefits, but it has not defined the term *dependents*. Dictionary definitions support a broad construction of the term *dependent* as being able to include a domestic partner where the domestic partner of an employee relies on the employee for

42. *See* Tyma v. Montgomery County, 801 A.2d 148, 155–57 (Md. Ct. App. 2002).

1. See Colorado Springs Fire Fighters Ass'n v. Colorado Springs, 784 P.2d 766, 773 (Colo. 1989) (limits on city's payment of health care premiums for employees was matter of local concern not addressed by state statutory provisions); Schaefer v. City and County of Denver, 973 P.2d 717, 719 (Colo. Ct. App. 1998)(same).
2. *See* Crawford v. City of Chicago, 710 N.E.2d 91, 98 (Ill. App. 1. Dist.), *appeal denied,* 720 N.E.2d 1090, (1999). *See also* Devlin v. City of Philadelphia, 862 A.2d 1234, 1246 (Pa. 2004).
3. *See*, for example, Allen Smith, Experts: Domestic Partner Benefits are Worth the Trouble, November 5, 2007, on the Society for Human Resources Management website at http://moss07.shrm.org/LegalIssues/FederalResources/AnalysisofFederalEmploymentLaw/Pages/CMS_023585.aspx.

financial, emotional, or physical support in whole or in part. The General Assembly has also given you the power to take measures that promote the hiring and retention of good employees, a power that seems to include the authority to offer domestic partner benefits. This conclusion, the city attorney says is consistent with the decision of most courts in other states that have had to decide a similar question.

A note on counties as employers. North Carolina cities have two bases for determining that they have the authority to offer domestic partner benefits: (1) the statutory provision in G.S. 160A-164authorizing them to take measures that “promote the hiring and retention” of capable employees and (2) the specific statutory authority in G.S. 160A-162(b) to offer benefits to dependents. The first of these two bases is available to counties, because G.S. 153A-94, the county statute, contains the very same provision as the city statute. But, as we saw above, G.S. 153A-92(d), the county statute authorizing the purchase of insurance, does not contain the same specific statutory authority to offer benefits to dependents. So counties have one base for determining that they have the authority to offer domestic partner benefits, while cities have two. The one base is sufficient.

A note on community colleges and local school boards as local government employers. North Carolina’s community colleges and local school boards receive most of their funding for employee salaries directly from the state, although the counties they serve fund much of their other operational costs. Therefore, community college and local school board employees form a hybrid category. With respect to the two largest and most important employee benefits—retirement and health insurance—the General Assembly has decided that community college and public school employees may participate in the plans that cover state employees; namely, the Teachers and State Employees Retirement System and the State Health Plan for Teachers and State Employees. This means that the General Assembly’s decisions on whether to extend State Health Plan coverage to domestic partners will govern community college and public school employees, even if the counties in which these employers are located make different decisions with respect to their own employees. Community colleges and local boards of education do make individual decisions about other kinds of benefits, such as dental and life insurance.

A note on state employees. The broad discretion granted cities and counties with respect to employee benefits is in sharp contrast to the way benefits are handled for North Carolina state employees. Most benefits for state employees are mandated by statute or administrative regulation. For example, state agencies, just like local boards of education and community colleges, must provide health insurance coverage for their employees and their dependents through the State Health Plan for Teachers and State Employees. The General Statutes give the state Director of the Budget the authority to offer a flexible benefit program with benefits other than retirement and health insurance for state agency employees. The Board of Governors of the University of North Carolina is given similar authority to provide additional benefits to university employees. With respect to benefits other than health insurance, therefore, the state and the University of North Carolina have the authority to offer employees domestic partner benefits in areas such as dental and life insurance. The University of North Carolina at Chapel Hill has used its authority to do just that.

Are Public Employee Domestic Partner Benefits Contrary to State or Federal Law or to North Carolina Public Policy?

> The city attorney reminds the council, the manager, and the human resources director that while G.S. 160A-4 and 153A-4 call for broad construction of grants of power to local governments, they do contain one significant limitation. She quotes the relevant provision to them:
>
> > . . . the provisions of this Chapter . . . . shall be broadly construed . . . Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.
>
> Although we have concluded that it is reasonable to interpret the grant of authority to provide benefits to employees and dependents as including the general authority to provide domestic partner benefits, the city attorney advises, we must also consider whether offering domestic partner benefits would be contrary to state or federal law or to the public policy of North Carolina. The city attorney outlines four possible arguments that offering domestic partner benefits would contravene North Carolina law or public policy and the counterarguments to them.

Federal law does not regulate who may or must be in benefit plans. As noted in the first paragraph of this bulletin, many private employers offer domestic partner benefits. The federal Defense of Marriage Act (DOMA) has not formed the basis of any claim that local governments violate federal law by offering domestic partner benefits. DOMA controls the definition of the term *spouse* for the purposes of federal legislation—including the Family and Medical Leave Act (FMLA) and those sections of the Internal Revenue Code related to the favored tax treatment of some employee benefits. But DOMA does not prohibit employers from expanding the universe of relatives and friends for whom, for example, FMLA-type leave may be granted. That discretion rests with individual employers.

Across the states, challenges to public employer decisions to offer domestic partner benefits have generally come from taxpayers who view domestic partner benefits as contravening statutes that require marriage to be between a man and a woman. Such challenges have usually focused on four primary arguments. Three of these arguments are closely related:

1 That a local government's decision to offer domestic partner benefits is an intrusion into an area reserved for state legislation;
2 That the extension of domestic partner benefits creates a common law marriage;
3 That the extension of domestic partner benefits would create a new marriage-like relationship.

The fourth argument is a little different:

4. That domestic partner benefits conflict with state statutes regulating sexual behavior.

All four of these arguments have generally failed in the courts.

Argument 1: A local government's decision to offer domestic partner benefits is an intrusion into an area reserved for state legislation.

Some opponents of domestic partner benefits have argued that by offering domestic partner benefits, a local government employer is intruding into the area of domestic or family relations, which is generally regulated at the state level. In North Carolina, the area broadly defined as family law is covered beginning (alphabetically) in Chapter 48 of the General Statutes with the laws regulating adoptions and continuing through Chapter 52, which codifies the Uniform Interstate Family Support Act. Chapter 51 regulates marriage, Chapter 52 delineates the powers and liabilities of married persons, and Chapter 50 covers divorce. As noted earlier, G.S. 51-1 limits marriage to "a male person and a female person," while G.S. 51-1.2 provides that marriages between individuals of the same gender are not valid in North Carolina. Additionally, Chapters 28, 29, and 30 of the General Statutes govern the rights of family members in the distribution of a deceased person's estate.

The question of whether a local government's decision to offer domestic partner benefits to employees with same-sex partners is an unlawful intrusion into the field of domestic relations has yet to be addressed by North Carolina's appellate courts. An early Colorado case, however, has set the tone for the response to this argument. Its opinion has been echoed and cited in cases arising in a number of states. It seems likely that this argument would fail in North Carolina as well.

Counterargument 1: Policies offering domestic partner benefits do not affect family relationships because they only qualify an additional group of people as eligible to participate in employer-based health benefits.

In the Colorado case, *Schaefer v. City and County of Denver*,[46] plaintiffs opposed to Denver's domestic partner ordinance argued that the Colorado Uniform Marriage Act fully occupied the field of family relationships in that state. Denver, therefore, lacked the authority to offer domestic partner benefits. The plaintiffs claimed that the extension of benefits to "spousal equivalents"(as the ordinance referred to them) conflicted with the traditional definition of *family* and therefore had a direct impact on the state's requirements for marriage.

The Colorado Court of Appeals disagreed. It found that although the Uniform Marriage Act did reflect a legislative intent to strengthen and preserve the integrity of marriage and to safeguard meaningful family relationships, the domestic partner ordinance did not infringe on that purpose. All the domestic partner ordinance did was qualify a new, separate and distinct group of people (who happened not to be eligible to marry) for employer-based health and dental insurance benefits.[47] Using similar reasoning, courts in Pennsylvania, Washington, Maryland, Illinois, and Florida have all upheld domestic partner ordinances against challenges based on the argument that they interfered with the state's exclusive ability to regulate family affairs. In *Devlin v. City of Philadelphia*, for example, the court held that the creation of a "life partner" status for benefits purposes did not give unmarried partners the same rights and responsibilities as those of married persons.[48] Courts in both Maryland and Illinois found that domestic partner ordinances affected only the personnel policies of the public employers in question and did not intrude on any state interest.[49]

46. Schaefer v. City and County of Denver, 973 P.2d 717 (Colo. Ct. App. 1998).
47. *See Schaefer*, 973 P.2d at 721 (interpreting Colorado Revised Statues § 14-2-101 *et seq*. (1998)).

1. *See Devlin*, 862 A.2d at 1243–45 (creation of "life partner" status for employee benefits purposes does not give unmarried partners the same rights and responsibilities as married couples and thus is not an attempt to legislate in the area of "marriage").
2. *Tyma*, 801 A.2d at 158 (local ordinance granting county employees domestic partner benefits affects only county personnel policies and does not interfere with state's ability to regulate marriage); *see also Crawford*, 710 N.E.2d at 99 (domestic partner benefits ordinance affects only Chicago's personnel policies; no state policy involving any other locality is either involved or undermined; no state policy prohibiting a local government from offering domestic partner benefits). *See also* Leskovar v. Nickels, 166 P.3d 1251, 1255–56 (Wash. App. 2007), *rev. denied*, 166 P.3d 1251 (2007) (mayor's executive order that same-sex marriages of city employees be recognized for benefits purposes does not intrude into area reserved for state and employee benefits are a matter of local concern); *Lowe*, 766 So. 2d at 1204–05 (county's domestic partner ordinance does not legislate within the domestic relations area reserved to the state).

The city manager joins in the discussion. What about here in North Carolina? Would offering benefits to same-sex or opposite-sex domestic partners give these unmarried couples the same rights and responsibilities as married couples have under North Carolina law? The attorney shakes her head.

A North Carolina local government employer that offers domestic partner benefits would not be conferring the rights and responsibilities of marriage under North Carolina law. In North Carolina, the rights conferred by marriage include the following:

- An equal share in the real and personal property acquired by either spouse or both together during the marriage;[50]
- An equal share in the vested and nonvested pension, retirement, and any other deferred compensation of the other spouse;[51]
- The right to insure their spouses' lives under a life insurance policy without the spouse's consent;[52]
- The right to alimony upon separation;[53]
- The right to assert a claim to administer a deceased spouse's estate;[54] and
- The right to a share in the real property and the personal property of a deceased spouse.[55]

North Carolina law also makes each spouse responsible for debts incurred during the marriage regardless of which spouse is the individual legally obligated for the debt,[56] and it makes each spouse responsible for the support of any minor child born to the marriage.[57]

Offering the domestic partners of their employees the opportunity to participate in the employer's group health plan and other group insurance benefits would confer none of these rights and responsibilities. The provision of domestic partner benefits would not, for example, give the domestic partners the right to share in each other's estate or the responsibility for each other's debts. Nor would one local government employer's decision to offer domestic partner benefits affect any other employer in the state. As the court in the Denver case notes, such a decision would simply enlarge the group that one employer allows to participate in its group bene fit plans by virtue of a connection to an employee.

In the Denver case, the challengers also argued that their state's insurance code and regulations occupied the entire area of employee benefits and preempted the ordinance. Colorado's court of appeals rejected this argument as well. The court acknowledged that those sections of the Colorado insurance code that regulated the health insurance industry limited the term *dependent* to spouses and children, but it found that these statutes did nothing more than impose *minimum* coverage requirements on insurance policies issued in Colorado. They did not limit carriers (or employers) from offering additional or broader coverage.[58]

1. G.S. 50-20(b)(1).
2. G.S. 50-20(b)(1).
3. G.S. 52-3.
4. G.S. 16.2A.
5. G.S. 28A-4-1.
6. G.S. 29-13 and 30-3.1.
7. G.S. 50-20(b)(4)d.
8. G.S. 50-13.4.

58. *See Schaefer*, 973 P.2d at 719–21 (1998) (interpreting Colorado Revised Statues § 10-7-203 (1998) and § 10-1-101 *et seq*.).

Similarly, nothing in North Carolina's insurance law (found in Chapter 50 of the General Statutes) speaks one way or another to employer extension of employee benefits to domestic partners, in the private or public sector. At the most, the General Statutes define *dependents* who must be covered in the case of small private employers without restricting such employers from providing greater coverage.[59] In the cases of the North Carolina Health Insurance Risk Pool and the State Health Plan for Teachers and State Employees, the General Statutes define *dependents* in such a way as to exclude the coverage of domestic partners. Outside of those three areas, the decision about coverage in an employer's health insurance or other employee benefit plan remains an area for individual employer discretion.

The argument fails.

Argument 2: The extension of domestic partner benefits creates a common law marriage. Counterargument 2: North Carolina does not recognize common law marriages.

A common law marriage is one that is formed by agreement and practice but is not solemnized by a ceremony and issuance of a marriage license. In a common law marriage, the spouses agree that they are married and live together as husband and wife, assuming all of the rights and responsibilities of marriage.[60] Opponents of domestic partner benefits argue that by extending domestic partner benefits, local governments effectively create common law marriages between individuals who would not be eligible to marry under a state's marriage laws.[61] Common law marriages, however, are legally recognized in only ten jurisdictions: Alabama, Colorado, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia.[62] North Carolina does not recognize common law marriages between opposite-sex couples or same-sex couples. Thus offering domestic partners the opportunity to participate in an employer's benefits programs cannot create a common law marriage in North Carolina.[63]

The argument fails.

Argument 3: The extension of domestic partner benefits would create a new marriage-like relationship.

This argument arises from the fact that employers who offer domestic partner benefits typically require employees and their domestic partners to establish certain facts before the employee allows the domestic partner to enroll in its benefit programs. Those facts are usually the same as or very similar to facts that individuals must establish in order to be granted a marriage license. Most employers who offer domestic partner benefits require the employee and partner to show that they are at least eighteen years old, that they are competent to contract, and that they do

59. G.S. 58-50-125(d).

60. *See Black's Law Dictionary*, 8th edition (2004), under *common-law marriage*. *See also* Janet Mason, "Marriage in North Carolina," *Popular Government*, Vol. 71, No.2, Winter 2006 (School of Government: Chapel Hill), pp 26–36, at p. 29, available online at www.sog.unc.edu/pubs/electronicversions/pg/pgwin06/article3.pdf .

61. *See, e.g.*, *Tyma*, 801 A.2d at 158 (county's recognition of domestic partnership does not create common law marriage); *Lowe*, 766 So. 2d at 1210–11 (domestic partnership does not violate Florida prohibition against common law marriage).

62. *See* Table: Marriage Laws of the Fifty States, District of Columbia and Puerto Rico, Cornell University Law School Legal Information Institute (LII), at http://topics.law.cornell.edu/wex/table_marriage.

63. North Carolina does recognize common law marriages that are valid under the law of the state in which they were created. *See* Mason at p. 29 and p. 35, note 39.

not share certain blood relationships.[64] In addition, employers typically require domestic partners to certify that they have resided together for a stated minimum period of time, usually six months, and that they are in a long-term committed relationship. They also typically require an affirmation that the partners are either jointly responsible for each other's welfare and living expenses or for the direction and management of the household, or simply that they are financially interdependent. Some employers require documentary evidence of financial interdependence such as evidence of a joint checking account, joint ownership of property, joint tenancy under a rental agreement, health care power of attorney, or durable power of attorney.[65]

Opponents of domestic partner benefits argue that public employers who offer domestic partner benefits essentially recognize a marriage-like relationship between same-sex couples because the requirements for establishing domestic partnerships so closely mirror both the requirements and the typical financial arrangements of marriage.

Counterargument 3: Domestic partner benefits have nothing to do with marriage and only further define the category of health insurance beneficiaries.

With one exception, courts that have considered the argument that the existence of domestic partner benefits creates a new marriage-like relationship have rejected it. No North Carolina court has had occasion to address this question, but courts in a number of other states have found that employers are not recognizing a marriage-like relationship but are merely using some of the same criteria that the law requires for marriage to define the class of persons eligible to participate in their benefit plans. As one court explained, the recognition of domestic partners does not create the functional equivalent of marriage but simply adds another unmarried status to a list that already includes "single," "divorced" and "widowed."[66] Other courts have stressed the ways in which the recognition of a domestic partner grants unmarried couples only a very small part of the very large package of rights and responsibilities that married couples enjoy.[67]

Only the Michigan Supreme Court has found otherwise, in the case *National Pride at Work, Inc. v. Governor of Michigan*. That case may be distinguished from the cases mentioned above, however, because the court's conclusion clearly follows from the language of the state's constitution. In 2004, Michigan voters

64. *See, e.g.,* Town of Carrboro Code of Ordinances, Section 3-2.1, available at www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf ; Ralph v. City of New Orleans, 2009 WL 103895 (La. App. 4 Cir. 2009) at *4; *Tyma*, 801 A.2d at 151 n. 4; *Devlin*, 862 A.2d at 1237; *Lowe*, 766 So. 2d at 1202.
65. *See* Joseph Adams and Todd Solomon, *Domestic Partner Benefits: An Employer's Guide*, 2d ed. (Washington, D.C. 2003), pp. 32–39.
66. *See Devlin*, 862 A.2d at 1243–44, 1246-47. *See also Crawford*, 710 N.E.2d at 99 ("Public or private employers who permit their employees to obtain health benefits covering anyone the employee designated, whether a parent, child, cousin, friend, or domestic partner, do not create a new type of marriage; rather they merely extend the existing categories of beneficiaries").
67. *See Lowe*, 766 So. 2d at 1205–06 (county ordinance recognizing domestic partners does not address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship and thus does not create new "marriage-like" relationship); *Leskovar*, 166 P.3d at 1255–56, citing *Heinsma* (mayor's executive order that same-sex marriages of city employees be recognized for benefits purposes does not conflict with state defense of marriage law); *Tyma*, 801 A.2d at 158 (county's recognition of domestic partnership does not create alternative form of marriage, common law marriage, or any legal relationship or confer any other benefits of marriage). *See also* Slattery, 686 N.Y.S.2d at 686–89 (formal requirements regulating marriages are far more stringent than those regulating domestic partnerships and rights acquired by married partners with respect to their spouse's property are unavailable to domestic partners).

approved a so-called marriage amendment to the state constitution that stated that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose*" (emphasis added). In a divided decision, the Michigan Supreme Court held that the question of whether health insurance benefits are a benefit of marriage need not be decided because the language of the amendment made clear that same-sex domestic partnerships could not be given legal recognition for any purpose, including the purpose of allowing public employers to provide domestic partner health insurance benefits.[68]

Neither the North Carolina Constitution nor the General Statutes contain any provisions comparable to that of the Michigan marriage amendment. There is, therefore, no strong reason to think that the North Carolina courts would hold any differently than those courts in other states that have held that offering domestic partner benefits does not create a marriage-like relationship.

The argument fails.

Argument 4: Domestic partner benefits conflict with state statutes regulating sexual behavior.

Most employers who offer domestic partner benefits require a showing of cohabitation and an affirmation by the employee and his or her partner that they are in a committed, intimate relationship.[69] For opposite-sex domestic partners, this used to pose a problem. North Carolina retains in its criminal code two nineteenth-century statutes regulating sexual conduct. The first, G.S. 14-184, makes it illegal for a man and woman who are not married to each other to "lewdly and lasciviously associate, bed and cohabit together." Violation of the statute is a Class 2 misdemeanor. In making the typical application for domestic partner benefits, opposite-sex domestic partners would arguably be confessing to violating this statute.

For same-sex domestic partners, applying for domestic partner benefits is less clearly a potential violation of law. G.S. 14-177 makes it a Class 1 felony for a person to "commit the crime against nature, with mankind or beast." A *crime against nature* has been defined in a series of cases as including most forms of anal and oral sex when performed by unmarried persons.[70] While an affirmation of a committed, intimate relationship does not necessarily imply a sexual relationship, most people understand it as such.

In the past, some have argued that by offering domestic partner benefits to their employees, North Carolina local governments would be inviting employees to confess to violations of the General Statutes. They have also argued that governing board members would be breaking the law themselves, in as much as they would be at

68. *See* National Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524 (Mich. 2008).

1. *See, e.g.,* Town of Carrboro Code of Ordinances, Section 3-2.1, available at www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf ; Ralph v. City of New Orleans, 2009 WL 103895 (La. App. 4 Cir. 2009) at *4; *Tyma*, 801 A.2d at 151 n.4; Devlin v. City of Philadelphia, 862 A.2d 1234, 1237 (Pa. 2004);Lowe v. Broward County, 766 So. 2d 1199, 1202 (Fla. App. 4 Dist. 2000). *See more generally* Joseph Adams and Todd Solomon, Domestic Partner Benefits: An Employer's Guide, 2d ed. (Washington, D.C. 2003),pp. 32–39.
2. See the discussion of this statute in Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime*, 6th ed. (School of Government, University of North Carolina at Chapel Hill, 2007), pp. 207–09. For G.S. 14-184, see p. 213.

least indirectly violating their oath to uphold the law of the state by voting in favor of a domestic partner benefit.[71]

Counterargument 4: The U.S. Supreme Court's ruling in *Lawrence v. Texas* means that state statutes regulating sexual conduct do not apply to domestic partner benefits.

Since the U.S. Supreme Court's 2006 decision in the case *Lawrence v. Texas*,[72] public employers have not had to wrestle with questions of whether or not they invite their employees to confess to violating the law when they ask domestic partners to register or affirm their relationship, or whether the officials themselves in some way facilitate the breaking of the law merely by offering domestic partner benefits. In *Lawrence*, the Court held that a statute making it a crime for two persons of the same sex to engage in intimate sexual conduct violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The Court's reasoning in that case applies to statutes such as G.S. 14-184 and 14-177.

Lawrence involved two men who were arrested for and convicted of engaging in sodomy in a private home under a Texas statute making intercourse with a person of the same sex a misdemeanor. The defendants appealed their convictions through the Texas appellate courts under the Fourteenth Amendment. The U.S. Supreme Court struck down the Texas statute and ruled that the right to liberty under the Due Process Clause protects the rights of individuals to engage in private, consensual sexual conduct without government interference.

Since the Supreme Court's decision in *Lawrence*, the North Carolina courts have had a number of occasions to consider the implications of its holding for G.S. 14-184 and 14-177. In short, the courts have found that the *Lawrence* decision makes prosecution for private sexual conduct under these statutes unconstitutional.[73] The North Carolina case that received the greatest publicity involved Debora Hobbs, an employee of the Pender County sheriff's office, who was told by the sheriff that she had three choices: marry her live-in boyfriend, move out of their shared home, or prepare to be fired. The sheriff made his ultimatum on the grounds that Hobbs was violating G.S. 14-184. Hobbs challenged the law. The superior court judge hearing the case held that the statute violated Hobbs's substantive due process right to liberty under both the U.S. Constitution and the N.C. Constitution.[74]

71. Members of both the municipal council and the county board of commissioners take an oath to support and maintain the constitution and laws of North Carolina. See G.S. 160a-61 and 153A-26,respectively. G.S. 14-230 provides that any county commissioner or any official of any county, city, or town who violates his or her oath of office shall be guilty of "misbehavior in office" and shall be punished by removal from office. On the Durham County attorney's advice to the Durham Board of County Commissioners that G.S. 14-184 prevented them from offering domestic partner benefits to opposite-gender domestic partners, see "Benefits Advocates Criticize Decision," Durham Herald-Sun, March 16, 2003, at http://74.125.47.132/search?q=cache:FnohuN_DfUJ:www.glapn.org/sodomylaws/usa/north_carolina/ncnews027.htm+durham+couty+domestic+partner+benefi ts&cd=2&hl=en&ct=clnk&gl=us.

72. Lawrence v. Texas, 539 U.S. 558 (2006).

73. The statutes remain constitutional, however, when applied to nonconsensual conduct, conduct involving minors, and prostitution. *See* Hobbs v. Smith, 2006 WL 3103008 (N.C. Super. 2006); In the Matter of R.L.C., 361 N.C. 287, *cert. denied*, 128 S. Ct. 615 (2007) (G.S. 14-177 was not unconstitutional as applied to a fourteen-year-old juvenile accused of consensual sex with twelve-year-old girlfriend); State v.Pope, 168 N.C. App. 592, 593–94, *rev. denied*, 612 S.E.2d 636 (2005) (G.S. 14-177 was constitutional as applied to solicitation of oral sex for money); State v. Whiteley, 172 N.C. App. 772, 778–79 (2005) (G.S. 14-177 may properly be used to prosecute conduct involving a minor).

State courts elsewhere have reached conclusions similar to those of the North Carolina courts.[75]

As a result of court rulings like these, statutes still on the books that make it a crime to live with a member of the opposite sex in a domestic-partner type relationship or to engage in various types of sexual practices other than heterosexual intercourse are not enforceable. They are not a barrier to a North Carolina local government's ability to offer domestic partner benefits. Offering domestic partner benefits does not invite employees to admit to breaking the law, as such laws are unconstitutional as applied to private, consensual adult behavior, and it does not implicate the local government and its elected officials in encouraging a violation of the law.

The argument fails.

In Summary: North Carolina Law Does Not Appear to Prohibit Local Government Employers from Offering Domestic Partner Benefits

That's too much law for one night, jokes one of the council members. The city attorney laughs. Let's boil it down, she says. The General Statutes give cities the authority to purchase insurance and other benefits for employees and their dependents. The General Assembly has instructed us to construe that authority broadly, which in my opinion, allows us to include domestic partners in that definition. Consideration of how local governments in other states have interpreted the term dependent in their enabling legislation reinforces my conclusion that the City of Paradise may include domestic partners in its definition of dependents for benefits purposes.

We also have a second statutory basis for authority to offer domestic partner benefits; namely, the authority to take other measures that will promote the hiring and retention of good employees. If we were a county, rather than a city, this alone would be a sufficient basis on which to offer domestic partner benefits.

Our review of arguments to the effect that domestic partner benefits violate federal or state law or public policy shows that they are likely to fail. The city attorney pauses. In my opinion, she continues, you are free to offer domestic partner benefits if you so choose.

The Defense of Marriage Act and Federal Law Affecting Employee Benefits

In addition to allowing states to regard marriages legally performed in other states as invalid if they are between two persons of the same gender, the federal Defense of Marriage Act effectively makes federally required employee benefits unavailable to same-sex domestic partners. At Section 7 of Title 1 of the United States Code, DOMA provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

This means that any federal benefit or program that defines beneficiaries by reference to an employee's "spouse" is not legally required to be extended to a same-sex spouse or domestic partner. Currently,

1. *See Hobbs*, 2006 WL 3103008. *See also* Andrea Weigl, "Judge Rules Against Cohabitation Law," *The News & Observer*, Fri., July 26, 2006, available at www.newsobserver.com/102/story/462833.html.
2. *See, e.g.*, State v. Cook, 192 P.3d 1085 (Idaho 2008); McDonald v. Commonwealth, 645 S.E.2d 918 (Va. 2007); State v. Clinkenbeard, 123 P.3d 872 (Wash. Ct. App. 2005).

the only federal laws relating to employee benefits that this limitation affects are leave under the Family and Medical Leave Act and the Internal Revenue Code's tax-favored treatment of employer-provided benefits for spouses. For example, in contrast to opposite-gender married employees, unmarried employees do not have the right to take any form of leave pursuant to the federal Family and Medical Leave Act to care for a same-sex spouse or domestic partner of any gender with a serious health condition. Nor do unmarried employees have the right to take qualifying exigency leave to attend to family needs arising from the deployment of a domestic partner in a military operation or to care for a domestic partner who has been injured in the line of duty. The federal tax code prohibits unmarried employees from using pretax income to pay for their same-sex partner's medical expenses under either a flexible spending plan or a health reimbursement account or health savings account.

DOMA and Benefits Required by Federal Law: FMLA

The Paradise City Council votes to offer health insurance benefits to the same-sex domestic partners of its employees on the same terms as it offers them to opposite-gender spouses. A few weeks later, Margaret, an employee in the city's water department asks for FMLA leave to care for Rita, her domestic partner of ten years, who will be undergoing knee replacement surgery. The human resources director sympathizes with Margaret, but tells her that the FMLA applies only to employees who need time off to care for legal spouses, dependent children, or their own parents when they have a serious health condition.

But the city offers benefits to domestic partners, Rita protests. The human resources director corrects her. The city, she says, offers health insurance benefits to domestic partners, but it has not adopted a leave policy applicable to employees who have a domestic partner with a serious health condition. The two benefits are distinct, and one has no bearing on the other.

The federal Family and Medical Leave Act requires public employers with fifty or more employees to allow employees to take up to twelve weeks of job-protected leave to care for a family member with a serious health condition or to deal with a qualifying exigency arising out of the fact that a family member is on active duty in support of a contingency operation. Eligible family members include a spouse, son, daughter, or parent of the employee.[76] The military caregiver leave provisions of the FMLA require employers to allow employees to take up to twenty-six weeks of job-protected leave to care for a service member spouse, son, daughter, parent, or next of kin who has been injured in the line of duty.[77] Because DOMA defines *spouse* as the husband or wife in a legal union of opposite-sex partners, same-sex partners of marriages or civil unions performed in states where they are legal and domestic partners generally have no legal right to the benefits and protections of the Family and Medical Leave Act.

Some employers may nevertheless, on their own, wish to offer such benefits to employees with same-sex spouses or domestic partners. They are free to do so. The federal DOMA only restricts the universe of employees who have a legal right to take FMLA leave; it does not prohibit employers from offering similar leave to employees who wish to care for loved ones who do not fit the statutory definition of *spouse*.

The problem of leave-stacking. Employers who offer FMLA-like benefits to employees with same-sex spouses or domestic partners should be aware that in doing so they lose the ability to control the total amount of time that an employee is absent from work for family care.

1. *See* 29 U.S.C. § 2612(a)(1)(C) and (E).
2. *See* 29 U.S.C. § 2612(a)(3).

Consider the following situation.

> John works for Paradise County, which allows employees to take up to twelve weeks of job-protected leave to care for a same-sex spouse or unmarried domestic partner with a serious health condition. When Doug, whom John married in Vermont, is diagnosed with cancer, John asks for and is granted leave under the county's expanded family and medical leave policy. At the conclusion of his twelve-week leave, John returns to work. Two months later, John's mother undergoes a heart transplant. John asks for an additional six weeks of leave to care for his mother during her recuperation. Must the county grant John the additional six weeks, given that he has already taken twelve weeks of leave to care for Doug?

The answer is "yes." In taking time off to care for Doug, John has not tapped into his twelve-week entitlement of federal FMLA leave. The county cannot count the earlier twelve weeks of leave against his FMLA entitlement because Doug does not satisfy the FMLA's definition of *spouse*. Nor could the county have asked John to waive his rights under the FMLA in return for allowing him time off to care for Doug. Employees are expressly prohibited from waiving their FMLA rights in return for receiving some other benefit from the employer.[78] The same result would hold true if Doug were a domestic partner rather than a same-sex spouse married in another state. Thus, although federal law does not prohibit North Carolina local government employers from offering FMLA-like leave to care for same-sex partners, the fact that an employee cannot waive his or her rights to leave under the FMLA acts as a disincentive for employers to do so.

An employer offering FMLA-like leave could, however, limit the availability of FMLA-like leave to care for same-sex partners to those employees who have not taken true FMLA leave within a given period of time.

DOMA and Benefits Required by Federal Law: COBRA

> Roger enrolls Sam, his domestic partner, in the city's health insurance plan. A few months later, Roger resigns. The human resources director prepares a standard form letter to Roger explaining his rights under COBRA to continue on the city's health insurance plan at his own cost for the next eighteen months. She realizes, however, that she will have to revise the paragraph that deals with spouses and dependents covered under the plan because under COBRA, the treatment of domestic partners differs from the treatment of spouses and dependent children.

The federal Consolidated Omnibus Budget Reconciliation Act of 1973 (COBRA) requires all covered public employers[79] to allow employees to continue to participate in the employer's group health plan for a limited period of time at the employee's own cost after separation from employment.[80] Employers must also offer this continuation coverage to qualified beneficiaries enrolled through the employee upon the occurrence of certain events. That is, the covered dependent may elect continued coverage under COBRA even if the employee declines. COBRA defines *qualified beneficiary* as either the spouse of the covered employee or the dependent

78. *See* 29 C.F.R. § 825.220(d).

1. Public employers are covered by COBRA if they have had twenty or more employees on more than50 percent of the business days in the preceding calendar year. *See* 42 U.S.C. § 300bb-1(b)(1).
2. *See* 42 U.S.C. § 300bb-1. In addition to separation from service, other COBRA-qualifying events are a reduction in hours that bring the employee below the minimum number of hours required for health insurance coverage, the employee's enrollment in Medicare, the divorce or legal separation of the employee and his or her spouse, the employee's death, and a child's loss of dependent status under the terms of the employer's health insurance plan. *See* 42 U.S.C. §§ 300bb-2(2)(A)(iii) and 300bb-3.

child of the employee.[81] Therefore, if a local government employer decides to extend health insurance benefits to same-sex spouses or domestic partners of its employees, there is no legal requirement that it offer COBRA continuation coverage to those partners if the employee declines coverage. In other words, a domestic partner, unlike an opposite-gender spouse, does not have an independent right to COBRA continuation coverage. An employer may, of course, choose to offer continuation coverage at the group rate to domestic partners even if the employee himself or herself declines continuation coverage, but in the case of domestic partners, the employer will not be bound by any of the requirements of the law with respect to qualifying events or the length of coverage.

Treatment of Domestic Partner Benefits under Federal Tax Law

Becky enrolls Sue in the city's health insurance plan. When she is filling out the application forms, the human
resources director asks her whether Sue qualifies as her dependent for tax purposes. What do you mean? Becky asks. The human resources director explains. Normally, when an employee enrolls a spouse under the city's health insurance plan, the employee elects to pay the spouse's premium out of salary on a pre-tax basis, but Becky will not be able to do that unless Sue meets the IRS test of a dependent.

That is so unfair, Becky grumbles. You know that this is not a decision that the city makes, the human resources director replies. The federal Defense of Marriage Act governs the meaning of the word *spouse* in the tax code. Our hands are tied. Becky wants to know whether this means that she also cannot use money set aside in her flexible spending account for Sue's medical expenses unless Sue qualifies as a dependent. The human resources director indicates that this is so.

Employer-provided health coverage has long been tax-favored at the federal level. North Carolina local government employers who decide to offer domestic partner health insurance and who offer flexible spending, health reimbursement, or health savings accounts must make sure that they comply with the Internal Revenue Code as they administer these benefits, because the tax treatment of the benefits will not be the same as that for those of opposite-gender married couples.

Health Insurance Premiums

When an employer covers the cost of an employee's health insurance premium, as many North Carolina local governments do, the cost of that premium is excluded from taxable income when reporting the employee's earnings to the Internal Revenue Service. These contributions are subject to neither withholding nor payroll taxes (Social Security, Medicare, and unemployment taxes).[82] Employer-provided health insurance is thus a tax-free form of compensation. Similarly, when an employer pays for the cost of the premium for an employee's spouse or dependents, whether in whole or in part, the amount contributed by the employer is excluded from taxable income and is not subject to payroll taxes. When employers do not cover the entire cost of an employee's health insurance premium or where the participation of family members is on a contributory basis, use of a so-called premium conversion plan allows employees to exclude from income and payroll taxes the wages used to pay for their own or their family members' insurance premiums.[83] Because DOMA restricts the meaning of the word *spouse* to the

81. *See* 42 U.S.C. § 300bb-8(3)(A).
82. *See* 26 U.S.C. §§ 106(a), 3121(a)(2), and 3306(b)(2). Treas. Reg. § 1.106-1 provides that the exclusion from gross income extends to contributions that the employer makes to a health plan on behalf of the employee's spouse or dependents, as defined in 26 U.S.C. § 152, as well.
83. *See* 26 U.S.C. § 125.

husband or wife in an opposite-sex marriage, the payments made toward the cost of the health insurance premium of a same-sex spouse cannot be excluded from taxable income. Payments made toward the cost of the health insurance premium for a domestic partner of any gender are similarly disqualified from tax-favored status for spouses.

Domestic Partners Who Qualify as Dependents under the Internal Revenue Code

Typically, the cost of health insurance for both same-sex spouses and domestic partners is paid for with after-tax dollars. Payments for domestic partner coverage may, however, be excluded from the employee's income and made with tax-free dollars if the spouse or partner qualifies as a dependent within the meaning of Internal Revenue Code § 152. Section 152(a) defines *dependent* as either (1) a qualifying child or (2) a qualifying relative. Despite the use of the term *relative*, a qualifying relative for tax purposes does not need to be related to the taxpayer. The domestic partner of an employee may be deemed a qualifying relative if he or she meets the following criteria:

1. The domestic partner has the same principal place of abode as the taxpayer and is a member of the taxpayer's household for a given tax year;
2. The taxpayer provides over one-half of the domestic partner's support; and
3. The domestic partner is not a qualifying child of such taxpayer or of any other taxpayer during that year.[84]

Support includes amounts spent to provide food, lodging, clothing, education, medical and dental care, recreation, transportation, and similar necessities. Tax-exempt income, savings, and borrowed amounts used to support that person are included in the calculation of total support.[85]

The definition of *dependent qualifying relative* thus excludes those same-sex spouses or domestic partners who work and earn approximately as much as or more than the employee, even where those domestic partners work for employers who do not offer health insurance coverage or who offer health insurance coverage that the domestic partner cannot afford.

If a domestic partner does meet the Internal Revenue Code Section 152 definition of dependent, however, the cost of the domestic partner's health insurance premiums is excludable from taxable income, whether the premium is paid by the employer or the employee. An employer will not usually have independent knowledge of whether an employee's domestic partner qualifies as a dependent under Section 152, however. In a 2003 Private Letter Ruling, the Internal Revenue Service advised an employer that it could rely on a domestic partner certification that contained representations that support the qualifying relative test in Section 152(d) to establish that a domestic partner is a dependent and that his or her health insurance coverage may be excluded from the employee's taxable income.[86] Note that because the children of an employee's domestic partner will not qualify as dependent children under Section 152 unless they are also the biological or adopted children of the employee, they too must meet the definition of a qualifying relative in order for the cost of their coverage to be excluded from taxable income.

If a domestic partner does *not* meet the Section 152 dependent test, the amount that an employee contributes to the cost of a partner's health insurance cannot be excluded from income and must be made on an after-tax basis. To the extent that an employer contributes all or part of the cost of the premium for a nondependent domestic

1. *See* 26 U.S.C. § 152(d).
2. 29 CFR § 1-152-1(a)(2)(i) and (ii).
3. Priv. Ltr. Rul. 200339001 (June 13, 2003).

partner, the Internal Revenue Service has advised that the difference between the amount of the fair market value of the health insurance premium paid by the employer and the amount paid by the employee is includable in the employee's gross income and is subject to income tax withholding and employment taxes.[87]

Flexible Spending Accounts, Health Reimbursement Arrangements, and Health Savings Accounts

The medical expenses of same-sex spouses and domestic partners are similarly excluded from tax-favored treatment under flexible spending accounts (FSAs), health reimbursement arrangements (HRAs), and health savings accounts (HSAs). Flexible spending accounts allow employees to set aside wages on a pre-tax basis to pay for the unreimbursed medical expenses of "the taxpayer, his spouse and his dependents" as that term is defined in Section 152.[88] A health reimbursement arrangement is a form of FSA to which only an employer may contribute. The money in an HRA may be withdrawn by the employee to reimburse himself or herself for the employee's own, a spouse's, or a dependent's medical expenses. The Internal Revenue Code excludes the amount of the employer's contribution from the taxable income of the employee.[89] Health savings accounts are a third and more restrictive vehicle through which employees may pay for unreimbursed medical expenses for themselves and their family members with pre-tax income. Both employer and employee may contribute to an HSA, and contributions may be withdrawn to reimburse the employee for certain medical expenses for "such individual, the spouse of such individual, and any dependent" as defined in Section 152.[90] So long as the money in an HSA is spent on allowable medical expenses for the employee, legal spouse, or dependent, both the employer and employee contribution are excluded from tax.

In summary, an employer may not reimburse an employee out of an FSA, HRA, or HSA for the medical expenses of a same-sex spouse or a domestic partner unless the partner satisfies the qualifying relative test and is a dependent for tax purposes.

Conclusion

North Carolina local government employers appear to have the authority to offer domestic partner benefits to their employees and their employees' same-sex spouses or domestic partners of the same or different gender. The North Carolina General Statutes give local governments employers the authority to purchase insurance and other benefits for their employees and, in the case of municipalities, their employees' dependents. The General Statutes also give local governments the authority to develop policies that will foster the hiring and retention of a capable and diligent workforce. Because the General Statutes themselves contain a rule of construction instructing that the authority given to local governments is to be construed broadly, it is reasonable to conclude that cities, counties, and other local government entities may choose to offer domestic partner benefits as a recruiting and retention tool.

87. Priv. Ltr. Rul. 200339001 (June 13, 2003); Priv Ltr. Rul. 9111018 (Dec. 14, 1990); Priv. Ltr. Rul.9231062 (May 7, 1992).

1. *See* 26 U.S.C. § 105(b).
2. *See* IRS Notice 2002-45, in Internal Revenue Bulletin 2002-28.
3. *See* 26 U.S.C. § 223(d)(2).

While North Carolina local governments appear to have the authority to offer domestic partner benefits to their employees, local government employers should remember that this issue has never been addressed by the state's appellate courts. Public employers should also remember that the authority granted by the General Statutes is permissive and need not be exercised. The decision about whether to offer domestic partner benefits is one that must be made by each individual governing board in light of whether it believes that offering such benefits will help recruit and retain "capable, diligent, and honest career employees."

For those local governments that decide to offer domestic partner benefits, a few reminders are in order. First, the employer should establish a definition of *domestic partner* in its personnel policy. Some common elements of such a definition include that the parties to the relationship are over eighteen years of age, that they are not married or parties to another domestic partner relationship, that they intend the relationship to be of unlimited duration, that the parties reside together in a common home and have done so for a period of so many months (to be decided by the employer), and that the parties share financial responsibilities for their household. Some employers require documentation of joint financial responsibility in the form of joint loan obligations, joint ownership of property, or the existence of a durable power of attorney between the parties. Before offering health insurance benefits to domestic partners, employers should make sure that the health insurance contract they currently have in place allows for coverage of domestic partners, and if so, what form of documentation of a domestic partner relationship the insurer will require of employees. Employers should also decide at this time whether or not they will extend COBRA-like continuation coverage of health insurance benefits to domestic partners who participate in health plans through an employee, and if so, on what terms. Employers should also develop a certification form that employees could use to establish domestic partner dependent status in connection with the use of FSAs, HRAs, and HSAs.

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Appendix C

Plan Documents

CIGNA Medical Plan Documents

- Standard Open Access Plan
- Enhanced Open Access Plan
- Indemnity Plan (Medicare)

CIGNA Dental Plan Documents

- Standard Dental PPO
- Enhanced Dental PPO

Hartford Plan Documents

- Basic Life Plan
- Supplemental Life Plan
- Long Term Disability Plan

United Healthcare Vision Plan Documents

- Standard Vision Plan
- Enhanced Vision Plan

Voluntary Benefits (The Pierce Group)

- Cancer Insurance
- Accident Insurance

Appendix D

Participating North Carolina Jurisdictions

Within North Carolina, the following data was obtained from those jurisdictions offering Domestic Partner Benefits:

Jurisdiction	# of Employees *	# of DPB Participants	Offers Opposite Sex DPB?	Impact on Recruitment/Retention
City of Greensboro	3100	3 active / 1- 2 retirees	No	Not tracking
Durham County	1950	3 active / 2 retirees	No	Not tracking
Orange County	843	8	Yes	Not tracking
Town of Chapel Hill	700	Fewer than 12	Yes	Not tracking
City of Durham	2707	24	Yes	Exit interview and EE climate survey comments are generally positive.
Town of Carrboro	162	N/R	Yes	Not tracking

* # of employees eligible for medical insurance coverage

Appendix E

Public Jurisdiction Activity

Jurisdiction	# of insured	DPB Participants	Same Sex and/or Opposite sex offered	Cobra Like Policy offered	# of years offered
Baltimore County Public Schools	11,000	30-50 from year to year	Both options offered	Yes	2
Montgomery County, MD	30,000	300	Both options offered only to Fire and Police and county employees only same sex coverage offered	Yes	7
Baltimore City Public Schools	11,200	50-60 at any given time	Same sex only	Yes	6
Baltimore City	City has 12,000 actives and 22,000 retirees	Under 1,000	Same sex only	Yes	10
Travis County, TX	4,000	350	Both options offered	No	At least 13 years
Broward County, FL	5,000	200 to 300 from year to year	Both options offered More insured on the same sex option	Yes	9 years
Cook County, IL	24,000	Very small number (would not release actual #)	Same sex only	Yes	10 years

Appendix F

The Hidden Costs of Domestic Partner Benefits

by Michael E. Hamrick

Executive Summary

Corporate executives often hear that health care for domestic partners costs no more than it does for married couples. That may be true for some companies. But executives at many companies can expect that the cost of health care for domestic partners will be higher—and perhaps significantly higher—than for married couples. One bit of evidence comes from a small group plan in California that paid 17.1 percent more last year for same-sex couples than for opposite-sex couples.

Generally, a lack of data makes the cost of domestic partner benefits difficult to predict. The benefit is new, there is no published actuarial data, no guide to how many employees will choose to accept the benefits, virtually no tracking of the specific costs involved, and no uniformity in the definitions of what constitutes an eligible domestic partner. Estimates of health-care costs for domestic partners are either unreliable or outright guesswork because they ignore the disproportionate number of high-risk people enrolling in the benefits program and the increased medical costs associated with same-sex couples.

Taking high-risk enrollees and same-sex medical costs into account, some employers can expect 3 to 5 percent higher costs if only 1 or 2 percent of their employees choose domestic partner benefits.

The Hidden Costs of Domestic Partner Benefits

Introduction

Advocates of domestic partner benefits contend that the cost of offering such benefits to cohabitating couples is the same as for married couples. But what little data exist today argue against that view. WellPoint, which owns Blue Cross of California and a number of other major insurers, reviewed a pool of small California employers with approximately 700,000 employees in 2001. WellPoint found that costs for same-sex couples were much higher than for opposite-sex couples: "The loss ratio (health-care costs as a percent of premiums paid) for same-sex domestic partners was 17.1 percent HIGHER than for the remaining two-party members [meaning opposite-sex couples]."[1]

No american insurance company has made health insurance available to cohabiting couples on the same policy at any price outside of the corporate employee-benefit platform. The reason is that insurers avoid unpredictability. Because they cannot reasonably forecast the health-care costs for cohabitating couples, insurers are unwilling to risk the profitability of individual domestic partner insurance policies.

I. The Difficulty of Projecting the Costs of Domestic Partner Benefits

Insurers build their actuarial tables—and set their prices—using years of historical data. Without such data, their forecasts become less certain and their pricing more volatile. There are five reasons why insurers have insufficient data.

First, domestic partner benefits are a fairly new benefit. A 1999 Hewitt Associates survey found that most domestic partner benefits plans were launched within the last six years.[2]

Second, estimates of domestic partner benefit enrollment vary widely. Some proponents estimate rates of between 0.5 and 3 percent.[3] The Hewitt survey reports that in 37 percent of companies, between 1 and 5 percent of employees elected domestic partner benefits for a partner. In 5 percent of the companies surveyed, more than 5 percent of employees eligible for benefits elected domestic partner benefits. The average enrollment shift—the number of domestic partners added to the insurance plan—for all companies was 1.2 percent.[4] The wide difference might result from the broad variety of definitions about what constitutes an eligible plan participant.

Third, definitions relating to domestic partners are inconsistent. Pricing models require clearly defined assumptions for determining the profit or loss associated with a particular group within an insurance pool. Every risk manager understands what the phrase "employee and spouse" means, but the definition of domestic partnership varies considerably from firm to firm.[5] Indeed, at least one organization that argues for domestic partner benefits recommends permitting the definition to vary from employee to employee. It proclaims that the "ideal" domestic partner policy is one that:

> covers a *wide range of family types*. If possible, an employer should offer benefits to same- and opposite-sex couples, *both romantic and non-romantic*, as well as partners' children. By crafting an inclusive policy such as this, the employer *allows the employee to define his or her own family* and responds to that family's needs.[6]

Most corporations have not adopted such a broad policy. Fifty-two percent of companies require a signed affidavit only (i.e., a form certifying the relationship). Fifteen percent of employers require an affidavit plus other proof. The least restrictive employer plans (13 percent) require no proof at all. Only 5 percent require domestic partner registration with local government. The remaining firms (15 percent) require various combinations of certification and designated types of evidence.[7]

From an actuarial point of view, the more the definition of what constitutes a domestic partnership varies, the less valuable the classification becomes as a predictor of future costs. With little or no historical data upon which to rely and no consistency across firms in the definition of what

adverse selection, which can have a dramatically disproportionate effect on costs. For example, a 1percentage-point increase in the *unhealthy* population group due to adverse selection could result in an 8.56 percent increase in utilization/claims costs.[13]

Impact of Adverse Selection Illustrated

	Random Selection	Adverse Selection	% Chg.
Ratio of Healthy/Unhealthy	92/8	91/9	-1/+1
% Losses from Unhealthy Group	71.00%	79.88%	8.88%
% Losses from Healthy Group	29.00%	28.68%	-0.32%
Impact on Total Plan Costs	100.00%	108.56%	8.56%

Advocates of domestic partner benefits claim that most firms experience a proportional increase in costs related to enrollment shifts.[14] In other words, if 1 percent of employees enroll a domestic partner in the benefits plan, claims costs will rise roughly 1 percent. The problem is that domestic partners will cost more to insure than the general population. As a result, the employer's insurance costs will increase at a higher rate than the rise in the number of employees, and in most cases, the employer will not recognize that domestic partners account for the disparity.[15]

III. The Inescapable Adverse Selection Associated with Domestic Partner Benefits

A. Fluidity and Adverse Selection

Approximately 43 million Americans have no health insurance, and given insurers' experience with contestable claims, it would be surprising if some uninsured persons did not try to take advantage of easy access to domestic partner benefits plans.[16] A study in the mid-1990's found that more than half of those with serious medical needs knew as much as one year in advance of their declining health.[17]

According to a recent survey, 32 percent of the employers that offer domestic partner benefits have no waiting period for replacing one domestic partner with another. Twenty-six percent require a minimum period of six months during which a domestic partner couple must reside together.[18] In view of the instability of domestic partnerships and the apparent ease of adding a domestic partner to a benefits plan at any time, such policies practically invite abuse.[19] Employers should anticipate adverse selection in the domestic partners added to their insurance plans.

B. The Unique Case of Same-Sex Relationships

The risk of adverse selection is increased by the unique health-care problems associated with gay sex. The high level of sexually transmitted diseases among gays, lesbians and bisexuals has been well documented.[20] Within the gay community, the rate of new HIV infections has again risen to rates comparable to the first years after AIDS was discovered in the early 1980's. A 3-year study recently completed by the Centers for Disease Control (CDC) found that 4.4 percent of men who had sex with men became infected with HIV each year during a 3-year period from 1998 to 2000.[21] The CDC estimates that these numbers underreport by as much as one-third the number of new but undiagnosed HIV infections. At this rate, total new HIV infections would affect approximately 6.6 percent of men who have sex with men per year.[22]

AIDS likewise continues to be a serious health risk for men who have sex with men.[23] According to the CDC, 63.5 percent of the cumulative AIDS cases in men have occurred in men who had sex with men.[24] Eighty-two percent of the cumulative AIDS cases among white, non-Hispanic males involve men who had sex with men.[25] Prior to the development of newer AIDS drugs, epidemiologists estimated "that 30 percent of 20-year-old gay men will be infected with HIV or dead of AIDS by age 30, and that a majority will become HIV-infected during their lifetimes."[26]

Advocates of domestic partner plans claim that employers with domestic partner benefits have

not experienced an increase of cost because of HIV/AIDS.[27] However, the numbers of HIV infections and AIDS cases consistently reveal that HIV/AIDS affects gay men disproportionately. In fact, one observer estimates that "the incidence of AIDS among 20- to 30-year-old homosexual men is roughly 430 times greater than among the heterosexual population at large."[28] At a minimum, domestic partner benefits plans should expect to have higher percentages of HIV/AIDS among their participants than in non-domestic partner benefits plans. And employers should anticipate significant increases in health-care costs. Some estimate that HIV treatment alone costs $10,000 to $12,000 per person annually, and when you add the costs of full-blown AIDS cases, the aggregate costs to health insurers—and therefore employer plans—will be in the billions of dollars.[29]

The increased health-risk concerns are not limited to the HIV/AIDS issue. Gays and lesbians have increased likelihood of alcohol abuse, domestic violence, mental illness and contracting other sexually transmitted diseases.[30] Many of these illnesses or problems are expensive to treat and will add costs to numerous components of an employer's benefits plan.[31]

Given the health consequences of gay sex, it is reasonable to be concerned about the impact on health-insurance costs. If gay and lesbian individuals contract the flu, diabetes, cancer and heart conditions (etc.) at the same rate as the general population (and there is no evidence to the contrary), all things being equal, gay men and lesbians will cost more to insure overall.[32]

IV. The Inadequacy of Current Cost Projections

An advocate for domestic partner benefits has developed a model supporting the belief that costs rise proportionately at various enrollment rates.[33] But that model is flawed. The pro-advocacy model looks at insurance costs as static and ignores the issue of adverse selection. The model includes the cost of FICA taxes to the company because the portion of health insurance premiums paid by the corporation is subject to FICA taxes. But because it does not account for adverse selection, even with FICA taxes the model computes a cost to the employer that is less than the percentage of new enrollees. The pro-advocacy model in Table 1 in the Appendix shows that with 20,000 employees and an enrollment rate of 0.5 percent for domestic partnership benefits, the total cost to the employer increases only 0.36 percent. With a total enrollment shift of 2 percent, the total cost to the employer rises only 1.44 percent.

The model in Table 1 reflects a relationship between *current* premium costs paid by employers on behalf of employees and the growth in employees covered under the plan *at the same cost*. This is an incorrect basis for analyzing the relationship between domestic partner benefits and the cost to employers because it assumes that *new enrollees* to domestic partner plans will represent a cross section of society. But as shown above, inherent characteristics of domestic partnerships and current statistics on disease and health problems in the gay and lesbian community demonstrate that there will be adverse selection in domestic partner benefits plans. The only question is how much. Again, if 71 percent of insurance claims come from 8 percent of the plan participants, and individuals are added with higher likelihood of illness, costs will rise dramatically.

Given the millions of uninsured persons in the United States, the ease of entering domestic partnerships and obtaining health-care benefits, the number of gay men with HIV/AIDS, and the increased risk of additional diseases for other gays, lesbians and bisexuals, it is reasonable to estimate that a significant number of domestic partners will have known, high-risk health conditions when they join a domestic partnership health-care plan. If a domestic partnership plan brings one extra enrollee in 10 with a high-risk health condition into the risk pool (10 percent adverse selection), costs begin to rise disproportionately with enrollment at all levels of enrollment shift. With an enrollment shift of 0.5 percent, the additional cost to the employer would be 0.8 percent; with an enrollment shift of 2 percent, the additional cost would be 3.21 percent; and with an enrollment shift of 5 percent, the increased cost would be 8.03 percent.[34] If the plan gains one in four high-risk enrollees (25 percent adverse selection), the cost is much worse: with an enrollment shift of 0.5 percent, the additional cost to the employer would be 1.47 percent; with an enrollment shift of 2 percent, the additional cost would be 5.87 percent; and with an enrollment shift of 5 percent, the increased cost would be 14.68

percent.[35] Finally, if one in two enrollees are high risk (50 percent adverse selection), the cost increase is over five times the enrollment shift: with an enrollment shift of 0.5 percent, the additional cost to the employer would be 2.58 percent; with an enrollment shift of 2 percent, the additional cost would be 10.31 percent; and with an enrollment shift of 5 percent, the increased cost would be 25.78 percent.[36]

The problem with adverse selection is that it is impossible to know how high the cost will go until the company pays it.[37] In view of the likelihood of adverse selection in domestic partnership plans, no model predicting costs is reasonable without taking adverse selection into account. When adverse selection is included in the analysis, it is clear that adding domestic partners to an insurance plan will cost far more than the proportionate cost that the proponents predict. Even if the enrollment shift is small, and the resulting increase in costs is insignificant to an employer, the costs will be disproportionate. This conclusion is consistent with the results of WellPoint's experience in its California small group-insurance pool in 2001.

V. The Potential Impact of Domestic Partner Benefits on Rising Health-Care Costs

Health-care costs appear to be spiraling out of control. According to a 2001 survey, monthly premiums for employer-sponsored health insurance rose 11 percent from spring 2000 to spring 2001. The report also indicated that "premium equivalents for self-insured plans—which are a reflection of underlying health-care costs"—rose 9.5 percent during the same period. The report suggests that the rise in self-insured plan costs indicates that employers can expect higher premium increases in the coming years.[38] Preliminary data for 2002 indicate that this year's increases will be more extreme.

Prescription drugs are a major driver of the growth in health-care costs. The cost for prescription drugs rose an average of 15.5 percent scross all plan types from 2000 to 2001.[39] And there can be no doubt that the increase in HIV/AIDS cases had something to do with it. The Human Rights Campaign's estimate of from $10,000 to $12,000 annually to treat HIV does not even include the cost of viral load tests that "can cost from $80 to $300 each and must be administered every few months."[40]

The unavoidable adverse selection associated with domestic partner benefits plans will exacerbate health-insurance costs for participating firms. Instead of an 11 percent increase in costs, an employer with a 1 percent shift in enrollment and only 25 percent adverse selection will face an increase of nearly 14 percent in health-care costs. Given this outlook for health-insurance costs, employers should not lightly assume that a decision to adopt domestic partner benefits is inexpensive.

Conclusion

Until health-care costs for domestic partners are tracked separately, as in WellPoint's 2001 review, no one can know for sure how domestic partner benefits policies will affect companies financially. The cost of domestic partner health insurance is almost certain to exceed the cost of insurance for married employees because adverse selection is unavoidable. That excess cost will be passed along to employers and other employees as well.

The bottom line is that a company should not adopt domestic partner benefits without conducting its own analysis. If a company does choose to extend domestic partner benefits, it should track at least the following:

1. The loss ratio for marriages;
2. The loss ratio for domestic partnerships;
3. The loss ratio for same-sex partners compared to opposite-sex partners;
4. The length of time between adding a partner to an employee's benefits plan and the first major medical expense.

ENDNOTES

[1] Mark (Denny) Weinberg, "Domestic Partners and the Uninsured Issue," March 1, 2002, e-mail to distribution list. Mark Weinberg is Executive Vice President and Chief Development Officer of WellPoint, Inc.

[2] *Survey Findings: Domestic Partner Benefits 2000*, Hewitt Associates, p. 10.

[3] Sally Kohn, *The Domestic Partnership Organizing Manual for Employee Benefits ("Manual")*, p. 1, The Policy Institute of the National Gay and Lesbian Task Force (1999), www.ngltf.org/downloads/dp/dp_99.pdf. Employers who offer benefits to same-sex and opposite-sex domestic partners will experience an enrollment shift at the higher end of the range. Human Rights Campaign Worknet (HRC), *How to Achieve Domestic Partner Benefits in Your Workplace*, www.hrc.org/worknet/dp/dptool.pdf.

[4] *Domestic Partner Benefits 2000*, p. 27.

[5] *Ibid.*, p. 15.

[6] *Manual*, p. 6 (emphasis added).

[7] *Domestic Partner Benefits 2000*, p. 15.

[8] Indeed, when WellPoint reviewed the cost of domestic partner benefits for all couples in 1998, the loss ratio was only 2 percent higher than for married couples. Weinberg e-mail.

[9] *Domestic Partner Benefits 2000*, p. 16.

[10] Steve Doughty, "How Live-in Love Doesn't Last," *Daily Mail* (London), January 16, 2002, p. 7.

[11] Larry L. Bumpass and James A. Sweet, "National Estimates of Cohabitation," *Demography*, 26(4): 615-625, p. 620 (1989).

[12] These results are from a private morbidity study of various population cohorts in the mid-1990's.

[13] Because 8 percent of a randomly selected population accounts for 71 percent of medical claims, each 1 percent of unhealthy individuals accounts for 8.875 percent of total claims, while each 1 percent of healthy individuals accounts for approximately 0.32 percent of claims.

[14] M. V. Lee Badgett, Ph.D., "Calculating Costs with Credibility: Health Care Benefits for Domestic Partners," *Angles*, 5(1): 1-8, p. 1 (November 2000).

[15] Even if domestic partners were classified as a separate group, it would take years to fully understand the financial impact of offering domestic partner coverage because higher claims occur after the new enrollees are added to the plan. Without tracking those costs separately, it is impossible to determine the full cost of domestic partner insurance.

[16] For example, in the late 1980s insurance companies were receiving a surprising number of AIDS-related claims. Lincoln National Reinsurance Company reviewed 125 life insurance claims where AIDS was the cause of death and found that 36.8 percent (46) of the claims were *contestable*—a legal process by which an insurer attempts to deny payment of a claim due to misrepresentation, fraud or change in medical condition prior to becoming insured. During the same period of time, only 21 percent of all claims were contestable, thus showing that individuals with known health conditions were apparently seeking insurance benefits. At that time record-keeping was poor because of privacy concerns and because of hesitancy by some physicians to identify AIDS as the cause of death. Lincoln National's medical and research staff said that they did not recognize half the AIDS-related claims. Gabriel L. Shaheen, "AIDS: Pricing and Reserving Considerations," *Record of Society of Actuaries*, 14(3): 1360-1367, p. 1367 (1988).

[17] See endnote 12.

[18] *Domestic Partner Benefits 2000*, p. 17.

[19] Amanda May, "Odd Couples: Wait, are those really straight-looking guys actually together? Nope, they're just fake domestic partners," *New York Magazine*, July 8, 2002, www.nymag.com/page.cfm?page_id=6182. Advocates of domestic partner benefits claim there is no evidence employees have registered domestic partners fraudulently. The fact is that if a domestic partner benefits policy does not limit the reasons for cohabiting, it is not fraudulent to cohabit for the purpose of enabling a friend or partner to obtain benefits. Moreover, in view of the resistance to employer scrutiny of domestic partnerships, it would be surprising if an employer were able to discover that a domestic partner had been registered because of known health issues. *Ibid.* ("The [New York] city clerk's office wouldn't comment on the possibility of fraud. 'We don't know people's personal lives,' snapped one spokesperson").

[20] Gabriel Rotello, *Sexual Ecology: AIDS and the Destiny of Gay Men*, New York: Penguin, 1998; John R. Diggs, Jr., M.D., *The Health Risks of Gay Sex* (Corporate Resource Council, 2002).

[21] Elianna Marziani, "AIDS Infection Back at '80s Level," *The Washington Times*, June 1, 2001, p. 1.

[22] *Ibid.*

[23] Eighty-three percent of AIDS cases among adults and adolescents occur in men. "Basic Statistics," Centers for Disease Control—Division of HIV/AIDS Prevention, June 2001, www.cdc.gov/hiv/stats.htm (total of 784,032 adult and adolescent cases, with 649,186 cases in males).

[24] *Ibid.* Eight percent of this total number of AIDS cases in men includes men who also inject drugs.

[25] "HIV/AIDS Surveillance Report: U.S. HIV and AIDS cases reported through December 2000 (year-end edition)," Centers for Disease Control and Prevention, 12(2), p. 18, Table 9, www.cdc.gov/hiv/stats/hasr1202.pdf.

[26] Walt Odets, Ph.D., "Psychosocial and Educational Challenges for the Gay and Bisexual Male Communities," a report to the American Association of Physicians for Human Rights, AIDS Prevention Summit, Dallas, Texas, July 15-17, 1994.

[27] Badgett, pp. 3-4 (citing a report from 1992, when there were very few employers offering domestic partner benefits).

[28] Jeffrey Satinover, M.D., *Homosexuality and the Politics of Truth*, p. 57, Grand Rapids: Baker Book House, 1996.

[29] HRC, *HIV/AIDS Drugs*, October 2001, www.hrc.org/issues/hiv%5Faids/background/drugs.asp. With an average period of 8-11 years from HIV infection to development of AIDS-related symptoms, it is likely that costs may exceed $90,000 for each person who undergoes HIV treatment. The CDC estimates that there are approximately 40,000 new HIV infections in the United States each year, and that 42 percent of those infections—16,800—occur in men who have sex with men. CDC HIV/AIDS Update as of December 2000. Therefore, future HIV treatment expenditures of $1.5 billion are accruing each year just for men who have sex with men (math: $90,000 lifetime HIV treatment costs X 16,800 new HIV infections for men who have sex with men per year).

[30] Diggs, 2002. The increased risk of domestic violence applies to heterosexual domestic partners as well. Linda J. Waite and Maggie Gallagher, *The Case for Marriage: Why Married People are Happier, Healthier and Better-Off Financially*, pp. 155-56, New York: Doubleday, 2000.

[31] Domestic violence costs corporations from $3 to $5 billion annually. Beth McConnell, "Bill Would Guarantee Abused Workers' Rights," *HR News*, 20(10): 1,13, p. 1 (October 2001).

[32] The likely increased cost is highlighted by the Gay and Lesbian Medical Association's publication of a 481-page manual that describes health problems unique to gays, lesbians, bisexuals and transgendered people. *Healthy People 2010, Companion Document for Lesbian, Gay, Bisexual, and Transgender (LGBT) Health*, Gay and Lesbian Medical Association, available at www.glma.org. The one area where married employees' spouses may have higher medical costs is pregnancy. However, pregnancy costs for married women certainly did not equal the costs of insuring same-sex couples in WellPoint's California small group pool in 2001.

[33] Badgett, p. 4.

[34] Appendix, Table 2.

[35] Appendix, Table 3

[36] Appendix, Table 4.

[37] Richard K. Kischuk, "Dealing with Unexpected Changes in Health Care Environment," *Record of Society of Actuaries*, 13(1): 404-413, p. 408 (1987).

[38] *Survey of Employer-Sponsored Health Benefits: 2001 Summary of Findings*, p. 1, Kaiser Family Foundation and Health Research and Educational Trust.

[39] *Ibid.*

[40] HRC, *HIV/AIDS Drugs*, October 2001.

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APPENDIX

Table 1

Model Ignoring Adverse Selection[1]

Enrollment Rate	New DPs (20,000 EEs)	Premium Pd. by Co.	Impact on Plan Costs	Total Cost (Incl. FICA tax)	% Change in total costs
0.50%	100	$4,250	$425,000	$457,513	0.36%
1.00%	200	$4,250	$850,000	$915,025	0.72%
1.50%	300	$4,250	$1,275,000	$1,372,538	1.08%
2.00%	400	$4,250	$1,700,000	$1,830,050	1.44%

Table 2

Model Showing Impact of Adverse Selection Rate @ 10%[2]

Enrollment Rate	New DPs (20,000 EEs)	Anti-Selection Percentage	Assume 10% Anti-Selection	Impact on Plan Costs[3]	Total Cost[4] (Incl. FICA tax)	% Change in total costs
0.50%	100	10%	10	$565,781	$1,023,294	0.80%
1.00%	200	10%	20	$1,131,563	$2,046,588	1.61%
1.50%	300	10%	30	$1,697,344	$3,069,881	2.41%
2.00%	400	10%	40	$2,263.125	$4,093,175	3.21%
5.00%	1000	10%	100	$5,657,813	$10,232,938	8.03%

Table 3

Model Showing Impact of Adverse Selection Rate @ 25%

Enrollment Rate	New DPs (20,000 EEs)	Anti-Selection Percentage	Assume 25% Anti-Selection	Impact on Plan Costs	Total Cost (Incl. FICA tax)	% Change in total costs
0.50%	100	25%	25	$1,414,453	$1,871,966	1.47%
1.00%	200	25%	50	$2,828,906	$3,743,931	2.94%
1.50%	300	25%	75	$4,243,359	$5,615,897	4.40%
2.00%	400	25%	100	$5,657,813	$7,487,863	5.87%
5.00%	1000	25%	250	$14,144,531	$18,719,656	14.68%

Table 4

Model Showing Impact of Adverse Selection Rate @ 50%

Enrollment Rate	New DPs (20,000 EEs)	Anti-Selection Percentage	Assume 50% Anti-Selection	Impact on Plan Costs	Total Cost (Incl. FICA tax)	% Change in total costs
0.50%	100	50%	50	$2,828,906	$3,286,419	2.58%
1.00%	200	50%	100	$5,657,813	$6,572,838	5.16%
1.50%	300	50%	150	$8,486,719	$9,859,256	7.73%
2.00%	400	50%	200	$11,315,625	$13,145,675	10.31%
5.00%	1000	50%	500	$28,289,063	$32,864,188	25.78%

APPENDIX ENDNOTES

[1] This model (based on M.V. Lee Badgett's assumptions) of a firm with 20,000 employees shows the relationship between enrollment rates (number of people enrolling their domestic partners in the plan) and the change in total costs. The model assumes that the employer is paying 85 percent of the premium costs annually ($5,000 est.) and paying the 7.65 percent FICA tax on employer-paid health insurance premiums. The portion of employer-paid health insurance premiums is considered taxable income to the employee (domestic partner employee) and is subject to the company FICA contribution on 100 percent of the imputed income. It also assumes that the cost for married employees is "individual-plus-one," or the cost of two single people, and that one half of the employees are married.

[2] The adverse selection models are based on the same assumptions as the model that ignores adverse selection.

[3] Impact on Plan Costs formula = [(Enrollment Rate %/1%) X 8.875%] X (Total Plan Premiums) X (percentage of individuals with existing health issues added to plan).

[4] Total cost projections (Models Showing Impact of Adverse Selection at various rates) include three components – company portion of premiums paid on behalf of domestic partner employees, FICA tax paid by company related to imputed income to employee and increase in claim costs due to adverse selection.

Appendix G

U.S. Code collection

§ 152. Dependent defined

(a) In general
For purposes of this subtitle, the term "dependent" means—
- **(1)** a qualifying child, or
- **(2)** a qualifying relative.

(b) Exceptions
For purposes of this section—

(1) Dependents ineligible
If an individual is a dependent of a taxpayer for any taxable year of such taxpayer beginning in a calendar year, such individual shall be treated as having no dependents for any taxable year of such individual beginning in such calendar year.

(2) Married dependents
An individual shall not be treated as a dependent of a taxpayer under subsection (a) if such individual has made a joint return with the individual's spouse under section 6013 for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.

(3) Citizens or nationals of other countries

(A) In general
The term "dependent" does not include an individual who is not a citizen or national of the United States unless such individual is a resident of the United States or a country contiguous to the United States.

(B) Exception for adopted child
Subparagraph (A) shall not exclude any child of a taxpayer (within the meaning of subsection (f)(1)(B)) from the definition of "dependent" if—

(i) for the taxable year of the taxpayer, the child has the same principal place of abode as the taxpayer and is a member of the taxpayer's household, and
(ii) the taxpayer is a citizen or national of the United States.

(c) Qualifying child
For purposes of this section—

(1) In general
The term "qualifying child" means, with respect to any taxpayer for any taxable year, an individual—

(A) who bears a relationship to the taxpayer described in paragraph (2),
(B) who has the same principal place of abode as the taxpayer for more than one-half of such taxable year,
(C) who meets the age requirements of paragraph (3), and

(D) who has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins.

(2) Relationship

For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if such individual is—

(A) a child of the taxpayer or a descendant of such a child, or

(B) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative.

(3) Age requirements

(A) In general

For purposes of paragraph (1)(C), an individual meets the requirements of this paragraph if such individual—

(i) has not attained the age of 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, or

(ii) is a student who has not attained the age of 24 as of the close of such calendar year.

(B) Special rule for disabled

In the case of an individual who is permanently and totally disabled (as defined in section 22 (e)(3)) at any time during such calendar year, the requirements of subparagraph (A) shall be treated as met with respect to such individual.

(4) Special rule relating to 2 or more claiming qualifying child

(A) In general

Except as provided in subparagraph (B), if (but for this paragraph) an individual may be and is claimed as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is—

(i) a parent of the individual, or

(ii) if clause (i) does not apply, the taxpayer with the highest adjusted gross income for such taxable year.

(B) More than 1 parent claiming qualifying child

If the parents claiming any qualifying child do not file a joint return together, such child shall be treated as the qualifying child of—

(i) the parent with whom the child resided for the longest period of time during the taxable year, or

(ii) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.

(d) Qualifying relative

For purposes of this section—

(1) In general

The term "qualifying relative" means, with respect to any taxpayer for any taxable year, an individual—

(A) who bears a relationship to the taxpayer described in paragraph (2),

(B) whose gross income for the calendar year in which such taxable year begins is less than the exemption amount (as defined in section 151 (d)),

(C) with respect to whom the taxpayer provides over one-half of the individual's support for the calendar year in which such taxable year begins, and

(D) who is not a qualifying child of such taxpayer or of any other taxpayer for any taxable year beginning in the calendar year in which such taxable year begins.

(2) Relationship

For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if the individual is any of the following with respect to the taxpayer:

(A) A child or a descendant of a child.
(B) A brother, sister, stepbrother, or stepsister.
(C) The father or mother, or an ancestor of either.
(D) A stepfather or stepmother.
(E) A son or daughter of a brother or sister of the taxpayer.
(F) A brother or sister of the father or mother of the taxpayer.
(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to section 7703, of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.

(3) Special rule relating to multiple support agreements

For purposes of paragraph (1)(C), over one-half of the support of an individual for a calendar year shall be treated as received from the taxpayer if—

(A) no one person contributed over one-half of such support,
(B) over one-half of such support was received from 2 or more persons each of whom, but for the fact that any such person alone did not contribute over one-half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such calendar year,
(C) the taxpayer contributed over 10 percent of such support, and
(D) each person described in subparagraph (B) (other than the taxpayer) who contributed over 10 percent of such support files a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such person will not claim such individual as a dependent for any taxable year beginning in such calendar year.

(4) Special rule relating to income of handicapped dependents

(A) In general

For purposes of paragraph (1)(B), the gross income of an individual who is permanently and totally disabled (as defined in section 22 (e)(3)) at any time during the taxable year shall not include income attributable to services performed by the individual at a sheltered workshop if—

(i) the availability of medical care at such workshop is the principal reason for the individual's presence there, and
(ii) the income arises solely from activities at such workshop which are incident to such medical care.

(B) Sheltered workshop defined

For purposes of subparagraph (A), the term "sheltered workshop" means a school—

(i) which provides special instruction or training designed to alleviate the disability of the individual, and
(ii) which is operated by an organization described in section 501 (c)(3) and exempt from tax under section 501 (a), or by a State, a possession of the United States, any political subdivision of any of the foregoing, the United States, or the District of Columbia.

(5) Special rules for support

For purposes of this subsection—

(A) payments to a spouse which are includible in the gross income of such spouse under section 71 or 682 shall not be treated as a payment by the payor spouse for the support of any dependent, and
(B) in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

(e) Special rule for divorced parents, etc.

(1) In general
Notwithstanding subsection (c)(1)(B), (c)(4), or (d)(1)(C), if—

(A) a child receives over one-half of the child's support during the calendar year from the child's parents—

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and—

(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.

(2) Exception where custodial parent releases claim to exemption for the year
For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if—

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

(3) Exception for certain pre-1985 instruments

(A) In general
For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if—

(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and

(ii) the noncustodial parent provides at least $600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

(B) Qualified pre-1985 instrument
For purposes of this paragraph, the term "qualified pre-1985 instrument" means any decree of divorce or separate maintenance or written agreement—

(i) which is executed before January 1, 1985,

(ii) which on such date contains the provision described in subparagraph (A)(i), and

(iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

(4) Custodial parent and noncustodial parent
For purposes of this subsection—

(A) Custodial parent
The term "custodial parent" means the parent having custody for the greater portion of the calendar year.

(B) Noncustodial parent
The term "noncustodial parent" means the parent who is not the custodial parent.

(5) Exception for multiple-support agreement
This subsection shall not apply in any case where over one-half of the support of the child is treated as having been received from a taxpayer under the provision of subsection (d)(3).

(6) Special rule for support received from new spouse of parent
For purposes of this subsection, in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

(f) Other definitions and rules
For purposes of this section—
(1) Child defined
(A) In general
The term "child" means an individual who is—
(i) a son, daughter, stepson, or stepdaughter of the taxpayer, or
(ii) an eligible foster child of the taxpayer.
(B) Adopted child
In determining whether any of the relationships specified in subparagraph (A)(i) or paragraph (4) exists, a legally adopted individual of the taxpayer, or an individual who is lawfully placed with the taxpayer for legal adoption by the taxpayer, shall be treated as a child of such individual by blood.
(C) Eligible foster child
For purposes of subparagraph (A)(ii), the term "eligible foster child" means an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.
(2) Student defined
The term "student" means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins—
(A) is a full-time student at an educational organization described in section 170 (b)(1)(A)(ii), or
(B) is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational organization described in section 170(b)(1)(A)(ii) or of a State or political subdivision of a State.
(3) Determination of household status
An individual shall not be treated as a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.
(4) Brother and sister
The terms "brother" and "sister" include a brother or sister by the half blood.
(5) Special support test in case of students
For purposes of subsections (c)(1)(D) and (d)(1)(C), in the case of an individual who is—
(A) a child of the taxpayer, and
(B) a student,
amounts received as scholarships for study at an educational organization described in section 170 (b)(1)(A)(ii) shall not be taken into account.
(6) Treatment of missing children
(A) In general
Solely for the purposes referred to in subparagraph (B), a child of the taxpayer—
(i) who is presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the family of such child or the taxpayer, and
(ii) who had, for the taxable year in which the kidnapping occurred, the same principal place of abode as the taxpayer for more than one-half of the portion of such year before the date of the kidnapping,
shall be treated as meeting the requirement of subsection (c)(1)(B) with respect to a taxpayer for all taxable years ending during the period that the child is kidnapped.
(B) Purposes

Subparagraph (A) shall apply solely for purposes of determining—

(i) the deduction under section 151 (c),

(ii) the credit under section 24 (relating to child tax credit),

(iii) whether an individual is a surviving spouse or a head of a household (as such terms are defined in section 2), and

(iv) the earned income credit under section 32.

(C) Comparable treatment of certain qualifying relatives

For purposes of this section, a child of the taxpayer—

(i) who is presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the family of such child or the taxpayer, and

(ii) who was (without regard to this paragraph) a qualifying relative of the taxpayer for the portion of the taxable year before the date of the kidnapping, shall be treated as a qualifying relative of the taxpayer for all taxable years ending during the period that the child is kidnapped.

(D) Termination of treatment

Subparagraphs (A) and (C) shall cease to apply as of the first taxable year of the taxpayer beginning after the calendar year in which there is a determination that the child is dead (or, if earlier, in which the child would have attained age 18).

(7) Cross references

For provision treating child as dependent of both parents for purposes of certain provisions, see sections 105 (b), 132 (h)(2)(B), and 213 (d)(5).

Appendix H

QUEENS UNIVERSITY OF CHARLOTTE

Declaration of Domestic Partnership

Statement of Domestic Partnership

We, __________________________ (employee) and __________________________ (domestic partner), state that we are domestic partners in accordance with the criteria below and apply for eligibility in select employee benefits plans as exclusively determined by Queens University of Charlotte.

Certification of Domestic Partnership

- We will have been each other's sole domestic partner for at least twelve (12) months at the time benefits coverage is effective.
- We are currently each other's sole domestic partner and intend to remain so indefinitely.
- We are at least 18 years of age and mentally competent to consent to a legally binding contract.
- We share the same primary residence and intend to do so indefinitely.
- We are of the same gender and neither one of us is legally married to another person.
- We are not related by blood to a degree of closeness which would prohibit legal marriage in the state in which we legally reside.
- We are jointly responsible for each other's common welfare and share financial obligations.
- We can and will, upon request, demonstrate our joint responsibility for each other's common welfare and financial obligations by providing proof of the existence, for a minimum of twelve (12) months preceding the execution of this declaration, of at least three of the following:

Joint mortgage or lease or other written evidence of common residence, such as joint utility bills

Joint checking account

Joint credit account

Joint ownership of motor vehicle

Designation of domestic partner as primary beneficiary in will

Designation of domestic partner as primary beneficiary of life insurance policy or retirement plan funds

Durable property or health care power of attorney

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QUEENS UNIVERSITY
OF CHARLOTTE

Declaration of Domestic Partnership

Termination of Domestic Partnership

We agree to notify the University's Office of Human Resources in writing if there are any changes in our status as domestic partners, as stated in this declaration, which may make the domestic partner no longer eligible for University benefits. We understand that the University will send a copy of this written documentation to the domestic partner if eligibility for benefits is terminated. We agree to notify the University within 30 days of this change in status. We understand that coverage for the former partner of the University employee will terminate under the University's active employee health coverage on the last day of the month that eligibility for that coverage ceased.

I, __________________________ (employee), understand that a subsequent Declaration of Domestic Partnership cannot be filed until at least twelve (12) months after termination of the domestic partnership established by this Declaration.

Financial Implications

We, __________________________ (employee) and __________________________ (domestic partner), understand that the employee may incur additional tax obligations as a result of the coverage of the domestic partner, and that the University may be required to report as income and withhold additional taxes from the employee's paycheck based on the value of the benefits. We understand that the tax implications for adding a domestic partner can be complicated, and that we should consult a tax advisor prior to electing domestic partner benefits coverage.

We also understand that, as a result of a false statement in this Declaration by either declarant, the University reserves the right to take any and all actions necessary to recover sums for benefits to which a person was not entitled and to take disciplinary action up to and including termination of employment.

Acknowledgement

We, __________________________ (employee) and __________________________ (domestic partner), declare under penalty of perjury that the statements above are true and correct.

____

Employee's/Domestic Partner's Home Address

________________________________ ________________________________

Employee's Signature/Date Domestic Partner's Signature/Date

Received by Queens University of Charlotte Human Resources Office:

__________________________ __________________________ __________

Signature Title Date

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Policies and Procedures

Domestic Partners

Queens University of Charlotte is committed to equal and nondiscriminatory treatment for employees in the administration of benefits programs, including the extension of benefits to same-gender domestic partners. A domestic partnership, for the purposes of this policy, is defined as a committed relationship between two adults of the same gender, which meets the criteria described in the Queens University of Charlotte Declaration of Domestic Partnership. Documentation may be required to verify that the criteria are met. A completed Declaration of Domestic Partnership must be submitted to the Office of Human Resources in order to establish eligibility for domestic partner benefits.
The following benefits are extended to eligible employees and their domestic partners:

- Medical and Dental Insurance
- Supplemental Life Insurance
- Tuition Remission
- Bereavement Leave
- Sick Leave
- Family and Medical Leave

Employee eligibility and terms and conditions of the benefits above are governed by the current University policies regarding the provision of those benefits to spouses.
In addition to coverage for a domestic partner, employees may also elect coverage for the qualified child(ren) of a domestic partner. The dependent child(ren) of a domestic partner are eligible for coverage if they are:

In the custody and care of and legally dependent on the same-gender domestic partner

A member of the household of the employee or, maintain the employee's home as a primary residence while living away from home in order to be a full-time student

Claimed as a dependent on the employee's or partner's most recent tax return

The employee must inform the Office of Human Resources in writing within 30 days of the dissolution of a declared domestic partnership. A copy of this documentation will be forwarded to the former partner and eligibility will be terminated. Another Declaration of Domestic Partnership cannot be filed until twelve (12) months after termination of the previous declared domestic partnership.

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MECKLENBURG COUNTY

Human Resources Policy & Procedures

BENEFITS

Domestic Partner Benefits

Mecklenburg County offers the following benefits for domestic partners and their dependent children based on qualifications as stated herein. Participation in the program will be held in confidence and not available as public record.

- Medical and Dental Insurance
- Vision Insurance
- Life (Basic & Supplemental) Insurance
- Cancer Insurance
- Accident Insurance
- Bereavement Leave
- Sick Leave
- FMLA
- COBRA

I. Eligibility

Mecklenburg County employees may apply for domestic partner benefits:

- If currently covered under the County's health and dental benefits plans, and;
- Upon submission of a signed notarized Affidavit of Domestic Partnership, certifying the employee and domestic partner meet the requirements defined in this policy.

Important Note: This policy and the Affidavit of Domestic Partnership do not expand eligibility as an employee or retiree. For example, eligibility under the medical and dental plans is still controlled by the eligibility requirements and rules of each plan. For medical coverage, if the domestic partner is covered by another health care plan, coordination of benefit requirements will apply to the domestic partner the same as a spouse with coverage under another plan.

II. Important Definitions

To assist in understanding Mecklenburg County's domestic partner benefits, important terms and definitions are described below:

Affidavit – An affidavit is a sworn statement in writing, made before a notary public.

Domestic Partner – Mecklenburg County defines domestic partners as two ***(SAME SEX) (OPPOSITE SEX) (NO DESIGNATION)*** people living together in a long-term relationship and who meet **all** of the following requirements for at least the last 12 months:

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- Live in a spousal-like relationship and intend to remain each other's domestic partner indefinitely;
- Reside together in the same permanent residence;
- Are emotionally committed to one another and are jointly responsible for the common welfare and financial obligations of the household, or the domestic partner is chiefly dependent upon the employee for care and financial assistance;
- Are not legally married or separated and are not the domestic partner of anyone else;
- Are not related by blood closer than would bar marriage under applicable law, and;
- Are both at least 18 years of age and mentally competent to enter into a legal contract.
- Can provide Proof of any three of the following commitments:
    - Joint mortgage, lease or ownership of property
    - Designation as beneficiary of a life insurance policy
    - Assignment of durable "Power of Attorney"
    - Joint ownership of a motor vehicle
    - Joint checking account
    - Joint ownership of investments
    - Joint responsibility of debts

Eligible Dependents of Domestic Partners – Children of domestic partners may also be covered if they meet the definition of an eligible dependent. Eligible dependents include natural, adopted, step and foster children and the children of the domestic partner as long as they meet all of the following criteria:

- Unmarried;
- Receive more than 50%, of their support from the employee;
- Live in the employee's household as their principle place of residence (unless they live at school, or live elsewhere as a result of divorce or separation);
- Not employed on a full-time basis, except on school vacations, and;
- Under age 19 (or under age 25) while a full-time student).

Legal Tax Dependents – Section 152 of the Internal Revenue Code describes when a domestic partner and the domestic partner's child(ren) qualify as tax dependents for the purposes of excluding the value of the County's health and dental benefits from the employee's taxable income (that is when the employee's domestic partner and/or partner's children are the employee's "legal tax dependents"). To be legal dependents, a domestic partner and the partner's children must meet all of the following criteria:

- Be citizens, nationals or residents of the United States;
- Live with the employee as a member of the employee's household;
- Receive over half of their support from the employee for the calendar year.

To claim a domestic partner or partner's child as a dependent on an employee's federal income tax return for any given calendar year, he or she must all the criteria stated above for the entire calendar year and not earn more than the exemption amount determined under Section 151 (d) of the Code for the applicable calendar year.

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III. Affidavit of Domestic Partnership

An Affidavit of Domestic Partnership may be obtained by calling the Human Resources department or by accessing myHR where a copy of the document may be printed.

By signing the Affidavit of Partnership before a notary public, the employee and partner attest to a series of statements, meeting the qualified requirements, which establish your relationship and signify acceptance of the terms.

Signing The Affidavit of Partnership makes the employee eligible to enroll the partner and the partner's children for benefits, if the employee already has benefit coverage. It also designates the domestic partner or the partner's children as the employee's survivors, making them eligible to receive certain benefits upon the employee's death.

Signing The Affidavit of Partnership does not automatically enroll the employee's domestic partner in the County's benefit plan. It also does not automatically name the domestic partner as beneficiary of the of life insurance, 401(k), 457 Plan, or Joint and Survivor option under the NC Local Governmental Employees Retirement System (NCLGERS).

The employee and the domestic partner will need to provide the information requested on The Affidavit of Partnership and sign it in the presence of a notary public. (Contact the Human Resources department to determine the status of in-house resources.) The employee shall send the notarized original to Human Resources for confidential retention, and maintain a copy of the document for personal records. The Affidavit of Partnership remains valid until the employee notifies Human Resources of a change.

If the employee is vested in NCLGERS at the time of his/her death, and has designated the domestic partner as beneficiary, the domestic partner is eligible for the Joint and Survivor Pension Benefit, even if the employee does not enroll the domestic partner in health or dental benefits.

IV. Change in Benefits Elections

An employee may change elections under some benefits plans during the year if there has been a change in status and the benefit change requested is consistent with the status change. All changes in benefit status must be made within 30 days of the event. Examples of changes in status include but are not limited to:

- Signing and filing an Affidavit of Domestic Partnership;
- Ending the domestic partnership by filing a Statement of Termination of Domestic Partnership;
- Birth or adoption of a child (employee's child and/or partner's child);
- A child loses dependent status;
- The domestic partner attains or loses on-the-job health care coverage;
- Legal marriage.

The employee should contact Human Resources following any change in status. Otherwise, changes cannot be made for the rest of the year, or until Open Enrollment.

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V. If The Domestic Partner is an Employee of Mecklenburg County

If an employee's domestic partner is also an employee of Mecklenburg County, coverage cannot occur concurrently as both employee and dependent under health and dental insurance.
If there are no dependent children, the employee has two (2) options:

- Employee can be covered as a dependent under the domestic partner's coverage. The employee must then drop his/her own coverage.
- Each may select single, employee only coverage in the respective plans.

If either have eligible dependent children, this allows for family coverage under Husband/Wife rates, but only one will make that election.

VI. Impact on Reported Income

Under the Internal Revenue Code, the total cost (County portion and employee portion of the insurance premium) of health and/or dental insurance to cover the domestic partner and/or the dependents of the domestic partner which is in excess of the total cost of the coverage for the employee only, may be considered taxable income to the employee. This income will be subject to federal tax, FICA, state and local taxes as well as any other applicable payroll tax that may apply.

In addition, the portion of the health or dental premium paid by the employee, as a result of adding a domestic partner and/or dependents of the domestic partner, which is in excess of the premium otherwise paid by the employee, will be deducted on an after tax basis from the employee's pay check.

An Exception to the Rule:
If the employee's domestic partner and/or his/her children qualify as the employee's legal dependents, the employee will not be taxed on the money spent for their health and dental insurance premiums. Employees should read Section II (Legal Tax Dependents) for more details.

VII. End of Relationship

Should the employee or the domestic partner no longer meet all the requirements of a domestic partner as described in Section II, the two are no longer considered to be domestic partners, and the former domestic partner and his/her dependents are no longer eligible for County benefits. The employee must complete and submit a Statement of Termination of Domestic Partnership. This form will revoke the Affidavit of Domestic Partnership. The employee has 30 days from the date the Statement of Termination of Domestic Partnership was signed to contact Human Resources to make changes to benefits coverage.

Employees should review their beneficiary designations to determine if the appropriate person is named for Life insurance and the survivor benefit from the NCLGERS.
Once the partnership has been terminated, the employee must again meet all of the requirements set forth within this policy, including the 12 consecutive months, before filing another Affidavit of Domestic Partnership with the same or different partner.

VIII. In the Event of the Domestic Partner's Death

In the event of the domestic partner's death, the employee must notify the Human Resources Department within 30 days of the occurrence.

IX. Continuation of Coverage

Domestic partners and their dependents lose eligibility for coverage when any one of the requirements for domestic partnerships is not met. COBRA rights **do not** apply to former domestic partners and/or their dependents.

X. Enrollment

A copy of the Affidavit of Domestic Partnership may be obtained by contacting Human Resources or by downloading and printing from myHR. The affidavit may be filed at any time during the year when the domestic partnership requirements have been met. Enrollment in domestic partner coverage must occur within 30 days of signing the affidavit. Otherwise, the employee must wait until the next benefits annual open enrollment. The employee's current elections will be effective through the end of the current year.

Sample policy format based on existing City of Greensboro Domestic Partner Benefits policy.

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MECKLENBURG COUNTY HUMAN RESOURCES
EMPLOYEE BENEFITS PLAN

AFFIDAVIT OF DOMESTIC PARTNERSHIP

We, ______________________________ (The Employee) and ____________________________
(Full Name) (Full Name)

(The Domestic Partner) certify that we are domestic partners in accordance with the following criteria and eligible for benefits coverage under the Mecklenburg County Benefits plan. We certify that we meet **all** of the following requirements for at least the last 12 months:

- Live in a spousal-like relationship and intend to remain each other's domestic partner indefinitely;
- Reside together in the same permanent residence;
- Are emotionally committed to one another and are jointly responsible for the common welfare and financial obligations of the household, or the domestic partner is chiefly dependent upon the employee for care and financial assistance;
- Are not legally married or separated and are not the domestic partner of anyone else;
- Are not related by blood closer than would bar marriage under applicable law, and;
- Are both at least 18 years of age and mentally competent to enter into a legal contract.

Our joint responsibility is demonstrated by the existence of the following three (3) documentations:

Joint mortgage, lease or ownership of property
Designation as beneficiary of a life insurance policy
Assignment of durable "Power of Attorney"
Joint ownership of a motor vehicle
Joint checking account
Joint ownership of investments
Joint responsibility of debts

We understand that Mecklenburg County reserves the right to verify our joint responsibility, and agree to provide evidence of joint responsibility upon request could result in disciplinary action or termination from Mecklenburg County.

Employee does not have a domestic partner covered under the Mecklenburg County benefits plan and has not had a domestic partner covered under the benefits plan within the last twelve (12) months.

State of ___________________
County of__________________
Sworn to before me this day of
___________________, 20_______

____
Signature

____
Date

____
Notary

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MECKLENBURG COUNTY HUMAN RESOURCES
EMPLOYEE BENEFITS PLAN

AFFIDAVIT OF TERMINATION OF DOMESTIC PARTNERSHIP

Declaration

I, ______________________________ (Employee), certify that on or about ________________, 20______, the Domestic Partner relationship between myself and __________________________ (Domestic Partner) has dissolved.

Domestic Partner Dissolution
A Domestic Partnership ends when:

- The Partners are no longer each other's sole Domestic Partner, or;
- The Partners no longer share the same common residence(s), or;
- The Partners no longer assume mutual obligations for the welfare and support of each other, or;
- One of the Partners dies.

I acknowledge that we no longer meet the criteria set for in the Affidavit of Domestic Partnership form, and we will no longer be considered Domestic Partners.

I also acknowledge that I will send a copy of this notarized Affidavit of Termination of Domestic Partnership form to my former Domestic Partner on ________________________, 20_____ at the following address:

____
Street Address

____
City, State, Zip Code

Other Acknowledgements
I declare, under penalty of perjury, that all of the information I have provided on this form is true and correct. I, the Employee, understand that nay false or misleading statement made will subject me to disciplinary action up to and including termination of employment and possible charges of fraud.

Employee Information

____
Name (printed)

____
Social Security Number

____
Signature

____
Date

State of ____________________
County of__________________
Sworn to before me this day of
______________________, 20_______

____
Notary

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