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2005

### **Same Sex Marriage and Its Implications for Employee Benefits: Proceedings of the 2005 Meeting of the Association of American Law Schools Sections on Employee Benefits, and Sexual Orientation and Gender Identity Issues**

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SAME SEX MARRIAGE AND ITS IMPLICATIONS FOR  
EMPLOYEE BENEFITS: PROCEEDINGS OF THE 2005  
MEETING OF THE ASSOCIATION OF AMERICAN LAW  
SCHOOLS SECTIONS ON EMPLOYEE BENEFITS, AND  
SEXUAL ORIENTATION AND GENDER IDENTITY ISSUES

**Professor Maria O'Brien Hylton\***: Welcome to this session on "Same Sex Marriage and its Implications for Employee Benefits." I'm Maria Hylton and I will introduce our speakers and moderate the program.

Our first speaker is Constance Hiatt, who is a partner with the Hanson Bridgett law firm here in San Francisco. She represents mostly large employers and large employee benefit plans, including the State of California's 401(k) and 457 plans as well as the University of California's benefits office. So, she has extensive experience in the employee benefits area and she came to us, to me really, through several very well known ERISA lawyers who are active in the ABA. When I was calling around last year trying to find a fabulous and dynamic speaker, everybody said Constance Hiatt, if you can get her, So, we got her.

Our second speaker is Shannon Minter. He is the legal director of the National Center for Lesbian Rights also based here in San Francisco. This is an organization that is the leading advocacy organization for lesbian, gay, bi-sexual and transgender individuals. He was the lead attorney on Sharon Smith's groundbreaking wrongful death suit,<sup>1</sup> and has litigated a variety of other important impact cases in California as well as in other parts of the country.

Our third speaker is Professor Teresa Collett. She's a professor of law at the University of St. Thomas School of Law in Minnesota, where she specializes in constitutional law, legal ethics, and church-state relations. She has published numerous law review articles on these topics and she recently testified before the United States Senate

\* Professor of Law, Boston University School of Law.

1. *Smith v. Knoller*, No. 319532 (Cal. Super. Ct. Aug. 9, 2001) (order overruling demurer and denying motion to strike), *available at* <[http://www.nclrights.org/publications/pubs/smith\\_order.pdf](http://www.nclrights.org/publications/pubs/smith_order.pdf)>. (visited Nov. 29, 2005).

Judiciary Committee in favor of the Federal Marriage Amendment.<sup>2</sup> That's as succinct as I can be with each of these three extremely impressive individuals.

Let me mention one other thing before Connie makes it up here to the podium. The session today is co-sponsored with the AALS Section on Sexual Orientation and Gender Identity Issues. Elvia Areola is the chair of that section, and I just want to publicly thank her for all of her help. She was extremely critical in our working our way to Mr. Minter today and for that I am very grateful.

**Constance Hiatt\***: Thank you so much for that kind introduction. I have practiced in the field of employee benefits law for sixteen years, working mainly with large employers on issues related to pension plans, health care plans and the like. Today, we're going to talk about domestic partner benefits. I think the title of the program was same sex marriage. I generally refer to it as domestic partner benefits just because it's easier to focus on the benefits aspect.

Why do employers give employees domestic partner benefits? A lot of large employers offer domestic partner benefits in today's environment and there are three main reasons. First is to attract and retain good employees. It's a competitive edge, particularly in California. It's also true, I think, in many university settings and certainly true in the tech industry. Additionally, some employers are required either by law, by contract or by bargaining agreements to provide domestic partner benefits. There may be a legal reason to provide the benefit. Finally, and certainly not in the order of importance, is the civil rights and equality issue. There are some employers that think it's the right thing to do.

On the other side, some employers worry about the cost of providing domestic partner benefits. My clients have told me, at least anecdotally, that there is no significant increase in cost because, in fact, not a lot of people sign up for domestic partner benefits. It's usually a fairly small percentage, but nonetheless, some employers worry about that.

To really do justice to the discussion about domestic partner benefits you have to talk about the Employee Retirement Income

2. *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Hearings Before the Senate Comm. On the Judiciary* (March 23, 2004) (testimony of Prof. Teresa Collett), available at <[http://judiciary.senate.gov/testimony.cfm?id=1118&wit\\_id=3183](http://judiciary.senate.gov/testimony.cfm?id=1118&wit_id=3183)> (visited Nov. 29, 2005).

\* Partner, Hanson Bridgett, San Francisco, California.

Security Act of 1974 (ERISA).<sup>3</sup> ERISA was a remedial statute, enacted to right wrongs. A key thing to remember is that in the 1950s and '60s there were long time employees at factories and automobile manufacturing plants, who lost employment when plants closed and also lost their pension benefits. Congress enacted ERISA to protect benefits that were offered by employers. One important point is that ERISA doesn't require that any employer offer any benefits. It's still a voluntary system and that's an important background note to remember in connection with domestic partner benefits. Employers don't have to offer pension plans or health and welfare benefits plans to employees, to spouses, to domestic partners, but if they do offer these benefits, ERISA will govern how the benefits are offered and administered.

Another key point to remember is preemption. To get the business community to support ERISA, Congress had to give them a carrot and the big carrot was preemption. If employers offer benefits, they only have to comply with federal law, not fifty different state laws that regulate employee benefits. The idea of consistency and uniformity was key to large employers. Section 514 of ERISA says that ERISA supersedes any and all state laws relating to employee benefits.<sup>4</sup> That's a key concept when we're talking about domestic partner benefits, particularly in the states that have granted special rights. An important exception to ERISA preemption provides that state insurance laws, banking laws and security laws are not preempted.<sup>5</sup> For purposes of domestic partner benefits, all state laws except insurance laws are going to be preempted. What that means is that a state can still require insurance products to offer domestic partner benefits even though employers may or may not be required to offer them in a self-funded plan.

Who is not covered by ERISA? Governmental employers, which in California is a very large part of the marketplace, are not covered by ERISA.<sup>6</sup> Additionally, most church plans are not covered by ERISA.<sup>7</sup> So, when we talk about preemption and its application to ERISA benefits, a different set of rules apply for governmental employers. Some employee benefits are not covered by ERISA,

3. 29 U.S.C. §§ 1001 - 1461 (2000).

4. *Id.* § 1144.

5. *Id.* § 1144(b)(2)(A).

6. *Id.* § 1003(b)(1).

7. *Id.* § 1003(b)(2).

such as leave policies, travel, moving expenses and club memberships. If you have a state law that mandates domestic partner benefits those non-ERISA benefits would have to be provided.

To the main point of today's talk, let's talk about same sex marriage. Where can you get it? Federal law is not a supporter of same sex marriage. The Defense of Marriage Act (DOMA)<sup>8</sup> was enacted in 1996 and says marriage is between a man and a woman for purposes of federal law. That has great import for employees benefits, largely because of ERISA and the Internal Revenue Code. Forty-four states have banned same sex marriage, most of them just by adopting the Defense of Marriage Act. That means there are only a handful of states that haven't addressed it or have offered laws that are favorable to domestic partner status. Of the forty-four states that have banned same sex marriage, three have domestic partner laws that offer favorable status and benefits to domestic partners. And there are a couple more that haven't addressed same sex marriage but do have favorable laws. The four states that have laws favorable to domestic partners are Massachusetts, New Jersey, California and Vermont,<sup>9</sup> but Massachusetts is the only state that has same sex marriage. The surprising thing is that such a law has little implication for ERISA covered plans. It's a tax reporting & withholding nuisance.

I practice in California where we have AB205, that's the Domestic Partner Rights and Responsibility Act that provides that domestic partners must have the same benefits, rights, responsibilities and obligations as a spouse.<sup>10</sup> So, that means that employers have to give domestic partners the same benefits as they would give a husband and wife subject to preemption.

Where do these issues arise in the employer's day to day world? The first area is pension plans, your traditional defined benefit plans. There are not a lot of those going into play these days but there are still a few around, particularly in large mature industries and in the governmental sector. But ERISA and the tax laws both have import when it comes to defined benefit plans.

8. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), codified at 1 U.S.C. § 7 & 28 U.S.C. § 1783 (2000).

9. See *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003) (holding that excluding same-sex couples from civil marriage violated state constitutional guarantees of due process and equal protection); Cal. Domestic Partner Rights & Responsibilities Act of 2003, 2003 Cal. A.B. 205, codified at CAL. FAM. CODE §§ 297-199.3 (2004); New Jersey Domestic Partnership Act, 2003 N.J. SESS. LAW SERV. ch. 246; 15 VT. STAT. ANN. tit. 15, §§ 1201-07 (2002).

10. CAL. FAM. CODE § 297.5 (2004).

The first issue one encounters with defined benefit pension plans is survivor benefits. Under ERISA and the Internal Revenue Code, plans have to provide retirement benefits to survivors. If an employee dies before retirement, the surviving spouse gets a pension. If an employee retires, the default form of payment is a joint and survivor annuity in favor of a spouse. The surviving spouse is always primary as the beneficiary.<sup>11</sup> Because of ERISA preemption that's the rule: spouses get survivor benefits. ERISA preemption precludes mandating an ERISA plan to offer domestic partner survivor benefits. So, when you have a California law like AB205 that requires treating an employee with a domestic partner the same as an employee with a spouse, ERISA preempts it and the employer does not have to offer these state-mandated benefits. That's a very important point that employers have to wrestle with. So, ERISA plans don't have to offer the same survivor benefits to a domestic partner as non-ERISA plans.

On the other hand, governmental plans in California do have to offer survivor benefits to domestic partners, if they offer it to spouses. They're not required under any law to offer survivor benefits but many do. So, governmental plans will be affected more heavily by the state mandates for domestic partner benefits.

What if an employer wants to offer survivor benefits to a domestic partner? It has to be secondary to spousal rights. Because of ERISA and the Defense of Marriage Act, the plan has to first provide that in the event of death the surviving spouse will get the survivor benefit. If there is no surviving spouse, then benefits can go to a domestic partner, but employers have to draft their plans carefully to reach that objective. What if participants do not want joint survivor annuities; what if they want to have a joint survivor annuity in favor of someone other than the spouse? Many plans permit that. So, many plans permit a domestic partner to be named as a survivor on a joint survivor annuity and the trick there is that a participant who is married can't name someone else unless the spouse consents. So, the spouse gets first dibs and has to waive that right in writing. If a participant did have a spouse and a domestic partner, the spouse would have to waive the benefit in favor of the domestic partner.

Can a plan require that a domestic partner waive an interest in a

11. See 29 U.S.C. § 1055 (2000).

benefit? It's tricky because it can only apply to future benefits. Under ERISA, you can't restrict benefits that are already accrued.<sup>12</sup> So, if you want to have a plan that says domestic partners will have a default survivor annuity it has to be limited to future accruals. You can't place a new restriction on previously accrued benefits. So, it's complicated for employers to put these benefits into plans; it's doable, but not without some pain.

How about defined contribution plans? They're a little easier regarding domestic partner benefits, because basically ERISA and the tax rules require that those plans pay the account balance to a spouse, if an employee or former employee dies. If the spouse waives the right to the benefit, another beneficiary can be named. Thus, a plan may permit a domestic partner to be named by an unmarried employee, and that's what happens in the practical world, or if the spouse consents, someone else can be named as beneficiary for a married participant. In the practical world, most 401k plans permit unmarried employees to name a beneficiary (married employees can name a non-spouse beneficiary with, spousal consent). Most, employees with domestic partners aren't married so they just name their domestic partners and that's still the preferred practice because it eliminates the chance of multiple claims for benefits. So, if you are dealing with employers who want to offer this benefit, unmarried employees who want to name their domestic partners should do it to a beneficiary designation. Again, governmental plans are not subject to the requirements that the default beneficiary be a spouse.

What are the other areas in which we wrestle regarding domestic partner benefits? A big one that's coming on the horizon is qualified domestic relations orders (QDROs). Divorce is much more popular than many of us ever imagined. Divorce lawyers write up these orders to split up the pension plans because that's a lot of money for a lot of employees. It's a big part of the marital estate or marital property. Under ERISA, QDROs are in favor of a spouse, former spouse, child or dependent.<sup>13</sup> What California did in AB205 is require state courts, when dividing the property accumulated during the life of a domestic partnership to look at the state law for dividing marital property during a marriage. So, it's going to be the same as community property division. That's important because family lawyers are going to start submitting QDROs for domestic partners. What's an ERISA

12. *See id.* U.S.C. § 1054(g).

13. *Id.* § 1056(d)(3)(B)(ii)(I).

plan to do? Well, they're going to say no go because of preemption. Even though an important exception to ERISA preemption is a QDRO,<sup>14</sup> ERISA says we'll leave it to the state court to decide whether something is marital property,<sup>15</sup> whether it's divisible, and whether it's a domestic relations order. So, there is some room to argue a domestic partner could be a beneficiary under a QDRO. However, the specific language of that exception to preemption says it is saved only if it's a QDRO as defined by ERISA,<sup>16</sup> and a QDRO under ERISA is for a spouse, former spouse or dependent.<sup>17</sup> The Defense of Marriage Act comes into play to say that can only be an opposite sex partner in a marriage. So, there's a pretty strong argument that domestic partnership QDROs are not going to apply to ERISA plans. I anticipate litigation on that point. Governmental plans in California will be seeing QDROs for domestic partners and it should operate the same as it does for spouses.

The other types of benefits that are at issue are health and welfare benefits. Most employers, certainly large employers, offer their employees health and welfare benefits and most of those plans cover spouses and other dependents. California law now requires that employers offer domestic partners health coverage under AB205, if coverage is offered to a spouse. Under ERISA, however, a state cannot require an employer to offer a benefit.<sup>18</sup> Nonetheless, governmental employers and insured plans are going to have to provide domestic partner health and welfare benefits in California.

What other issues come up for health and welfare plans? If the employer does offer domestic partner benefits, must it offer COBRA? COBRA stands for the Consolidated Omnibus Budget Reconciliation Act of 1985.<sup>19</sup> Basically, it requires that employers with health plans offer continuation of health coverage if employees lose coverage because they lose their job and offer continuation

14. *Id.* § 1144(b)(7).

15. *Id.*

16. "Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 206(d)(3)(B)(i) [29 U.S.C. § 1056(d)(3)(B)(i)] . . ." 29 U.S.C. § 1144(b)(7) (2000).

17. *Id.*

18. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *McGann v. H. & H. Music Co.*, 946 F.2d 401, 401 (5th Cir. 1991) ("Congress did not intend that ERISA circumscribe employers' control over the content of benefit plans."); *Hamilton v. Air Jamaica, Ltd.*, 945 F.2d 74, 78 (3d Cir. 1991) (holding that ERISA creates no substantive requirements for employee welfare benefit plans and that an employer may provide benefits on a case-by-case basis); *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 603 (7th Cir. 1989).

19. Pub L. No. 99-272, 100 Stat 277 (1985), codified at 29 U.S.C. §§ 1161-68 (2000).



coverage to the family in the event of the employee's death or if there is a divorce.<sup>20</sup> Basically, it says you can tack on eighteen to thirty-six months of coverage on your dime. You have to pay for continued coverage if you lose coverage.<sup>21</sup> It's a great law; employees really like it, except it is expensive. The question is does an employer have to offer continuation coverage to domestic partners? No, unless they are tax dependents. Under federal law, COBRA is only applicable for spouses, dependents and employees.<sup>22</sup> The Defensive of Marriage Act (DOMA) says a spouse has to be an opposite sex married partner, but a domestic partner who is a true tax dependent under Section 152 of the Internal Revenue Code would be eligible for COBRA. To be a tax dependent, the domestic partner has to reside with the employee for the entire year. The employee has to provide over half the support and, this is a new one, the domestic partner can't earn over \$3,100 a year.<sup>23</sup> That knocks a lot of people right out of the park. The IRS subsequently clarified that this income limit does not apply for purposes of identifying "dependents" for health insurance plans.<sup>24</sup> So, there are going to be a lot fewer domestic partners qualifying for tax dependency, although many may still be dependents for purposes of COBRA eligibility.

The question then is can an employer voluntarily offer COBRA to domestic partners? Well, of course, because COBRA is a floor, not a mandate. It specifies minimum coverage; an employer can always offer more. So, many employers do in fact offer continuation coverage to domestic partners and children of domestic partners. Again, government plans in California have to offer continuation coverage to domestic partners.

Last thing, I'm going to cover is the tax consequences. You have domestic partner benefits in your retirement plan or in your health and welfare benefit plan. How do you report these benefits? And, this is what drives a lot of employers nuts because they have to program their systems and it's no small feat. The first thing is for retirement plans. An employee who takes a lump sum distribution may roll that over tax free into another plan or an IRA.<sup>25</sup> Surviving spouses get the same favorable treatment; they can roll over tax free

20. 29 U.S.C. § 1163 (2000).

21. *Id.* § 1162(3).

22. *Id.*; 29 U.S.C. §§ 1167(3)(A)(i)-(ii).

23. I.R.C. § 152.

24. IRS Notice 2004-79, 2004-49 I.R.B. 898 (Nov. 17, 2004).

25. *Id.* § 402.

if they receive a lump sum after the death of an employee.<sup>26</sup> Domestic partners do not get tax free roll over treatment, so they are going to be taxed on the distribution.

What about health and welfare benefit plans? The Code exempts from income, employer provided health and welfare benefits,<sup>27</sup> if, it's coverage for an employee, a spouse and dependent,<sup>28</sup> and under DOMA spouse does not include domestic partners. So, if you have a health and welfare benefit plan that covers domestic partners that's taxable income to the employee. There's imputed income for the value of the health and welfare coverage. It's important because in the few rulings that have talked about this, the IRS has said that the actual coverage provided, such as the heart surgery or the hospital care, is not taxable if there's been imputed income or if the employee paid with after tax dollars. So, it's important that the imputed income take place to avoid a more horrendous tax consequence of the actual medical care being taxable. What's the value of that health coverage that's taxed? It's basically arms length fair market value. There are many ways to calculate generally either marginal costs or what the plan would charge employees to add one more person, and some plans, if they are self-funded, do an actuarial calculation similar to the COBRA premium base to calculate how much is going to be taxable. The employer has to report that as imputed income on the employee's W-2. State law may be different. In California and Massachusetts domestic partner coverage is not taxable to employees for state tax law. So you have reporting complications for employers because it's tax free in the states of California and Massachusetts.

Large employers have what are called cafeteria plans, that is Section 125 Plans. Those plans permit employees to have certain benefits and pay for the benefits on a pre-tax basis. So, if the employer charges employees for a portion of the cost of their medical coverage they can pay for it on a pre-tax basis.<sup>29</sup> Now, that's very important – no FICA, no income tax; it's great and the employer doesn't have to pay FICA so employers love 125 plans. Domestic partners can't participate in the 125 plan because DOMA says it's for a spouse, or dependent or an employee. So, if you are using a 125 plan to permit employees to pay their premiums pre-tax they have to

26. *Id.*

27. I.R.C. §§ 105(b); 106(a).

28. *Id.* § 105(b).

29. *Id.* §125.

use after tax dollars outside the plan to pay for the employee portion of the cost for a domestic partner. Again, it's not a determinative factor in whether an employer offers these benefits, but it's a headache because the reporting is quite different.

The only other thing I want to mention briefly is retiree health insurance. Retiree health is losing a lot of ground in popularity, but it's still found at many large employers. There are two ways to pre-fund it. Under the accounting rules, most employers want to pre-fund it. It can be funded through what's called a 401(h) account which is a separate account inside a defined benefit retirement plan. The Internal Revenue Code says you can pay a certain amount of retiree health benefits from your defined benefit retirement plan.<sup>30</sup> You can pay benefits for a former employee or spouse. Domestic partner retiree health cannot be paid out of a 401(h) account and the negative consequence would be that such payment would disqualify the entire retirement plan. So, for governmental employees that have these accounts it's a big headache; they have to figure out whether they're going to offer the benefit some other way or not offer it. Voluntary Employee Beneficiary Associations (VEBAs) are special trusts under section 501(c)(9) that permits an employer to pre-fund certain health and welfare benefits.<sup>31</sup> VEBAs can only be for the benefit of employees or former employees or their dependents, but the IRS has ruled in rulings that you can have up to a de minimus percent of the assets attributable to domestic partner benefits.<sup>32</sup> So, you can pay retiree health out of the VEBA on the behalf of a domestic partner, as long as it's not too much. So, those are important rules for employers to remember. That's just a very broad overview of why employers care about these benefits and the implications for employees and I think Shannon's going to talk about special California laws that affect insured plans.

**Shannon Minter\***: California has been a laboratory, experimenting with different legislative approaches to securing equal benefits for employees regardless of their sexual orientation or marital status. One of the most interesting approaches originated at the municipal level, in San Francisco. In 1996, the San Francisco Board of Supervisors enacted a local law entitled the Equal Benefits

30. *Id.* § 105.

31. *Id.* § 501(c)(9).

32. See I.R.S. Priv. Ltr. Rul. 200108010 (Nov. 17, 2000).

\* Legal Director, National Center for Lesbian Rights, San Francisco, California.

Ordinance.<sup>33</sup> The measure was framed as a restraint on the City of San Francisco, preventing the city from entering into any contracts with businesses that failed to provide equal benefits to their employees on the basis of either sexual orientation or marital status. The ordinance prohibited the city from contracting with employers who discriminated in the provision of family and medical leave, bereavement leave, health benefits, memberships and membership discounts, moving expenses, pension and retirement benefits; and travel benefits.<sup>34</sup> The idea was to leverage the city's influence as a significant player in the commercial sphere to encourage employers to provide equal benefits, as well as to ensure that the city did not do business with employers that discriminated against workers who are gay or unmarried. The ordinance generated a tremendous amount of controversy when it was first introduced. The Air Transport Association of America (ATA) and Federal Express were particularly unhappy and quickly filed a lawsuit seeking to invalidate the ordinance in federal district court.<sup>35</sup> Among other things, ATA and Federal Express challenged the ordinance on the ground that it was preempted by ERISA for all the reasons Connie just talked about. The district court split the baby, refusing to strike the ordinance altogether, but limiting its impact. The district court accepted, to a certain extent, the City's argument that the ordinance was lawful based on a "market participant" exception to federal preemption.<sup>36</sup> This doctrine provides that when a government entity is acting just as any other market participant, bargaining for goods and services, its actions are exempt from federal laws that otherwise would preempt it, including ERISA.<sup>37</sup> The district court accepted that this doctrine applied to the city,<sup>38</sup> except – and this is a rather large exception – in situations where the city effectively held a monopoly and thus was acting more like a government regulator than a market participant.<sup>39</sup> Even so, the court did not hold that the ordinance had

33. S.F., CAL. ADMIN. CODE § 12(B)(1)(b), available at [http://www.sfgov.org/site/sfhumanrights\\_page.asp?id=5922](http://www.sfgov.org/site/sfhumanrights_page.asp?id=5922) (visited Dec. 7, 2005).

34. *Id.*

35. See *Air Transport Ass'n of Am. v. City & County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), *aff'd in part, remanded in part*, 266 F.3d 1064 (9th Cir. 2001).

36. See *Bldg. & Constr. Trades Council v. Associated Gen. Contractors*, 507 U.S. 218 (1993).

37. See *Associated Gen. Contractors of Am. v. Metro. Water Dist.*, 159 F.3d 1178, 1183 (9th Cir. 1998); *Edh v. Hale*, No. C-93-2080-VRW, 1994 U.S. Dist. LEXIS 16617 at \*12 (N.D. Cal. Nov. 17, 1994).

38. *Air Transport Ass'n*, 992 F. Supp. at 1177-78.

39. *Id.* at 1179-80.

no application even under those circumstances. The court distinguished between the types of benefits that the ordinance properly could regulate without being preempted by ERISA and those it could not.<sup>40</sup> Specifically, the court held that some benefits “such as moving expenses, memberships and membership discounts, and travel benefits, are not governed by ERISA at all,”<sup>41</sup> and thus their regulation was not preempted.<sup>42</sup> The court also held that the city could regulate non-pension benefits that are not offered through an ERISA plan, such as family and medical leave and bereavement leave.<sup>43</sup> But what the city could not regulate, the court concluded, were benefits that are covered by ERISA and offered through an ERISA plan.<sup>44</sup> Unfortunately, these include both health insurance and pension benefits, which are generally the most financially significant benefits for most workers. The court also held that the ordinance could only be applied within the boundaries of San Francisco and could not be used to require companies to change their policies nationwide.<sup>45</sup>

Despite these limitations, the Equal Benefits Ordinance has had a galvanizing effect on businesses throughout the state and nationally. The City of San Francisco did a five year report in 2002, examining the impact of the ordinance.<sup>46</sup> The report noted that at the time the ordinance was enacted, only about 500 companies nationwide offered domestic partner benefits; just five years later, that number had mushroomed to more than 4,500, many of which had changed their policies to offer equal benefits because of the Equal Benefit Ordinance. The report further found that, despite the geographic and substantive limitations placed on the ordinance by the court, only a small number of companies doing business with the city elected to take advantage of them.<sup>47</sup> Instead, most companies opted to change their policies nationwide and to offer equal benefits in all areas,

40. *Id.* at 1180.

41. *Id.* at 1175.

42. *Id.* at 1180.

43. *Id.*

44. *Id.*

45. *Id.* at 1163-64.

46. SAN FRANCISCO HUMAN RIGHTS COMMISSION, FIVE YEAR REPORT ON THE SAN FRANCISCO EQUAL BENEFITS ORDINANCE 4 (2002), available at <[http://www.sfgov.org/site/uploadedfiles/sfhumanrights/fiveyearreport/fiveyearreport\\_final.pdf](http://www.sfgov.org/site/uploadedfiles/sfhumanrights/fiveyearreport/fiveyearreport_final.pdf)> (visited Dec. 7, 2005).

47. *Id.* at 5 (“Since the 1998 ruling, only 95 companies have elected to comply on a limited basis by continuing to discriminate in certain locales or in how certain benefits are offered.”)

including health and pension benefits.<sup>48</sup> In sum, the ordinance has been a tremendously effective tool, with a national impact.

At the statewide level, California has been equally creative in fashioning new methods of securing equal benefits for gay and lesbian workers. To provide some context here, it is helpful to recall that California first enacted our statewide domestic partner registry in 1999.<sup>49</sup> Initially, the domestic partner registry provided few significant benefits other than hospital visitation and some other benefits for public employees, but the law has expanded significantly over the years. Most dramatically, in 2003, the legislature enacted AB 205, a comprehensive domestic partnership law that is comparable in scope to the Vermont Civil Union law.<sup>50</sup> AB 205 grants domestic partners “the same rights protections and benefits” and imposes upon them “the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”<sup>51</sup> Within this overarching trajectory, California law with regard to employment benefits for gay people has evolved in an interesting and, thus far, unique way.

In 2001, the legislature amended our state law regarding employment benefits for domestic partners in a way that was quite creative. Rather than directly mandating equal benefits for domestic partners, the legislature required insurance providers to sell equal plans to employers who wished to offer equal benefits to their lesbian and gay employees.<sup>52</sup> This was a significant step forward, since many employers who wished to provide equal benefits to domestic partners had been unable to purchase insurance plans that did so. In effect, the legislature said, if an employer wants to provide equal benefits to domestic partners, insurance companies must make equal plans available for sale. Nonetheless, the 2001 law stopped well short of *requiring* employers to provide equal treatment. The reason for the legislature’s circumspection on this point was twofold. In part, it was

48. *Id.* at 5-6.

49. CAL. FAM. CODE §§ 297 (2004).

50. Cal. Domestic Partner Rights & Responsibilities Act of 2003, 2003 Cal. A.B. 205, codified at CAL. FAM. CODE §§ 297-299.3 (2004).

51. CAL. FAMILY CODE 297.5(a).

52. 2001 Cal. A.B. 25, codified at former CAL. HEALTH & SAFETY CODE §1374.58 subsequently amended by Cal. A.B. 2208. The bill is available at <[http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0001-0050/ab\\_25\\_bill\\_20011014\\_chaptered.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_25_bill_20011014_chaptered.html)> (visited Mr. 10, 2006).

political, based on fear that the business community would oppose a measure that directly mandated equal benefits. And in part, it was based on concerns about ERISA that Connie discussed – namely, the fear that a law directly mandating equal benefits would be preempted by ERISA.

That is where the law stood until 2003, when the legislature enacted AB 205,<sup>53</sup> which, as noted above, gave domestic partners nearly all of the rights and responsibilities of spouses under state law. In addition to the general mandate that spouses and domestic partners must be treated interchangeably for purposes of all state laws, AB 205 also specifically mandated that “[n]o public agency in this state may discriminate against any person or couple on the ground that the person is a registered domestic partner rather than a spouse or that the couple are registered domestic partners rather than spouses.”<sup>54</sup>

Thus, under its plain terms, AB 205 prohibits discrimination against domestic partners by state agencies, including discrimination in the provision of equal benefits to public employees. As Connie noted, ERISA does not apply to public employees, and thus ERISA does not pose any obstacle to the enforcement of this provision of AB 205.

AB 205 does not include a similar provision with regard to private employers. There is no specific language in AB 205 specifically stating that private employers and businesses also must treat domestic partners and spouses equally. Nonetheless, I believe, and more important, the California Supreme Court recently held, in a case that I will return to shortly,<sup>55</sup> that the omission of any specific directive along those lines is not meaningful. Rather, it is clear from the scope and language of the law, including express statements of legislative intent, that the legislature intended to mandate equal treatment of spouses and domestic partners in all contexts, including by private actors.<sup>56</sup> The resolution of this question with regard to

53. Cal. Domestic Partner Rights & Responsibilities Act of 2003, 2003 Cal. A.B. 205, codified at CAL. FAM. CODE §§ 297-299.3 (2004).

54. CAL. FAM. CODE § 297.5(h) (2004).

55. *Koebke v. Bernardo Hts. Country Club*, 115 P.3d 1212 (Cal. 2005).

56. *Id.* at 1219 (“It is clear from both the language of section 297.5 and the Legislature’s explicit statements of intent that a chief goal of the Domestic Partner Act is to equalize the status of registered domestic partners and married couples.”). Notably, the California Attorney General supported this position. See Brief of Bill Lockyer, Attorney General of the State of California as Amicus Curiae, *Koebke v. Bernardo Hts. Country Club*, 115 P.3d 1212 (Cal. 2005) (No. Si24179), 2004 WL 3256422.

private employers may lead to litigation over ERISA preemption at some point, but we are not at that stage yet.

Nonetheless, knowing that ERISA preemption may be an issue, advocates for equal benefits have continued to develop creative approaches to further insure that employees are getting equal benefits in California. Geoff Kors, the Executive Director of Equality California, was the primary architect of the San Francisco ordinance in 1996, and he likewise developed an equally creative approach for the entire state in 2004. In that year, the legislature enacted AB 2208, a law that prohibits insurance companies from issuing, providing, offering or selling policies in the state of California that discriminate between spouses and domestic partners.<sup>57</sup> I believe it is the first law of its kind anywhere in the country. It applies to all forms of insurance: health, life, auto, rental, and homeowners insurance. The measure is thus broad in scope, and yet also quite specific in requiring that if an insurance plan provides a benefit to spouses it must provide exactly the same benefit, on the same terms and conditions, to registered domestic spouses. The impact of AB 2208 has been sweeping. It doesn't quite amount to an indirect way of requiring *all* employers to provide equal benefits because it doesn't cover self-insured plans and has a few other loopholes. Nonetheless, it goes a long way towards ensuring that most employers in California are only able to purchase policies that provide equal benefits and therefore, in effect, either must stop providing benefits to married employees or provide them equally to employees in domestic partnerships. Encouragingly, AB 2208 did not meet with a great deal of opposition in the business community. The Chamber of Commerce supported it, and the insurance industry was strongly behind it. The attorneys who drafted the bill, myself included, were in constant communication with insurance industry representatives throughout the drafting process. They were very helpful in terms of thinking through some of the broader implications of the proposal, such as how to avoid creating a conflict with the federal Defense of Marriage Act with regard to the law's application to certain kinds of annuities that interact with federal regulations. AB 2208 went into effect on January 1, 2005 and I imagine we will see other states enacting similar

57. Cal. Insurance Equality Act, 2004 Cal. A.B. 2208, codified at CAL. HEALTH & SAFETY CODE § 1374.58 (2005) and CAL. INSURANCE CODE §§ 381.5, 10121.7 (2005), *available at* <[http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab\\_2201-2250/ab\\_2208\\_bill\\_20040913\\_chaptered.html](http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_2201-2250/ab_2208_bill_20040913_chaptered.html)> (visited Mar. 10, 2006).



laws over the next few years. For 2006, Equality California and the Transgender Law Center are developing a bill that takes a similar approach to health care benefits for transgender employees. Following the model of AB 2208, the bill would make it unlawful for health insurance companies to issue or sell policies that do not provide equal health benefits to cover medical treatments for transsexual persons. If passed, it would be the first such law in the country.

In addition to issues relating to ERISA, attempts to secure equal benefits for gay employees also raise another intriguing legal issue, which is how to characterize the type of discrimination at issue when employers or businesses treat spouses differently than domestic partners. Is this sexual orientation discrimination? Sex discrimination? Discrimination on the basis of marital status? I want to end by calling your attention to an interesting evolution in the case law addressing these issues here in California. In 1985, the National Center for Lesbian Rights represented Boyce Hinman, a gay man who worked for the State of California in a lawsuit seeking equal dental benefits for his long term partner. We argued that the state's failure to provide equal benefits discriminated on the basis of sexual orientation and marital status. Unfortunately, we lost.<sup>58</sup> Without extensive analysis, the California Court of Appeal held that the employer's policy did not discriminate against gay people because it treated all unmarried people similarly. The court further held that the state may restrict certain benefits only to married people, despite the disparate impact of this restriction on same-sex couples who are barred from marriage by state law.<sup>59</sup>

Just this year, however, the California Supreme Court revisited this issue and reached a different result, based on the new domestic partner law. In *Koebke v. Bernardo Heights Country Club*,<sup>60</sup> the California Supreme Court considered a discrimination claim by two women who belong to a private golf club in San Diego. The club offered very generous benefits to spouses, but denied them to domestic partners. Following its 1985 decision in *Hinman*, the California Court of Appeal ruled in favor of the club.<sup>61</sup> The court held that the club's policy did not discriminate on the basis of sexual

58. *Hinman v. Dept. of Personnel Admin.*, 213 Cal. Rptr. 410 (Cal. Ct. App. 1985).

59. *Id.* at 419.

60. 115 P.3d 1212 (Cal. 2005).

61. *Koebke v. Bernardo Hts. Country Club*, 116 Cal. App. 4th 791 (Cal. Ct. App. 2004), *rev'd*, 115 P.3d 1212 (Cal. 2005).

orientation, but rather simply denied benefits to all unmarried people, which, according the Court of Appeal, it was permitted to do.<sup>62</sup> On appeal, however, the California Supreme ruled in favor of the lesbian couple. For the first time, the court held that a private business may not provide special benefits only to married people, while denying them to all same-sex couples. Although declining to hold that restricting benefits to married people discriminates on the basis of sexual orientation,<sup>63</sup> the court ruled that failure to provide equal benefits to domestic partners is a new, and unlawful, type of marital status discrimination.<sup>64</sup> Based on the clear intent of AB 205 to equalize the treatment of domestic partners and spouses, the court held that the club was required to provide the same benefits to members with domestic partners as it provided to members who were married.<sup>65</sup>

Whether California courts will extend the reasoning in *Koebke* to require all private employers in California to provide equal benefits to registered domestic partners remains to be seen, as do the implications of any such decisions under ERISA. In the meanwhile, if past trends are any indication, it is likely that other states will be following California in developing new legislative approaches to protecting the right of gay workers to equal benefits at both the state and local level.

Thanks to you all.

**Professor Teresa S. Collett\***: I want to thank the organizers of this program for including me. It is in the best spirit of the academy to include those who have differing points of view. I appreciate most that the section on sexual orientation is willing to hear those who do not share their views and I think it shows the sort of generosity that I have experienced in my friendship with some members of that section. I think it also is consistent with the essential definition of politics which is free and equal citizens reasoning together about how we order our common lives.

To the extent that we find the issue of same-sex marriage resolved by court edict, it becomes more and more a winner take all

62. *Id.* at 813-814.

63. 115 P.3d. at 1229-30.

64. *Id.* at 1221-26. The court explained that discrimination against registered domestic partners is a type of marital status discrimination. *Id.* at 1221 n.4.

65. *Id.* at 1226-27 ("We conclude that [California law] prohibits discrimination against domestic partners registered under the Domestic Partner Act in favor of married couples.")

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proposition. Ultimately it results in extreme resolution one way or the other, which will be unsatisfactory to one side or the other. This, in turn, results in what Justice O'Connor has characterized as the most tense relationship between the federal courts and the Congress in her lifetime.<sup>66</sup> It also results in tense relationships among citizens who have differing points of view. It results in otherwise inexplicable political behavior. In my own home state's legislature members of different political parties argue over whether to acknowledge simple things like the reasonableness of gay and lesbian citizens wanting to have unpaid leaves to visit their partners in the hospital, in part, because if that's protected by statute, it may be part of a litigation scheme to demand judicial recognition of same sex marriage. There is concern that a court will say, "Well, the legislature obviously thinks it's part of good public policy; look what just passed last session."

I understand why such basic courtesies become non-negotiable items; that's what happens when you resort to courts. It's part of why the Texas legislature wouldn't repeal the stupid statute in *Lawrence*,<sup>67</sup> even though a lot of Republicans saw it as stupid. You won in *Lawrence* and you got the Defense of Marriage Act introduced in Congress; that's what happens when it is a winner take all situation.

So, this is where we are at: eleven state constitutional amendments passed in November and more being introduced now. Come, let us reason together, let's talk about real needs; let's talk about how to accommodate needs in a way that I can tolerate and you can tolerate. Let's not talk about non-negotiables. That may get some of you crucified by your side. I know it gets me beat up on my side, but if we don't do it, it's going to be war. So, end of sermon, now to lecture.

I believe that what I've said concerning heterosexual couples applies even more to gay and lesbians. I have taken the position in an article that was published in the *Widener Journal of Public Law* that, sadly frankly, we are seeing more heterosexual couples order their relationships privately rather than marry and enjoy the benefits under the marriage laws.<sup>68</sup> The vast majority of benefits that Connie talked

66. See Claire Cooper Bee, *O'Connor Urges Judges to Boost Lawmaker Ties*, SACRAMENTO BEE, July 23, 2004, at A-3; Blaine Harden, *O'Connor Warns of Interference from Congress on Federal Jurisdiction*, WASH. POST, July 21, 2005.

67. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (invalidating TEX. PENAL CODE ANN. § 21.06(a) (2003)).

68. Teresa Stanton Collett, *Benefits, Nonmarital Status and the Homosexual Agenda*, 11 WIDENER J. PUB. L. 379, 397-99 (2002).

about are predominantly based on a marriage that meets the traditional arrangement of a wage earner and a stay-at-home spouse. For example, Social Security benefits really only benefit you, where you have a wage earner that has accumulated a great deal of income over the wage earning lifetime and another wage earner who has only very limited income during his or her wage earning lifetime. The system was designed in anticipation that the wife, and honestly that was the anticipation, worked perhaps one or two years before she caught her man. When we look at the two wage earner couple, be it heterosexual or homosexual, the Social Security benefits scheme simply does not work. It's better to take your independent benefits.

Most of the benefits covered by ERSIA are intended for a dependent spouse rather than two independent individuals working for independent employers. That's why, as Connie mentioned, that in anticipation of bringing in domestic partnership coverage most employers are deeply concerned about increased cost, but once they undertake it, they find that there is very little increase in cost. It's because enrollment is minuscule. Lee Badgett and Josh Goldfoot stated in their article, "For Richer, For Poorer" that in some way marriage provides incentives for couples to form more traditional kinds of households that will get the marriage benefit.<sup>69</sup> Studies show that even if they legally marry, same gender couples are not likely to adopt the traditional form, often expressing a strong belief that both members of the couple should work outside the home. Steven O. Murray in *American Gay*, reprinted in Martha Brinig's *Family Law in Action: A Reader*, says very few same sex couples, 5 percent, believe that one partner should support a non-working partner.<sup>70</sup> Fewer still do according to the study by Harry and Winston, each reported less than one percent.<sup>71</sup> So, if we are looking to the sort of benefits that employers extend under the traditional model of wage earner and stay at home spouse, most of the debate that we are engaged in is a debate that is modeled under a model that simply does not apply to the demographics that we see exhibited by the community that is urging this argument.

69. M.V. Lee Badgett & Josh A. Goldfoot, *For Richer, For Poorer: The Freedom to Marry Debate*, 1 ANGLES, May 1996, at 1, 3, at < [http://www.iglss.org/media/files/Angles\\_12.pdf](http://www.iglss.org/media/files/Angles_12.pdf)>.

70. Stephen O. Murray, *AMERICAN GAY* (1996), reprinted in *FAMILY LAW IN ACTION: A READER* 96 (Margaret F. Brinig et al., eds. 1999).

71. Stephen O. Murray, *American Gay* (1996), reprinted in *FAMILY LAW IN ACTION: A READER* 95 (Margaret F. Brinig et al. eds. 1999) ("Very few same-sex couples (5 percent) believe that one partner should support a non-working partner. Fewer still do so; Harry and Weston each reported 1 percent.").

If the argument is really about acceptance, then let's argue about that, but let's not argue about it in terms of benefits that will not be utilized. So often we hear the statistic quoted from an a General Accounting Office (GAO) report that there were 1,049 rights related to marriage under federal law.<sup>72</sup> The 1997 report from the GAO to the House Judiciary Committee states very carefully that "no conclusions can be drawn from our identification of a law as one in which marital status is a factor concerning the effect of the law on married people versus single people. A particular law may create either advantages or disadvantages for those who are married or may apply to both married and single people."<sup>73</sup> It has become the conventional wisdom that such benefits exist but it is in fact a myth when you actually read the document at issue.

So, what we're arguing about is whether these benefits, if they exist at all, would be utilized, but when you look at the demographics of the community at issue, for the most part what we see is that most benefits can be achieved through private ordering. What do I mean by that? Let's look at some of the benefits that Connie mentioned, such as the idea that domestic partners should be protected by some sort of survivorship benefit in the retirement plan. ERISA does require that the spouse be protected, but if we're talking about a long term same sex relationship there is no spouse. So, there is no requirement that the spouse waive the spousal protection; if a former marriage has been dissolved, the partner is free to designate whoever he or she wants as the beneficiary of the survivorship benefits. And, if the employee designates the employee's partner as the recipient of those benefits, the employer will honor that.

It may be that the employee doesn't want to designate the surviving partner. Why might that be? There may be children from a prior relationship and there may be a support obligation that extends beyond the death of that parent, enforceable by court order attendant to the divorce. In that case, the employee would not designate the surviving partner, but that's not a product of any injustice of the law; that's a product of the preexisting heterosexual relationship that the individual had entered into.

Often we also hear that there is some sort of injustice related to the health benefits, but if Dr. Badgett and his co-author are correct or

72. U.S. GENERAL ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT 2 (GAO/OGC-97-16, 1997).

73. *Id.*

David Chambers in his *Michigan Law Review* article is correct about homosexual couples' demographic,<sup>74</sup> they're two wage earner families, so each of them will have his or her own employer which most often will provide these benefits. If these are correct again and if the statistic we heard today of less than 1 percent is correct there is not an injustice imposed by the law; it's simply the demographics of the community.

What about QUADROs? QUADROs have already been put at issue and we're not sure how the law will be resolved on that. What about some of the other economic benefits that Shannon Minter raised? They are separate and independent of ERISA. What about the tax benefits? At least temporarily the marriage penalty has been suspended, but if in fact, it is a two wage earner family then like many heterosexual couples, gay couples will experience not an income tax benefit from marriage, but an income tax detriment from marriage.<sup>75</sup> What about inheritance taxes? At the moment domestic partners don't get the gift tax benefits of being able to make \$20,000.00 gifts tax free that a married couple can make.<sup>76</sup> They can only make individual ten thousand dollar gifts to those that they love and care about and that is a difference. The unified credit, however, is being increased every year.<sup>77</sup> A gay couple would have to have a combined estate of over \$3,000,000.00 before the differences in making tax free gifts would be relevant.<sup>78</sup> Only 2 percent of the entire American population had estates that large.<sup>79</sup> According to filings for in the *Lawrence* case, 2.8 percent of the male population and 1.4 percent of the female population identify themselves as homosexual.<sup>80</sup> So, we are talking about 3.2 percent of 2 percent that would have an estate that's taxable and therefore for whom the inability to make joint tax free gifts would be relevant.

So, again, the debate isn't about benefits. Private ordering will take care of most of these complaints and when we look at what heterosexual couples are doing with prenuptial agreements and post-

74. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 480 (1996).

75. See Pub. L. No. 108-311, 118 Stat. 1166 (2004).

76. I.R.C. § 2503(b).

77. *Id.* § 2010(c).

78. *Id.*

79. See Internal Revenue Service, Estate and Gift Taxes, <[www.irs.gov/business/small/article/0,,id=98968,00.html](http://www.irs.gov/business/small/article/0,,id=98968,00.html)> (visited Mar. 2, 2006).

80. See Brief of Amici Curiae Human Rights Campaign et al., at 16 n.42, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102).

nuptual agreements, we find they're trying to escape the legal regime related to marriage. The simple fact is, this argument is not about the benefits under legal regime; it's about the social strictures. Let's have that debate, but let's not disguise it. Thank you.