

BENEFITS LAW JOURNAL

ERISA Preemption and Spousal Equivalency Benefits Under State or Local Law for Domestic and Civil Union Partners

Diane M. Soubly

This article explores the variety of state and local laws relating to spousal equivalency benefits and the possible bases for express and implied preemption under ERISA of such state and local laws in light of the growing number of states and localities that recognize same-sex marriages, civil unions, and domestic partnerships for benefit purposes.

The 1993 film *Philadelphia* earned an Academy Award for Tom Hanks and garnered international recognition for Spanish actor Antonio Banderas. Hanks portrayed Andrew Beckett, an AIDS-afflicted

Diane M. Soubly is an experienced ERISA litigator with over 25 years of experience in all types of individual and class action ERISA and benefits litigation (including fiduciary breach, cash balance conversion, pension miscalculation, retiree health care, severance benefits, excessive fees, imprudent investment, and anti-cutback rule violations) and in counseling plans, plan sponsors and plan fiduciaries on employee benefits and executive compensation issues. She has authored several amicus briefs on various benefit issues on behalf of the American Benefits Council, the National Association of Manufacturers, and the Chamber of Commerce for the United States of America. She is a past member of the Board of Directors of the American Benefits Council and currently serves on the Council's Legal Affairs Committee. A Fellow of the College of Labor and Employment Lawyers, she practices in the Chicago office of Schiff Hardin LLP. The views expressed in this article are the personal views of the author and do not necessarily reflect those of the law firm with which she is associated. She thanks her colleague Charlene Kalebic and her former colleague Ashley Eddy for their assistance.

attorney fired from a silk-stocking law firm; Banderas, his compassionate partner Miguel. Collapsing during testimony by the head of the firm, Beckett began what became his final hospital stay just before the jury returned a sizeable verdict in his favor. At Beckett's hospital bedside, Miguel sustained his partner in medical crisis. For some moviegoers, *Philadelphia* celebrated the depth of two non-traditional partners' commitment to one another.

In the 20 years since that positive portrayal in a mainstream Hollywood film, states and localities have grappled with the issue of health care benefits for partners in non-traditional relationships. As of July 24, 2011, New York joined a small cadre of states that recognize same-sex marriages.¹ Consistent with Section 3 of the federal Defense of Marriage Act (DOMA), currently under attack by the Administration as unconstitutional,² more than 40 states restrict marriage to opposite-sex couples by constitution or by law.³ Nonetheless, a growing number of states and localities seek to protect spousal equivalency benefits through statutes or ordinances recognizing domestic partnerships and civil unions for benefit purposes.

Most states or localities that have passed domestic partnership or civil union laws have chosen simply to permit, rather than to require, private employers to extend spousal equivalency benefits to employees with domestic or civil union partners. Few mandate such benefits. To the extent that states or localities do mandate such benefits, the federal Employee Retirement Income Security Act (ERISA)⁴ probably preempts such laws where they attempt to regulate, directly or indirectly, self-insured plans. For insured plans, however, ERISA preemption of state or local laws mandating spousal equivalency benefits appears more problematic.

Hoping to fall within the Savings Clause of ERISA's express preemption provision and thus to avoid ERISA preemption,⁵ certain states and localities have amended their insurance laws to require that insurers only offer policies to employers providing the same or equivalent benefits to employees in certified civil unions or domestic partnerships that they offer to married employees. However, even if ERISA does not expressly preempt state or local laws that fall within ERISA Section 514's Savings Clause, courts may find that ERISA nonetheless preempts even laws relating to insured plans, if those laws force plan administrators to follow state law instead of plan documents when they recognize beneficiaries; if those laws adversely impact the uniform administration of national employee benefit plans; and/or if those laws impair, alter, or modify other federal law, such as the DOMA.

Until courts rule on whether ERISA preempts state and local laws that mandate spousal equivalency benefits, employers in jurisdictions with such laws face a critical choice. Do those with insured plans contract with insurers that may continue to offer policies without

spousal equivalency benefits,⁶ or comply with state and local law? Do those with self-insured plans decide not to comply with state or local law on the ground of ERISA preemption? Those who choose not to comply risk the loss of state or local contracts and may face enforcement actions or penalties under such laws. Employees may also bring civil actions based upon their employers' non-compliance. In states that do not provide employers immunity from suit for challenges to conduct relating to bona fide employee benefit plans, aggrieved individuals may file discrimination charges or discrimination lawsuits alleging that their employers' plans impose greater or different eligibility requirements for employees with domestic or civil union partners than for married employees. Employers faced with such charges or lawsuits may interpose the defense that ERISA preempts all such laws that dictate beneficiaries to plan administrators by state law, rather than by plan document.

THE "PATCHWORK QUILT" OF STATES AND LOCALITIES

State and/or local laws run the full gamut of legal relationships for same-sex married couples and for same- and opposite-sex unmarried but committed couples. Those states and localities recognizing such relationships permit, and sometimes require, private employer welfare benefit plans to extend spousal equivalency benefits to employees with domestic or civil partners and spousal benefits to employees with same-sex marital partners.

Same-Sex Marriage

States differ dramatically in their treatment of same-sex marriage. On the one hand, over 40 states restrict marriage to the union of one man and one woman by constitution and/or by statute,⁷ while 19 states ban any legal recognition of same-sex unions equivalent to marriage.⁸ For example, Section 11, Article XV of the Ohio Constitution (known as the "Marriage Amendment") requires that the state and its political subdivisions recognize only opposite-sex unions as marriage. It also prohibits the state and its political subdivisions from creating or recognizing "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." To further illustrate, Georgia's Constitution and Georgia's marriage laws recognize marriage only as the union of a man and a woman. Georgia prohibits entry into same-sex marriages within Georgia and does not recognize same sex-marriages entered into in other jurisdictions.⁹ In another variation of prohibiting same-sex marriages, in mid-June of 2011, the Tennessee legislature passed a statute defining "sex" as the status of being male or female and forbidding localities from passing

anti-discrimination ordinances that protect statuses other than those protected under state law.¹⁰

On the other hand, certain jurisdictions (Massachusetts, Vermont, Connecticut, Iowa, New Hampshire, New York, California (for such marriages entered into after the California Supreme Court ruling that same-sex couples have the right to marry in California but before the effective date of Proposition 8), and the District of Columbia) recognize same-sex marriages. After the passage of Proposition 8 prohibiting same-sex marriages, California only recognizes same-sex marriages entered into before November 5, 2008, *i.e.*, the date of the referendum amending the state constitution with prospective effect only.¹¹

Vermont, Connecticut, and New Hampshire initially recognized same-sex civil unions, but now recognize same-sex marriages instead. After a ruling by the Vermont Supreme Court allowing the legislature to act to recognize same-sex couples as it did heterosexual married couples, Vermont passed a civil union statute in 2000, but then passed a same-sex marriage enactment over legislative veto, effective September 1, 2009, after which no civil unions may be performed. Similarly Connecticut recognized same-sex civil unions in 2005, but then automatically transformed such unions into marriages as of October 1, 2010, two years after the Connecticut Supreme Court ruled that denying same-sex couples the rights and responsibilities of, and the title of, marriage violated the Connecticut Constitution's equal protection provision.¹² Again, New Hampshire legalized same-sex marriages, effective January 1, 2010, after which no civil unions may be performed in that state.

Some states may extend full faith and credit to same-sex marriages entered into in other states.¹³ California also extends full faith and credit to same sex marriages contracted outside California prior to November 5, 2008.¹⁴ Same-sex marriages contracted outside California after November 5, 2008, have the same rights, protections, benefits, responsibilities, obligations and duties under the laws as those granted to and imposed upon spouses, with the exception of the designation as "marriage."¹⁵ Arguably, California and Illinois have accorded full faith and credit (as permitted by the Section 2 of the DOMA) to such relationships recognized in other states, and employers in those states arguably are permitted to extend spousal benefits to employees who entered into same-sex marriages in states that recognize such unions.

Civil Unions

In addition to the states that previously recognized civil unions until extending the right to marry to same-sex couples, certain other states (among them Hawaii, Delaware, and Rhode Island)¹⁶ explicitly recognize civil unions and extend the rights and privileges under state law that spouses enjoy to members of civil unions. In like vein,

some states ban same-sex civil unions, just as they ban same-sex marriages.¹⁷

One of the most recent civil union statutes, “The Illinois Religious Freedom Protection and Civil Union Act” became effective June 1, 2011. The act defines “civil union” as a legal relationship between two persons, of either the same or opposite sex, “established pursuant to this Act.”¹⁸ The act also defines “party to a civil union” as “a person who has established a civil union pursuant to this Act” and requires that definitions of “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and “other terms that denote the spousal relationship” as used in the law must include “party to a civil union.”¹⁹ In order to be valid, the civil union must:

- Be entered into after both parties have reached 18 years of age;
- Be obtained after the dissolution of a marriage or civil union or substantially similar legal relationship of one of the parties, if such a relationship existed; and
- Not be between close relatives, which includes an ancestor and a descendant, siblings whether the relationship is by the half or the whole blood or by adoption, an aunt or uncle and a niece or nephew, whether the relationship is by the half or the whole blood or by adoption; and first cousins.²⁰

The Illinois civil union statute does not cite to any portion of the Illinois Insurance Code, and it does not expressly reference ERISA or benefit plans. It does expressly afford the same “legal protections” and the same “benefits” to partners in civil unions as state law affords spouses. The act provides in relevant part:

A party to a civil union is entitled to the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses, whether they derive from statute, administrative rule, policy, common law, or any other source of civil or criminal law.²¹

Illinois law does not compel private employers to extend spousal benefits to married employees; however, under the Illinois Department of Insurance’s recent guidance interpreting the act (which does not amend the insurance code), insurance policies issued in Illinois will be deemed to include spousal equivalency benefits for civil union partners if the policies provide spousal benefits. Private employers with fully insured plans will thus find that, as of June 1, 2011, their plans extend spousal equivalency benefits by legislative and/or agency fiat.²²

Moreover, private employers in Illinois who extend such benefits (whether by fiat, in the case of employers with insured plans, or voluntarily, in the case of employers with self-insured plans) should do so in a non-discriminatory manner, since Illinois includes sexual orientation as a protected status in its anti-discrimination statute.²³ Illinois does not exempt bona fide health care plans from the ambit of its antidiscrimination statute.

The taxation of the value of spousal equivalency benefits under federal and state law may result in unequal treatment of employees in the issuances of W-2s and theoretically unequal compensation, assuming that an employer takes into account the tax consequences of certain benefit structures in setting compensation. The Department of Justice's recent statements regarding the unconstitutionality of Section 3 of the DOMA in its brief in *Golinski* do not amount to a judicial ruling. Moreover, a court may choose to disregard the DOJ's position in light of the intervention of the ranking Republican members in support of the DOMA's constitutionality in two cases in the First Circuit. Under the DOMA, benefits provided to domestic or civil union partners appear to remain taxable under federal law, and such partners do not fall within the definition of "spouse" in the federal Tax Code, so that employees with such partners may only file joint federal returns if their partners qualify as "dependents" under federal tax law. In states where individuals may file joint state returns only if they file joint federal returns, employers may face discrimination challenges under state law if their plans require joint returns as proof of a domestic or civil union or a same-sex marriage.

New Jersey also provides for the establishment of same-sex civil unions and much more clearly accords civil unions the same status as marital unions.²⁴ In order to establish a civil union in New Jersey, two persons must:

1. Not be a party to another civil union, domestic partnership or marriage;
2. Be of the same sex; and
3. Be at least 18 years of age.²⁵

New Jersey extends to persons in civil unions the same legal benefits, protections and responsibilities granted to married couples.²⁶ The New Jersey civil union statute expressly enumerates "laws relating to insurance, health and pension benefits" among the specific legal benefits, protections and responsibilities listed that apply to civil union couples in the same manner as they apply to spouses.²⁷ In addition, the law provides that, whenever any law, rule, regulation, judicial, or administrative proceeding refers to a marriage, spouse, husband, wife, family, next of kin, dependent, or other term denoting a spousal or

marital relationship, it shall be construed as including reference to a civil union and the partners in a civil union.²⁸

Some states expressly grant civil unions and domestic partnerships a rough equivalency. Although California law does not provide for civil unions, it appears as if California recognizes civil unions validly formed in another jurisdiction which are substantially equivalent to a California domestic partnership.²⁹ Some states also expressly extend full faith and credit to civil unions entered into in other states. New Jersey, for example, extends full faith and credit to civil unions entered into outside of the state.³⁰ Illinois similarly recognizes civil unions entered into outside of the state.³¹

Domestic Partnerships

Certain states have recognized domestic partnerships and permit, but do not require, private employers to extend spousal equivalency benefits to employees with domestic partners.³² Some localities have mandatory equal benefits laws, while at least one locality strikes a middle ground: it affords a preference in bidding on city contracts to businesses seeking certification as “living wage businesses.”

PERMITTING, BUT NOT REQUIRING, SPOUSAL EQUIVALENCY BENEFITS

For some time, California has recognized domestic partnerships and has provided for a registry of domestic partnerships at the state level. Pursuant to California law, a same-sex couple or an opposite-sex couple age 62 or older may seek registration of their domestic partnership if they can complete a declaration that they fulfill all of the following requirements:

- Both persons have a common residence;
- Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity;
- Both persons are not related by blood in a way that would prevent them from being married to each other in this state;
- Both persons are at least 18 years of age;
- Both persons are members of the same sex, or one or both of the persons of opposite sex are over the age of 62 and meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age

insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals;

- Both persons are capable of consenting to the domestic partnership; and
- Both persons consent to the jurisdiction of the Superior Courts of California for the purpose of a proceeding to obtain a judgment of dissolution or nullity of the domestic partnership or for legal separation of partners in the domestic partnership, or for any other proceeding related to the partners' rights and obligations, even if one or both partners ceases to be a resident of, or to maintain a domicile in, California.³³

California insurance laws require group health insurance policies to provide the same coverage to registered domestic partners³⁴ of employees as they provide to spouses of employees.³⁵

At least one state has chosen to supplant its domestic partnership law with a civil union statute. New Jersey once provided for the establishment of a domestic partnership for same-sex couples and for opposite-sex couples over the age of 62. However, since the passage of New Jersey's civil union statute, only domestic partnerships prior to the statute's effective date remain grandfathered and no new domestic partnerships are recognized at the state level. The New Jersey domestic partnership statute required that persons who sought to register as domestic partners execute and file an Affidavit of Domestic Partnership, pay a fee, and meet all of the following requirements:

- Both persons had a common residence and were jointly responsible for each other's common welfare as evidenced by joint financial arrangements or joint ownership of property (such as a joint deed, mortgage or lease; joint bank account; designation of partner as the primary beneficiary under a will, life insurance policy or retirement plan; or joint ownership of a vehicle);
- Both persons agreed to be jointly responsible for each other's basic living expenses during the domestic partnership;
- Neither person was in another marriage or domestic partnership;
- The persons were not related by blood or affinity;
- Both persons were of the same sex, or both were at least 62 years of age, in which case the persons could be of the opposite sex;

- Both persons had chosen to share each other's lives in a committed relationship;
- Both persons were at least 18 years of age;
- Both persons had jointly filed an Affidavit of Domestic Partnership with the state; and
- Neither person had been in another Domestic Partnership for at least 180 days (except in the case of death of a partner), and any prior Domestic Partnerships had been terminated in accordance with New Jersey law for terminating Domestic Partnerships.³⁶

A couple could meet the common residence requirement by a shared residence in New Jersey, or by a shared residence out of the state if one partner were a member of a state retirement system.³⁷

The law specifically provided that an employer was not required to provide dependent coverage for an employee's domestic partner. However, if an employer offered health benefits to the domestic partner of an employee, the employer could require the employee to contribute up to the full amount of the cost of the coverage of the domestic partner. Further, the law specifically provided that the aforementioned provisions "shall not be deemed to constitute unlawful discrimination" under New Jersey's anti-discrimination laws.³⁸

"Tipping the Scale" by Granting Preferences

In a slightly different approach designed to encourage employers to offer spousal equivalency benefits, the City of Atlanta maintains a Living Wage Ordinance, passed in 2005, that grants preferences for city contracts to businesses certified as "living wage businesses." Under that Ordinance, the City certifies a business as a "living wage business" only if it provides the same health benefits to employees with domestic partners that it provides to employees with spouses or families.

It is difficult to predict the judicial outcome if a business challenges the 2005 ordinance as violating a 2004 statutory amendment to the Georgia code reserving to "any organization or person" (including employers) the right to choose whether to extend spousal equivalency benefits and prohibiting state and local governments from imposing penalties upon or withholding benefits, rights or privileges from employers who choose not to extend such benefits.³⁹ Georgia law provides that any organization, including a private company, may elect to, or elect not to, contractually provide to unmarried persons the same benefits, rights or privileges as the organization provides to married persons. State or local governments cannot impose penalties

or withhold benefits, rights or privileges from any organization that chooses to provide different benefits, rights or privileges to married persons than it does to unmarried persons.⁴⁰ Further, state and local governments are not permitted to require, as a condition of doing business with the government, companies to provide benefits to people who are domestic partners or civil union partners of an employee, or people who have some other non-married status with respect to an employee.⁴¹ Nonetheless, the Living Wage ordinance specifically provides in Section 2-1214(d) that, “[i]f the business [seeking certification as a ‘living wage business’] provides health benefits for an employee’s spouse, such benefits must also be provided to domestic partners.” In addition, if health benefits are provided to the family, such benefits must also be provided to the domestic partner of the employee.”

MANDATING SPOUSAL EQUIVALENCY BENEFITS

The State of California, the City of Los Angeles, and the City/County of San Francisco mandate spousal equivalency benefits to domestic partners.

With few exceptions, California law prohibits state agencies from entering contracts for goods and services in the aggregate annual amount of \$100,000 or more with entities that discriminate between employees with spouses and those with registered domestic partners with respect to the provision of benefits.⁴² Contracts in violation of this statutory provision are void.⁴³ However, the language of the state nearly mirrors the language of the San Francisco ordinance that the Ninth Circuit found preempted under ERISA.⁴⁴

The City of Los Angeles (as well as the City/County of San Francisco)⁴⁵ requires that private employers who seek city contracts must provide both same-sex domestic partners and opposite-sex domestic partners of a certain age with spousal equivalency benefits. The Los Angeles Ordinance expressly states that its provisions “are designed to ensure that the City’s contractors will maintain a competitive advantage in recruiting and retaining capable employees,” and that the City intends “to assure that those companies wanting to do business with the City will equalize the total compensation between similarly situated employees with spouses and with domestic partners.”⁴⁶ The Ordinance defines “Domestic Partner” as “any two adults, of the same or different sex, who have registered as domestic partners with a governmental entity pursuant to state or local law authorizing this registration or with an internal registry maintained by the employer of at least one of the domestic partners.”⁴⁷

Under the Los Angeles Ordinance, no awarding authority of the City may execute or amend a contract with a city contractor “that discriminates in the provision of Benefits between employees with spouses and employees with Domestic Partners, between spouses

of employees and Domestic Partners of employees, and between dependent and family members of spouses and dependents and family members of Domestic Partners.”⁴⁸ The term “Benefits” in the Ordinance includes, in a non-exhaustive list, health care benefits, family and medical leave, and pension and retirement benefits.⁴⁹ To the extent that an employer’s benefit plan offers a cash equivalent under a Section 125 cafeteria plan, the Ordinance also permits such a benefit in lieu of the Equal Benefit Requirement only if the department enforcing the Ordinance has determined that the contractor “has made a reasonable, yet unsuccessful effort to provide Equal Benefits” or if it would be unreasonable under the circumstances to require the contractor to provide spousal equivalency benefits.⁵⁰ Employers who desire city contracts may also win exemption from the Ordinance if they “allow each employee to designate a legally domiciled member of the employee’s household as being eligible for spousal equivalent benefit” or provide benefits neither to spouses nor domestic partners of employees.⁵¹ The penalties for failure to comply with the Ordinance include:

1. Cancellation, termination, or suspension of the contract;
2. Retention of the monies due or to become due under the contract by the City until the contractor achieves compliance; and
3. Pursuit of all remedies against the contractor and introduction of the failure to comply as evidence of non-compliance with the Contractor Responsibility Ordinance.⁵²

The Ordinance reaches not only employees working within the City but also employees working outside the City on City contracts.⁵³

ERISA PREEMPTION OF SPOUSAL EQUIVALENCY LAWS

When it passed ERISA in 1974, Congress intended to encourage employers to establish benefit plans voluntarily; thus, ERISA did not mandate that employers provide their employees with pension or welfare benefits.⁵⁴ In light of that congressional intent, courts have balanced the traditional role of states as laboratories for experimentation with a recognition that diverse and often conflicting state laws dictating benefits or benefit plan terms adversely affect national uniform plan administration and discourage employers from conferring benefits upon their employees.

In the first decades after the passage of ERISA, the courts routinely preempted any state laws that “relate[d] to” an ERISA plan by reading ERISA’s express preemption provision very broadly. In 1995, the Supreme Court significantly narrowed the scope of the express ERISA

preemption. After the so-called “*Travelers* Trilogy,”⁵⁵ it has become much more difficult to predict whether a federal court in any given situation will find ERISA preemption. Even post-*Travelers*, however, under general principles of ERISA preemption analysis, state and local laws, no matter how salutary in purpose, that regulate self-insured plans or that dictate beneficiary choices to plan administrators probably cannot withstand ERISA preemption.

Types of ERISA Preemption

Three types of federal preemption can arise under ERISA, one express and two judicially made, but all animated by the Supremacy Clause of the Federal Constitution. First, ERISA contains an express preemption provision, ERISA Section 514, which courts have interpreted to preclude states from regulating self-insured plans even indirectly. Courts have also preempted state and local laws that adversely affect the national uniform administration of employee benefit plans, or that frustrate the purposes of other federal law in violation of the Federal Law Savings Clause in ERISA Section 514. Second, courts have judicially fashioned “implied preemption” based upon ERISA’s comprehensive and carefully reticulated enforcement scheme,⁵⁶ evidencing Congress’s intent to make the federal scheme exclusive. Finally, although courts post-*Travelers* appear to have conflated this third type of preemption with the second above, courts have recognized conflict preemption under the Supremacy Clause, under which federal law prevails over conflicting state and local laws.

Presumption Against ERISA Preemption

Before the *Travelers* trilogy, courts expressed ERISA preemption as “oust-the-field” preemption, whether the state law appeared consistent or inconsistent with ERISA. Post-*Travelers*, courts now begin with the presumption that ERISA does not preempt state law, especially in traditional areas of state concern. Those seeking to avoid state or local law on the basis of ERISA preemption must overcome that presumption by demonstrating that ERISA expressly or impliedly preempts state law.

Early ERISA preemption analysis seemed to proceed from the presumption that Congress intended broad, “oust-the-field” preemption of state and local laws (including judicial decisional law) under ERISA. However, in light of the “unhelpful text” in ERISA’s express preemption provision,⁵⁷ the Supreme Court retreated from that view in favor of a presumption *against* federal preemption, absent a clear and express congressional intent otherwise in a given circumstance, when state and local law “clearly operate in a field that has been traditionally occupied by the States.”⁵⁸ In *Travelers*, the Court expressed

the view that “nothing in the language of [ERISA] or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern.”⁵⁹ Similarly, historically, marriage and domestic laws have been “matters of local concern,” and the state’s or locality’s traditional authority to provide guidelines for entities with whom it will contract may also appear a “matter of local concern.” In light of the passage of the Patient Protection and Affordable Care Act in 2010 (ACA), however, the Court may take some future opportunity to revisit its conclusion that ERISA itself does not contain any indication that Congress intended to make health care regulation a matter of national concern and may look beyond ERISA to the ACA for that intent.

Since *Travelers*, the courts have granted more leeway to the states in crafting laws that escape ERISA preemption. However, if a state law requires plan administrators to engage in conduct that conflicts with ERISA plan documents, then the presumption against federal preemption can be overcome, even in an area traditionally a matter of local concern.⁶⁰ Employers can also rebut the presumption against ERISA preemption by demonstrating that they sponsor self-insured plans that states (and their political subdivisions) may not even indirectly regulate in light of ERISA Section 514’s Deemer Clause.

ERISA Preemption Because of Self-Insured Plan

The Savings Clause of ERISA Section 514 saves state and local laws from preemption insofar as those laws impact insured plans.⁶¹ Where states have dictated mandatory benefit minimums in the past, typically by category of benefits, courts have generally saved such laws from ERISA preemption because those mandates appeared in state insurance codes and reached only insured plans.

To escape ERISA preemption, such laws must be directed at the insurance practice of entities “engaged in” insurance and must not substantially affect the risk pooling arrangement between the insurer and the insured.⁶² So, in *Kentucky Assoc. of Health Plans, Inc. v. Miller*,⁶³ after disavowing prior cases relying upon McCarran-Ferguson Act factors to determine the reach of the Savings Clause, the Supreme Court held that ERISA does not preempt Kentucky’s “any willing provider” state insurance laws, which impose upon insurers certain conditions for the right to do business within the state, including restricting the permissible bargains between the insurer and insured employers to those that permit reimbursement to any willing provider, including out-of-network providers.

A clear distinction arises under ERISA’s express preemption provision between insured and self-insured plans. The Deemer Clause in ERISA Section 514 prohibits the deeming of self-insured plans as insurance entities that states can indirectly regulate under their

insurance codes. Instead, courts have determined that even indirect regulation of self-insured plans cannot withstand ERISA preemption. As the Eighth Circuit carefully noted in affirming the partial dissolution of a federal injunction enjoining enforcement of the Arkansas Patient Protection Act, the Supreme Court did not have self-insured plans before it in *Miller*, so that the Court had applied the Savings Clause in ERISA 514(a) to save Kentucky's similar "Any Willing Provider" statute from federal preemption only in regard to insured plans. The Eighth Circuit thus left the injunction in force as it applied to self-insured plans.⁶⁴ Accordingly, the injunction prohibited Arkansas from enforcing the provisions of its Patient Protection Act, including requirements regarding health care benefits, against self-insured plans.

Even under the most progressive of statutory schemes relating to domestic or civil partner coverage, state statutes may exempt self-insured plans, especially where the provisions relating to spousal equivalency benefits appear in or amend the state insurance code. The California Insurance Code defines a "self-insured employee welfare benefit plan" as any plan or program of benefits provided by an employer or an employee organization, or both, for the purpose of providing hospital, medical, surgical, nursing, or dental services, or indemnification for the costs incurred for those services, to the employer's employees or their dependents.⁶⁵ The California Insurance Code defines "insurance" as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event."⁶⁶ "Policy" is defined as the "written instrument, in which a contract of insurance is set forth."⁶⁷ "Health insurance" is defined as: "an individual or group disability insurance policy that provides coverage for hospital, medical or surgical benefits."⁶⁸

Moreover, the purchase of stop-loss insurance to reimburse catastrophic loss does not negate the self-insured nature of a plan, so long as the plan administration remains unified and the insurer does not become the plan administrator.⁶⁹

In short, because the Deemer Clause of ERISA's express preemption provision prohibits the deeming of a self-insured plan as an insurance entity, ERISA precludes even indirect regulation by the states of self-insured plans. Stop-loss coverage that serves simply to reimburse a plan or a plan sponsor for catastrophic care expenditures does not deprive an employee benefit plan of its status as a self-insured plan for ERISA preemption purposes. States cannot circumvent ERISA preemption by embedding mandates on private employers with self-insured plans in state insurance codes.

Express Preemption Because of "Connection to" Plan

ERISA Section 514(a) states that ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee

benefit plan” governed by ERISA.⁷⁰ Originally, courts read “relates to” broadly to mean “referring to” or “having a connection with” an ERISA plan,⁷¹ unless the state law affected benefit plans in so remote or tenuous or peripheral a fashion that the law did not “relate to” an ERISA plan.⁷² Post-*Travelers*, the Supreme Court has cautioned against an uncritical literalism in interpretation of the phrase “relates to,” a phrase that seems to lack an end point or boundary.

“To determine whether a state law has the forbidden connection [with an ERISA plan], we look both to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive, as well as to the nature of the effect of the state law on ERISA plans.”⁷³ In ERISA, Congress intended to avoid mismanagement of plan assets and to facilitate the national uniform administration of benefit plans by avoiding a patchwork quilt of inconsistent state regulations. Again, ERISA itself does not mandate that employers provide benefits, other than the extent to which the ACA may amend ERISA to mandate certain benefits or to afford certain patient protections. Rather, Congress intended to benefit participant employees and their beneficiaries through a federal scheme that voluntarily encourages employers to establish plans.

Where a state law would require a plan administrator to alter the terms of an ERISA-governed plan and to provide benefits pursuant to state law rather than plan documents, the Supreme Court has found an impermissible “connection to” an ERISA plan, even in the traditionally “local concern” area of domestic relations. In *Egelhoff v. Egelhoff*,⁷⁴ for example, although a deceased employee had, *after* his divorce, re-designated his ex-wife as his beneficiary in plan documents, Washington state law provided that a divorce automatically revoked a former spouse’s life insurance beneficiary status upon divorce. State law therefore directed a choice of beneficiary that conflicted with the choice provided in an ERISA plan and placed the plan administrator in the position of violating federal law: ERISA Section 404 requires that plan administrators administer ERISA plans in accordance with their terms. To comply with state law, the plan administrator would have to ignore or alter plan terms. The Supreme Court held that the Washington statute “[bound] plan administrators to a particular choice of rules for determining beneficiary status” and forced plan administrators “to pay benefits to the beneficiaries chosen by state law, rather than those identified in the plan documents.”⁷⁵ The Court observed that the state statute implicated an area of “core ERISA concern” and ran counter to ERISA Section 102(b)(4) (*i.e.*, that a plan shall specify the basis on which payments are made to and from the plan) and ERISA Section 404(a)(1)(D) (*i.e.*, that a plan fiduciary administer plan documents according to their terms).

A state statute’s mandate of employee benefit structures or their administration satisfies the “connection with” test.⁷⁶ In *District of*

Columbia v. Greater Washington Bd. Of Trade,⁷⁷ the Supreme Court found that ERISA preempted a District of Columbia law requiring employers to maintain the same benefits for employees on worker's compensation disability as they maintained for active employees. The DC statute provided: "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter."⁷⁸ As the Ninth Circuit recently noted in distinguishing the San Francisco health care reform ordinance from the ordinance in issue in *Dillingham*: "The [*Dillingham*] Court held that the ordinance contained an impermissible 'reference to' an ERISA plan because its requirement was measured by reference to the level of benefits provided by the employer's ERISA plan."⁷⁹ In contrast, the San Francisco ordinance required no change to an ERISA plan, according to the Ninth Circuit, and an employer could avoid the ordinance's requirements by simply paying a sum to the City towards the cost of the employer's employees' participation in the San Francisco HAP, a safety net health care plan.

Where compliance with the varied state or local laws mandating the provision of benefits to domestic or civil union partners of the same or opposite sex would compel a plan sponsor to alter the terms of its plans, ERISA may preempt such laws. As in *Egelhoff*, *Dillingham*, and *Fiedler*, such laws would force a plan administrator to choose between following plan terms or following state or local law.

Express Preemption Under the Federal Law Savings Clause of ERISA Section 514

Under the so-called Federal Law Savings Clause of ERISA's express preemption provision, state, or local laws that impair, alter, or modify federal law cannot withstand federal preemption. Permitting actions under state and local spousal equivalency benefits laws, or actions claiming that failure to provide such benefits violates state and local discrimination laws, may impair the exemption from the federal Full Faith and Credit Clause that Congress crafted in Section 2 of DOMA of 1996.

With the passage of the DOMA, Congress apparently reacted to the possibility that Hawaii and/or other states would recognize same-sex marriages. Section 2 of the DOMA contains an exception from the Full Faith and Credit Clause in the Federal Constitution that would otherwise compel states to grant full faith and credit to sister states' recognition of same-sex marriages, civil unions and/or domestic partnerships. Arguably, state laws that recognize or grant full faith and credit to same-sex marriages, civil unions and/or domestic partnerships entered into in other states may impair Section 2 of the DOMA and would thus not withstand preemption under ERISA's Federal Law Savings Clause.

There are some significant concerns with this argument. First, it is not entirely clear where Congress derived its authority to amend the Federal Constitution's Full Faith and Credit Clause. Second, Section 2 of the DOMA may in essence devolve onto the states the very traditional role they have retained under the Tenth Amendment to determine whether to recognize non-traditional unions as substantially equivalent to marriage and to extend benefits accordingly.

Implied Preemption (“Conflict Preemption”)

In *Ingersoll-Rand Co. v. McClendon*,⁸⁰ the Supreme Court recognized, not only that ERISA's express preemption provision embodied Congress's intent that plan sponsors would remain subject to a uniform body of benefits law, but also that ERISA's highly reticulated and comprehensive civil enforcement scheme impliedly preempts any state or local law providing a cause of action that duplicates, supplements, or supplants the ERISA civil enforcement scheme. In a later decision, the Court *in dicta* observed that such state or local law conflicts with clear congressional intent to make the ERISA remedial scheme exclusive.⁸¹

To the extent that the various state and local laws discussed in detail above contain penalty provisions and invest employees or the states or cities with additional causes of action against employers for failure to alter their ERISA-governed plans, the law conflicts with Congress's intent to make ERISA's enforcement scheme exclusive. Arguably, ERISA Section 502 impliedly preempts state and local law mandating spousal equivalency benefits and imposing penalties and additional causes of action against private employers who fail to comply with those mandates during the entire term of their contracts with the cities. Withholding a benefit from an employer until the employer modifies its ERISA plan and providing an enforcement scheme of compliance for employers that “voluntarily” chose to provide such benefits also arguably interferes with ERISA's exclusive enforcement scheme.

STATE OR LOCAL DISCRIMINATION LAWS AND ERISA PREEMPTION

If private employer plans impose additional requirements on domestic or civil partners or on same-sex marriage partners, or if such plans fail to cover all domestic partners or civil unions (as defined in various jurisdictions), employees may bring civil litigation claiming that the plans violate state or local discrimination laws. However, on the grounds discussed above, private employers may assert the affirmative defense of ERISA preemption in opposition to such claims.

State or Local Discrimination Laws

Some states do not afford a private right of action to private sector employees who would seek to challenge employer health care plans on the ground that they violate state or local discrimination laws.⁸² Others that may afford a cause of action for discrimination generally may exempt bona fide employee health care plans. Still others may afford a cause of action for a type of sexual orientation-plus or marital status-plus discrimination (an evolving area of the law difficult to predict with certainty) to employees who can demonstrate that private employers disparately treated similarly situated employees on the basis of sexual orientation when they offered or declined to offer health care benefits to employees.

As one state that provides an exemption from discrimination suits for bona fide employee benefit plans, New Jersey's anti-discrimination laws broadly cover several protected classes.⁸³ However, as an exception to this law, New Jersey has "carved out" bona fide employee retirement, pension, employee benefit or insurance plans or programs from the application of the anti-discrimination laws. In *Rutgers Council of AAUP Chapters v. Rutgers, The State University*,⁸⁴ the Superior Court of New Jersey held that the denial of health benefits to domestic partners of university employees did not violate New Jersey's Law Against Discrimination (LAD)⁸⁵ because the exception in N.J.S.A. 10:5-12 limits the scope of the LAD from applying to bona fide employee benefit plans. The court held that the "LAD's unambiguous exception for benefit and insurance programs bars plaintiffs' claim that the LAD precludes the alleged discriminatory effect of the [benefit plan]."⁸⁶

Like New Jersey, while California prohibits negative employment actions due to the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, California's anti-discrimination statute appears to contain a limited exception of the law's application to health plans: "Nothing in this part relating to discrimination on account of marital status shall . . . [p]rohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents."⁸⁷ An administrative opinion by the California Industrial Relations Board applying to a public employer⁸⁸ suggests a theory of sexual orientation-plus discrimination that may extend to private employers. In that case, the City of Oakland's health benefits policy extended coverage to "domestic partners and eligible dependents of gay and lesbian employees," but denied coverage to a male employee who applied for health care benefits for his opposite-sex domestic partner. The employee filed a discrimination complaint with the Labor Commissioner and argued that the policy

denied him a benefit available to other similarly situated employees (*i.e.*, unmarried employees in domestic partner relationships) solely because of his sexual orientation. The commissioner held that the city's policy discriminated based on sexual orientation because it used an employee's actual or perceived sexual orientation as the eligibility criterion. Although the city believed it had created a "level playing field" between couples legally able to marry and those who could not, it instead created a new type of discrimination.

Finally, certain states and localities may afford employees of private employers a discrimination cause of action under evolving theories of discrimination law. To illustrate, while Ohio laws prohibit discrimination based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry with respect to hiring, tenure, or terms, conditions or privileges of employment, they do not treat sexual orientation, domestic partnership status, or civil union status as protected statuses.⁸⁹ However, courts in Ohio have applied a "sex plus another characteristic" analysis to same-sex harassment and discrimination and may extend that theory to claims involving spousal equivalency benefits. The Ohio appellate courts, as discussed above, upheld the domestic partnership registries of Cleveland and Cleveland Heights against constitutional challenge, even in the presence of the Ohio "Marriage Amendment," a state DOMA.

To further illustrate, Illinois law prohibits unlawful discrimination in employment on the basis of sexual orientation and marital status.⁹⁰ However, because the Illinois statute recognizing civil unions is so new, no case law as yet suggests that these discrimination laws would apply to an employer who imposed different requirements for married employees and for employees in civil unions. The discrimination statute defines "sexual orientation" as actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth.⁹¹ The term "marital status" is defined as the legal status of being married, single, separated, divorced, or widowed.⁹² Of interest, although perhaps a holding whose time has passed, the City of Chicago's ordinance forbidding discrimination on the basis of marital status has been construed to permit a public employer to provide domestic benefits only to same-sex domestic partners. In *Izharry v. Bd. of Ed. of City of Chicago*,⁹³ a public employee challenged the City of Chicago's Board of Education's denial of spousal equivalency benefits to opposite-sex domestic partners on constitutional and statutory (ordinance) grounds. The Seventh Circuit first upheld the ordinance against the employee's constitutional challenge (a challenge unavailable to private sector employees), finding that the City of Chicago's Board of Education had a rational basis for denying benefits to opposite-sex domestic partners (*i.e.*, to encourage homosexual applicants

to apply to teach in the Chicago schools). The Court also rejected the employee's claim that the Board had violated a city ordinance against discrimination on the basis of marital status. In doing so, the Court opined that the employee had perhaps "misinterpreted the ordinance as forbidding any preference for marital status" and seemed to accept her employer's proffered reason for the preferential treatment to same-sex domestic partners, which was "to level the playing field" since homosexuals do not have the right to marry as heterosexuals do under Illinois law.⁹⁴

However, in the current climate of change in favor of recognizing other types of non-traditional unions for benefit purposes, and in the wake of the new Illinois statute embracing civil unions and affording full faith and credit to such unions entered into and recognized by other states, Illinois courts may also determine that, with the absolute bar to legally recognized same-sex unions no longer in place, employees may be able to demonstrate comparables among unmarried employees. The courts need only look to Massachusetts for more current analysis in *Partners Healthcare System, Inc. v. Sullivan*,⁹⁵ finding a discrimination claim under Massachusetts state law and distinguishing earlier cases finding no comparables: "The court [in *Foray v. Bell Atl.*, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 1999)] rejected the [heterosexual domestic partner's discrimination] claim, finding that the plaintiff was not similarly situated to people with homosexual domestic partners, as those people, unlike Plaintiff [a heterosexual domestic partner], could not marry their partners. That reasoning reveals a distinction: the court relied on the fact that homosexual partners could not marry, a fact no longer true in Massachusetts." Like the Massachusetts statute permitting same-sex marriage, the new Illinois statute removes the former absolute bar or impediment for a state-recognized legal union between same-sex partners, extending all requirements, rights and responsibilities under Illinois' marital and domestic relations law to same-sex civil unions, save for the title of "marriage."

Courts might also look to *Sprogis v. United Air Lines, Inc.*,⁹⁶ a case in which the Seventh Circuit applied an analysis later dubbed "sex-plus" discrimination by then Professors Herma Hill Kay and (now Justice) Ruth Bader Ginsberg in one of the first law school textbooks on gender-based discrimination. In *Sprogis*, the airline applied a no-marriage rule only to female employees in the category of "stewardesses" and had never applied the no-marriage rule to any male employee, whatever his position, including male "flight cabin attendants." United had discharged *Sprogis* because she violated the no-marriage rule, and it had defended against her Equal Employment Opportunity Commission (EEOC) charge on the ground that its no-marriage rule was a bona fide occupational qualification (BFOQ) for the position of flight cabin attendant, even though it had never applied the rule to any male flight cabin attendants. Deferring to the EEOC's regulations relating to a no-marriage rule applied

only against women, the Seventh Circuit observed that the agency had cautioned: “It does not seem to us relevant that the rule is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.”⁹⁷ In essence, the court recognized that sex plus the factor of marriage constituted discrimination on the basis of sex. To the extent that employees with opposite-sex domestic or civil partners contend that private employer plans discriminate against them by treating them differently than similarly situated employees with same-sex domestic or civil partners on the basis of sexual orientation, courts might employ a sex-plus or domestic-partnership-plus or civil-union-plus analysis under a state’s anti-discrimination law.

ERISA Preemption of State and Local Discrimination Laws

In an ironic twist of fate, however, private employers may enhance the ERISA preemption defense of state anti-discrimination laws if they decline to extend spousal equivalency benefits to heterosexual domestic or civil union partners.

In *Partners Healthcare System*,⁹⁸ the federal district court found that ERISA preempted plaintiff’s state-law discrimination claim because the law, if applied to the benefit plan, would have limited the plan administrator’s choice of beneficiary to that which state law required, not what the plan required. The court reasoned that that limitation of choice of beneficiary paralleled the choice faced by the plan administrator in *Egelhoff*, where a Washington statute dictated the beneficiary, rather than the plan documents.

In *Partners Healthcare*, a heterosexual cohabiting but unmarried employee complained that his employer had discriminated against him on the basis of sexual orientation by failing to extend coverage to his heterosexual partner while extending coverage to the cohabiting partner of a homosexual employee. Finding that the Massachusetts discrimination law⁹⁹ would require changes to the employer’s plan so that it offered domestic partner benefits to both opposite-sex and same-sex domestic partners of the employer’s employees, the court held that ERISA preempted the state statute. The court also concluded that Title VII and the state statute were not co-extensive on the protection of sexual orientation discrimination, so that the Federal Law Savings Clause in ERISA Section 514 did not save the law from preemption. In reaching its conclusion, the court also cited with approval the analysis of the federal district court in *Air Trans. Ass’n of Am.*¹⁰⁰ (“The Court concludes that the [San Francisco] Ordinance has a connection with ERISA plans because it mandates employee benefit structures for City contractors and because the purpose and effect of the Ordinance conflicts with ERISA’s objective of permitting uniform

national administration of employee benefit plans and eliminating the need to comply with conflicting State and local regulations.”)¹⁰¹

CONCLUSION

In the face of a growing trend of states and localities extending legal recognition to non-traditional couples and permitting or requiring private employers to afford such couples spousal equivalency benefits, employers with self-insured plans may oppose such efforts on the ground that ERISA preempts even indirect regulation of self-insured plans. Those employers with insured plans may find that courts save such state laws from ERISA preemption, particularly if the laws appear in state insurance codes and fall under the Savings Clause of ERISA’s express preemption provision. Nonetheless, if dissatisfied employees sue for failure to comply with these newly favorable laws extending benefits to same-sex spouses and/or domestic or civil partners, or for violations of anti-discrimination statutes, employers with self-insured plans may attempt to defend the administration of their ERISA-governed plans on the other grounds of ERISA preemption discussed above. No matter what the type of ERISA-governed benefit plan, whether self-insured or insured, an employer contemplating the choice of extending such benefits should consult an experienced ERISA litigator who can review the specific proposed design in question against the backdrop of state and local laws and principles of ERISA preemption.

NOTES

1. New York joins Connecticut (2008), Iowa (2009), Massachusetts (2003), New Hampshire (2010), Vermont (2009), and the District of Columbia (2009) in permitting the issuance of marriage licenses to same-sex couples.

2. U.S.C. § 7. In early July of 2011, the Department of Justice under the Obama Administration belatedly filed a brief in *Golinski v. US Dep’t of Personnel Management* on appeal to the Ninth Circuit, in which the Department takes the position that Section 3 of the DOMA violates the Equal Protection Clause and proposes that courts should employ heightened scrutiny (and not rational basis scrutiny) when reviewing classifications based upon sexual orientation. The Obama Administration also withdrew from defending the DOMA in an appeal before the First Circuit from two Massachusetts decisions finding Section 3 of the DOMA unconstitutional (*Gill v. Office of Personnel Management* and *Massachusetts v. United States*). Instead, the Republican members of the House of Representatives “Bipartisan Legal Advisory Group” have sought to intervene to defend the DOMA.

3 Same-sex marriage remains an issue of state concern. In 2006, the proposed Federal Marriage Amendment, attempting to amend the Federal Constitution to limit marriage to opposite-sex couples, suffered defeat in Congress. However, the DOMA directs:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus or

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 wife.

U.S.C. § 7. Moreover, on its Web site, the IRS takes the position that the term “spouse” in a qualified plan may not subsume a same-sex spouse or domestic partner. So, for example, an ERISA-governed retirement plan seeking to remain tax-qualified may not expressly define “spouse” for purposes of the election of a qualified joint and survivor annuity (QJSA) as a same-sex spouse or domestic partner, but may permit a participant to designate such a partner for survivor benefits other than the survivor portion of the QJSA, *e.g.*, minimum distribution benefits or a remaining account balance, www.irs.gov/retirement/participant. The effect of DOMA on tax-qualified retirement plan design falls outside the scope of this article.

4. 9 U.S.C. § 1001, *et seq.*

5. 29 U.S.C. § 514.

6. In order to remain certified or licensed to do insurance business within a particular state, insurers may decide that they will only offer policies that provide spousal equivalency benefits. For example, in Illinois, whose Religious Freedom Protection and Civil Union Act took effect on June 1, 2011, BlueCross and BlueShield of Illinois (BCBSIL) decided that spouses of civil unions would be eligible for coverage under insured plans if the policy covers spouses in marriage for BCBSIL fully insured individual and group businesses, as well as state-funded state municipalities, school districts, and counties. BCBSIL also took the position the law will extend to BCBSIL contracts issued and delivered in Illinois, regardless of where the member resides. Further, BCBSIL believes that religious organizations (which need not officiate at or solemnize a civil union based upon their religious practices), must as employers extend benefits as required by law. At the time it issued its position, BCBSIL expected that the Illinois Department of Insurance would issue an insurance FAQ relating to the law in early spring of 2011 and left open that it might make any appropriate adjustments to its position occasioned by the FAQ. The Department did not issue an insurance FAQ until a week after the law took effect.

7. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. www.ncsl.org/Issues & Research >> Human Services >> Same Sex Marriage.

8. Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.

9. Georgia Constitution Art. I, Section IV(a), (b); 5 Ga. Code Ann. § 19-3-3.1(a), (b).

10. Tennessee HB 600, www.capitol.tn.gov/Bills/107/Bil/HB0600.pdf.

11. *See* Strauss v. Horton, 46 Cal. 4th 364, 374 (2009) (“We conclude that Proposition 8 cannot be interpreted to apply retroactively so as to invalidate the marriages of same-sex couples that occurred prior to the adoption of Proposition 8. These marriages remain valid in all respects.”)

12. Kerrigan and Mock v. Commissioner of Public Health.
13. See, for example, Section 60 of Illinois' civil union statute.
14. Cal. Fam. Code § 308(a).
15. Cal. Fam. Code § 308(c). Recently, three same-sex couples who were married during the window when California permitted such marriages (and also registered as domestic partners) argued that the CalPERS exclusion of same-sex married partners and domestic partners from long-term care insurance policies under DOMA and the federal tax code violated the Federal Equal Protection Clause and Federal substantive due process. *Dragovich v. U.S. Dep't of Treasury*, U.S.D.C. No. 10-01564 CW (N.D. Cal. Jan. 1, 2011). Refusing to dismiss plaintiffs' challenge to Section 3 of the DOMA as failing to state a claim, the district court reasoned that DOMA Section 3 could be found to "[impair] the states' authority to define marriage, by robbing states of the power to allow same-sex civil marriages that will be recognized under federal law" (citing *Commonwealth of Massachusetts v. U.S. Dept. of Health and Human Services*, 698 F. Supp. 2d 234, 249 (D. Mass. 2010) (holding that the "DOMA plainly intrudes on a core area of state sovereignty—the ability to define the marital status of its citizens" and violates the Tenth Amendment). The court then concluded that plaintiffs had sufficiently stated that Section 3 of the DOMA did not bear a rational relationship to a legitimate governmental interest to withstand dismissal on a Rule 12(b)(6) motion on their equal protection and due process claims.
16. Hawaii, which had previously recognized beneficiary reciprocal relationships (now favored by public sector employers in states with constitutional prohibitions on same-sex marriages) since 1997, will recognize civil unions, effective January 1, 2012. The civil union statutes in Delaware and Rhode Island become effective January 1, 2012 and July 2, 2011, respectively.
17. Alabama, Arkansas, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and Wisconsin.
18. IL Act, § 10.
19. *Id.*
20. IL Act, § 25.
21. IL Act, § 20.
22. "Civil Unions and Insurance," Illinois Department of Insurance, <http://www.insurance.illinois.gov>.
23. Twenty-one states and the District of Columbia protect persons from discrimination based upon sexual orientation.
24. See N.J.S.A. 37:1-29 "Civil Union."
25. N.J.S.A. 37:1-30.
26. N.J.S.A. 37:1-31.
27. N.J.S.A. 37:1-32.
28. N.J.S.A. 37:1-33.
29. See Cal. Fam. Code § 299.2.
30. N.J.S.A. 37:1-34.

31. IL Act, § 60.
32. California, Hawaii, Maine, Nevada, Oregon, Washington, and the District of Columbia.
33. Cal. Fam. Code 297.
34. As defined by Cal. Fam. Code 297.
35. Cal. Ins. Code § 10121.7 (requiring provision of spousal equivalency benefits).
36. N.J.S.A. 26:8A-4.
37. In addition, the names of both persons are not required to be on the title or lease documents of the residence, one or both persons may have additional places in which to live, and one person may reside elsewhere temporarily, either on a long-term or short-term basis, if he or she intends to return. N.J.S.A. 26:8A-3.
38. N.J.S.A. 34:11A-20 a., b., c.
39. Prior to the 2004 amendment, the City of Atlanta had attempted to enforce its domestic partnership registry against private employers with operations in the City. The 2004 Amendment probably responded to that attempt. Atlanta Ordinance No. 93-0-0776 allows both same-sex and opposite-sex couples to register as domestic partners, so long as they demonstrate that they “live together in the mutual interdependence of a single home and have signed a “Declaration of Domestic Partnership,” registered with the Office of Treasury. The ordinance specifically states that it provides no legal rights to employees other than municipal employees. Instead of attempting to enforce Ordinance No. 93-0-0776 against private employers, the City has adopted the Living Wage Ordinance.
40. Ga. Code. Ann. § 50-1-8 (a), (b).
41. Under Atlanta Ordinance No. 93-0-776, the City of Atlanta does maintain a domestic partner registry that allows both same-sex and opposite-sex couples to register as domestic partners. To qualify as domestic partners, a couple must “live together in the mutual interdependence of a single home” and must sign a “Declaration of Domestic Partnership,” registered with the Office of Treasury. The ordinance specifically states that it provides no legal rights to employees other than municipal employees. However, the City of Atlanta has twice attempted to enforce the ordinance against private employers with operations within the city. These attempts pre-dated, and probably inspired, the amendment.
42. Cal. Pub. Con. Code § 10295.3.
43. Cal. Pub. Con. Code § 10420.
44. *Air Transport Assoc. v. San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998, *aff'd* 266 F.3d 1064, 1180 (9th Cir. 2001).
45. *See* San Francisco Administrative Code, Ch. 12B, § 12B.1.
46. § 10.8.2.1(a).
47. § 10.8.2.1(b)(8).
48. § 10.8.2.1(c)(1).
49. § 10.8.2.1(b)(2).
50. § 10.8.2.1(d)(1).

51. § 10.8.2.1(d)(2) and (3).
52. § 10.8.2.1(g).
53. § 10.8.2.1(e)(2). A discussion of a possible challenge to this Ordinance based on impermissible extraterritorial effect is beyond the scope of this article.
54. In March of 2010, Congress did impose certain insurance market reforms and benefit mandates (e.g., benefits for children up to age 26 (based solely on age and status as adult child of the covered employee) upon “group health plans,” including self-insured plans. ERISA does not preempt other federal law. Nor does ERISA itself require an employer to provide benefits to its employees.
55. *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 545 (1995) (*Travelers*); *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997) (*Dillingham*); *De Buono v. NYSA-ILA Med. & Clinical Servs. Fund*, 520 U.S. 806 (1997) (*De Buono*).
56. ERISA § 502.
57. *Travelers*, 514 U.S. at 656, *Dillingham*, 519 U.S. at 324.
58. *Travelers*, 514 U.S. at 654, *De Buono*, 520 U.S. at 814.
59. 514 U.S. at 661.
60. *See, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 150 (2001) (ERISA preempted law requiring plan administrator to “follow state’s beneficiary designation scheme or alter the terms of their plans so as to indicate that they will not follow it”).
61. *See, e.g.*, *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739–747 (1985) (ERISA does not preempt “state-mandated benefits” embedded in state insurance statute requiring that certain benefits be included in all group policies sold within the state; Savings Clause in ERISA § 514 saves such indirect regulation of choices available to insured benefit plans from preemption).
62. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 366 (2001).
63. 538 U.S. 329 (2003),
64. *Prudential Ins. Co. of America v. National Park Medical Center, Inc.*, 413 F.3d 897 (8th Cir. 2005). *See also* *Daley v. Marriott Intern., Inc.*, 415 F.3d 889, 895 (8th Cir. 2005).
65. Cal. Ins. Code § 10121(f).
66. Cal. Ins. Code § 22.
67. Cal. Ins. Code § 380.
68. Cal. Ins. Code § 106.
69. *Lincoln Mut. Casualty Co. v. Lectron Product, Inc.*, 970 F.2d 206, 210 (6th Cir. 1992) (governing Ohio); *United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga*, 801 F.2d 1157, 1161 (9th Cir. 1986) (governing California) (“*Pacyga*”); *Bill Gray Enterprises, Inc. Employee Health & Welfare Plan v. Gourley*, 248 F.3d 206, 215 (3d Cir. 2001) (governing New Jersey); *American Med. Sec. Inc. v. Bartlett*, 915 F. Supp. 740, 742 (D. Md. 1996), *aff’d* 111 F.3d 358 (4th Cir. 1997); *Brown v. Granatelli*, 897 F.2d 1351, 1355 (5th Cir.), *cert. den.* 498 U.S. 848 (1990) (citing *Pacyga* with approval in finding that purchasing stop loss insurance did not subject plan to state insurance law).

70. 29 U.S.C. § 1144.
71. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983).
72. *Id.* at 100, n.12.
73. *Dillingham*, 519 U.S. at 325.
74. 532 U.S. 141 (2001).
75. 532 U.S. at 147.
76. In *Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 328 (1997). *See also* *Retail Indus. Leaders Assoc. v. Fiedler*, 475 F.3d 180, 192–193 (4th Cir. 2007) (finding Maryland’s health care reform statute preempted under ERISA where the only rational choice presented to an employer in the face of a significant tax penalty against the employer that failed to provide for health care benefits for its employees was to change the structure of its benefit plan to provide coverage: “[A] state law has an impermissible ‘connection with’ an ERISA plan if it directly regulates or effectively] mandates some element of the structure or administration of employers’ ERISA plans.”)
77. 506 U.S. 125, 129 (1992).
78. D.C. Code Ann. 36-307(a-1)(1) (Suppl. 1992).
79. *Golden Gate Restaurant Assoc. v. City and County of San Francisco*, 546 F.3d 639, 658 (9th Cir. 2008) (rehearing en banc denied 2009). The Ninth Circuit distinguished *Fiedler* on the ground that the San Francisco ordinance offered employers a meaningful choice (rather than a Hobson’s choice of paying a tax or revising an ERISA plan) of paying into a fund so that its own employees could participate in the HAP at reduced rates, and that San Francisco did not attempt to use a non-ERISA option to force employers to change their existing ERISA plans. Unlike the statute at issue in *Egelhoff*, which the Ninth Circuit characterized as a state law requiring a plan sponsor to change a plan’s terms, the San Francisco ordinance merely required a level of contribution per employee determined by hours worked, and not with reference to the plan or to a level of benefits, as in *Dillingham*.
80. 498 U.S. 133, 142 (1990).
81. *Aetna Health, Inc. v. Davila*, 542 U.S. 200, 209 (2004).
82. Georgia law, for example, prohibits public employers from discrimination based upon race, color, religion, national origin, sex, disability, or age with respect to hiring, firing, limiting, segregating, classifying, promoting, advancing or other employment related actions. Ga. Code. Ann. § 45-19-29. However, the general Georgia discrimination law does not apply to private employers. The only discrimination laws in Georgia that relate to private employers are a state equivalent to the Equal Pay Act, the Age Discrimination in Employment Act and the Americans with Disabilities Act. The latter two statutes do not impact this analysis. Georgia state laws do not protect sexual orientation, domestic partnership status, and civil union status and thus do not prohibit a private company from offering health care benefits only to spouses of married employees. Nor do Georgia state laws prohibit a private company from offering spousal equivalency benefits to the domestic partners (as defined by the private company) of employees.
83. The law prohibits an employer from taking an adverse employment action (such as hiring, refusing to hire, requiring to retire, or affecting compensation, terms, conditions or privileges of employment) on the basis of race, creed, color, national origin,

ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or because of the liability for service in the Armed Forces of the United States or the nationality of any individual, or because of the refusal to submit to a genetic test or make available the results of a genetic test to an employer. N.J.S.A. 10:5-12.

84. 298 N.J. Super. 442, 689 A.2d 829 (Super. Ct. N.J. 1997).

85. N.J.S.A. 10:5-12,

86. *See also* *Boylan v. New Jersey*, 116 N.J. 236, 561 A.2d 552 (N.J. 1987) (holding that the exception to LAD prohibiting application to bona fide retirement, pension, employee benefit, or insurance plan or programs did not prohibit forced early retirement programs). UPS interpreted the New Jersey civil union law so as not to require the company to offer employee health benefits to same-sex civil union partners of hourly wage union employees. Only after much negative press and a letter from the Governor of New Jersey to the CEO (in which the governor made a personal appeal to UPS to override its legal ability to avoid provision of benefits to civil union couples) did UPS agree to provide such benefits.

87. Under California tax law, “dependents” have the same meaning as “dependents” pursuant to the U.S. Internal Revenue Code 26 U.S.C.A. § 152. Cal. Rev. and Tax. Code § 17056. Generally, unless a spouse or child, a dependent must be a person (1) who shares the same principal place of abode as the taxpayer/employee, (2) whose income is less than the exemption amount, (3) who receives over one half of his support from the taxpayer/employee, and (4) who is not a qualifying child of the taxpayer/employee or any other taxpayer/employee. 26 U.S.C.A. § 152. Thus, where both domestic partners are employed full time, it would be difficult for a domestic partner to qualify as a “dependent.”

88. *Ayyoub v. City of Oakland*, No. 9902937, 35 (1744) G.E.R.R. (BNA) 1605 (Cal. Indus. Rel. 1997),

89. Ohio Rev. Code 4112.02 (A).

90. 775 ILCS 5/2 102 and 103.

91. 775 ILCS 5/1-103 (O-1).

92. 775 ILCS 5/1-103 (J).

93. 251 F.3d 604 (7th Cir. 2001).

94. *See also* *Powell v. City of Chicago Human Rights Commission*, 906 N.E.2d 24 (1st Dist., 2009) (finding in gratuitous dicta, since a female employee proved ineligible for FMLA leave, that the employee had no right to paid FMLA leave to care for her same-sex partner even though the employer had allowed FMLA-eligible married employees to take such leave).

95. 497 F. Supp. 2d 29, 38 (D. Mass. 2007).

96. 444 F.2d 1194 (7th Cir. 1971).

97. *Id.* at 1198.

98. 497 F. Supp. 2d at 36–37.

99. Mass. Gen. Laws ch. 151B, § 4.

100. 992 F. Supp. at 1176.

101. *See also* Catholic Charities of Me, Inc. v. City of Portland, 304 F. Supp. 2d 77, 92 (D. Me. 2004) (citing *Shaw*, 463 U.S. at 97), and *Egelhoff*, the court found that ERISA preempted the Portland ordinance mandating that employers paid with city funds provide benefits for domestic partners because the ordinance was concerned with the substantive content and administration of employee benefit plans).

Reprinted from *Benefits Law Journal* Autumn 2011, Volume 24, Number 3, pages 20-47, with permission from Aspen Publishers, Inc., Wolters Kluwer Law & Business, New York, NY, 1-800-638-8437, www.aspenpublishers.com

