



# May North Carolina Local Government Employers Offer Domestic Partner Benefits?

Diane M. Juffras

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

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

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

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

1. See the Human Rights Campaign Foundation, The State of the Workplace 2007–2008, available at [www.hrc.org/documents/HRC\\_Foundation\\_State\\_of\\_the\\_Workplace\\_2007-2008.pdf](http://www.hrc.org/documents/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf) (last visited October 12, 2009).

2. Source: The National Conference of State Legislatures at [www.ncsl.org/Default.aspx?TabId=16315](http://www.ncsl.org/Default.aspx?TabId=16315) (last visited October 26, 2009). The District of Columbia also offers its employees domestic partner benefits.

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

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

### **Domestic Partner: A Definition**

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

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

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

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

In North Carolina, it is not possible for an employee with a same-sex domestic partner to claim any formal recognition of the relationship. Under North Carolina law, only a man and a woman may marry one another. Section 51-1 of the North Carolina General Statutes [hereinafter G.S.] provides that "a valid and sufficient marriage is created by the consent of a male

and female person who may lawfully marry . . . ." Other sections of G.S. Chapter 51 set forth in detail requirements such as age, competency, and family relationship that must be met before a man and a woman may marry.<sup>4</sup> As for marriages performed in other states, the 1996 federal law known as the Defense of Marriage Act allows states to regard marriages legally performed in other states as invalid if they are between two persons of the same gender. Section 2 of the Defense of Marriage Act, which is codified at 28 U.S.C. § 1738C, says

No State, territory, or possession of the United States . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory or possession . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, [or] possession . . . or a right or claim arising from such a relationship.<sup>5</sup>

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

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

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

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4. For an overview of marriage law in North Carolina, see Janet Mason, "Marriage in North Carolina," *Popular Government*, Vol. 71, No.2, Winter 2006 (School of Government: Chapel Hill), pp. 26–36, available online at [www.sog.unc.edu/pubs/electronicversions/pg/pgwin06/article3.pdf](http://www.sog.unc.edu/pubs/electronicversions/pg/pgwin06/article3.pdf).

5. Whether or not this section of the Defense of Marriage Act violates the Full Faith and Credit Clause of the United States Constitution is an issue that has not reached the United States Supreme Court or any federal court of appeals. The Full Faith and Credit Clause, Article IV, Section 1, of the U.S. Constitution, says that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

6. States currently recognizing either same-sex marriages or forms of domestic partnership include Connecticut (marriages); Iowa (marriages); Massachusetts (marriages); Vermont (marriages effective September 2009); California (authorized marriage between June 16, 2008, and November 8, 2008; recognized domestic partnerships both before and after); New Hampshire (civil unions; same-sex marriage effective January 1, 2010); New Jersey (civil unions); District of Columbia (domestic partnerships); New York (domestic partnerships; recognizes same-sex marriages entered into in other states); Oregon (domestic partnerships); Washington (domestic partnerships); Nevada (domestic partnerships); Hawaii (reciprocal beneficiary status for same-sex couples). Source: Human Rights Campaign at [www.hrc.org/documents/Relationship\\_Recognition\\_Law/Map.pdf](http://www.hrc.org/documents/Relationship_Recognition_Law/Map.pdf) (last visited October 12, 2009).

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

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

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

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

### **The North Carolina Constitution and Local Governments**

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

### **The General Statutes and Local Government Employee Benefits**

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

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7. N.C. Const. art. VII, § 1.

such authority is presumed by more general grants of power to hire employees or set employee salaries or compensation.<sup>8</sup>

The General Assembly has also granted city and county governing boards the authority to adopt policies regarding annual leave, sick leave, hours of employment, holidays, working conditions, “and *any other measures that promote the hiring and retention of capable, diligent, and honest career employees*”<sup>9</sup> (emphasis added). Again, such authority is presumed to be granted to other units of local government by the more general grants of power to hire employees and set their compensation.

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

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

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

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

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

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8. For water and sewer authorities, see G.S. 162A-6(a)(11); for public health authorities, see G.S. 130A-35.3(a)(7); for local ABC boards, see G.S. 18B-701(3) and (8); for regional councils of government, see G.S. 160A-475(2). For public school systems and community colleges, see the discussion on page 13 of this bulletin.

9. See G.S. 160A-164 and 153A-94.

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

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

#### *Interpreting the General Assembly’s Intent:*

#### *Are Domestic Partners Dependents within the Meaning of G.S. 160A-162?*

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

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

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

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

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10. See G.S. 160A-162(b) and 153A-92(b).

11. In contrast, local governments that receive their powers through a state constitution are considered to have more latitude in exercising their authority and are known as “home-rule states.”

12. See G.S. 160A-4 and 153A-4.

13. See *Homebuilders Ass’n of Charlotte, Inc. v. City of Charlotte*, 336 N.C. 37, 43–44 (1994) (this case involved whether a city had the power to impose regulatory user fees). See also *Bellsouth Telecomms., Inc. v. City of Laurinburg*, 168 N.C. App. 75, 79–83 (2005). The more recent case of *Durham Land Owners Association v. County of Durham*, 177 N.C. App. 629, 634, rev. denied, 615 S.E.2d 660 (2006), is not

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

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

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

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

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

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

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

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

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

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

18. See *Hayes v. Fowler*, 123 N.C. App. 400, 406 (1996). For examples of the courts' reliance on dictionary definitions to find the plain meaning of a statutory term in criminal cases, see *State v. Ramos*, 176 N.C. App. 769 (2006) (unpublished disposition) at \*3 (looking to the *American Heritage Dictionary* definition of the terms *lewd* and *licentious* when those words were not defined in connection with the elements of the criminal offense of taking liberties with a child). See also *State v. Manley*, 95 N.C. App. 213, 217, *disc. review denied*, 325 N.C. 712 (1989) (referring to *Webster's Third International Dictionary*); *State v. Wilson*, 87 N.C. App. 399, 402 (1987), *rev. denied*, 321 N.C. 479 (1988) (same).

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

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

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

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

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19. *Random House Dictionary of the English Language*, 2d edition unabridged (1987), under *dependent*.

20. *American Heritage Dictionary of the English Language*, 4th edition (2004), under *dependent*, visited online at <http://dictionary.reference.com/browse/dependent> (last visited October 26, 2009).

21. *Merriam-Webster’s Online Dictionary*, under *dependent*, at [www.merriam-webster.com/dictionary/dependent](http://www.merriam-webster.com/dictionary/dependent) (last visited October 12, 2009).

22. *Black’s Law Dictionary*, 8th edition (2004), under *dependent*.

23. Note, however, that *Black’s Law Dictionary* has an additional definition with respect to the word’s use in the context of tax law: “a relative, such as a child or parent, for whom a taxpayer may claim a personal exemption if the taxpayer provides more than half of the person’s support during the taxable year.” The *Random House Dictionary* also has an additional definition with respect to tax law: “a child, spouse, parent, or certain other relative to whom one contributes all or a major amount of necessary financial support: *She listed two dependents on her income-tax form.*”

24. See G.S. 160A-162(b).

25. See G.S. 160A-164 and 153A-94 (for cities and counties respectively).

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

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

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

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

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26. See *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 110–11 (Minn. Ct. App. 1995).

27. See *Connors v. City of Boston*, 714 N.E.2d 335, 337–39 (Mass. 1999).

28. *Heinsma v. City of Vancouver*, 29 P.3d 709 (Wash. 2001).

29. *City of Atlanta v. Morgan*, 492 S.E.2d 193 (Ga. 1997).

30. See *Heinsma*, 29 P.3d at 712.

31. See *Heinsma*, 29 P.3d at 712.

32. See *Heinsma*, 29 P.3d at 712–13.

*dependent* in a reasonable manner, and (2) that the City of Vancouver's definition of *dependent* as including domestic partners was reasonable.<sup>33</sup>

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

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

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

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

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33. See *Heinsma*, 29 P.3d at 713.

34. See O.C.G.A. § 36-35-4(a).

35. See *City of Atlanta v. Morgan*, 492 S.E.2d 193, 195 (Ga. 1997), *citing* Atlanta Ordinance 96-O-1018(a)(1)(B).

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

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

“a resident spouse, an unmarried child under the age of 19 years, a child who is a full-time student under the age of 23 years and who is financially dependent upon the parent or guardian, a child who is over 18 years of age and for whom a person may be obligated to pay child support, or a child of any age who is disabled and dependent upon the parent or guardian.” Nowhere else in G.S. Chapter 58, which regulates insurance, is the term *dependent* defined—most significantly, not in the sections governing health insurance generally (Articles 50 and 51) and not in those sections regulating health maintenance organizations (Article 67).

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

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

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

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

The statutes authorizing cities and counties to adopt personnel policies—G.S. 160A-164 and 153A-94, respectively—expressly authorize those employers to adopt “any other measures that promote the hiring and retention of capable, diligent, and honest career employees.” The two

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38. See Code of Virginia § 51.1-801.

39. *Arlington County v. White*, 528 S.E.2d, 706, 712–13 (Va. 2000).

40. See *Arlington County*, 528 S.E.2d at 712–13.

41. See *Arlington County*, 528 S.E.2d at 713–14.

statutes do not give examples of what might be included in such other measures, and there are no cases that define the boundaries of this grant of power. Does it include the authority to grant domestic partner benefits? Given the lack of any limiting language and given that the rule of construction that says that grants of authority to local governments are to be construed broadly, it seems likely that “any other measures” includes offering domestic partner benefits.

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

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

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

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

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

43. See *Colorado Springs Fire Fighters Ass’n v. Colorado Springs*, 784 P.2d 766, 773 (Colo. 1989) (limits on city’s payment of health care premiums for employees was matter of local concern not addressed by state statutory provisions); *Schaefer v. City and County of Denver*, 973 P.2d 717, 719 (Colo. Ct. App. 1998) (same).

44. See *Crawford v. City of Chicago*, 710 N.E.2d 91, 98 (Ill. App. 1. Dist.), *appeal denied*, 720 N.E.2d 1090, (1999). See also *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1246 (Pa. 2004).

45. See, for example, Allen Smith, Experts: Domestic Partner Benefits are Worth the Trouble, November 5, 2007, on the Society for Human Resources Management website at [http://moss07.shrm.org/LegalIssues/FederalResources/AnalysisofFederalEmploymentLaw/Pages/CMS\\_023585.aspx](http://moss07.shrm.org/LegalIssues/FederalResources/AnalysisofFederalEmploymentLaw/Pages/CMS_023585.aspx).

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

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

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

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

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

The city attorney reminds the council, the manager, and the human resources director that while G.S. 160A-4 and 153A-4 call for broad construction of grants of power to local governments, they do contain one significant limitation. She quotes the relevant provision to them:

...the provisions of this Chapter . . . shall be broadly construed . . . Provided, that the exercise of such additional or supplementary powers shall not be contrary to State or federal law or to the public policy of this State.

Although we have concluded that it is reasonable to interpret the grant of authority to provide benefits to employees and dependents as including the general authority to provide domestic partner benefits, the city attorney advises, we must also consider whether offering domestic partner benefits would be contrary to state or federal law or to the public policy of North Carolina. The city attorney outlines four possible arguments that offering domestic partner benefits would contravene North Carolina law or public policy and the counterarguments to them.

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

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

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

The fourth argument is a little different:

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

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

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

Some opponents of domestic partner benefits have argued that by offering domestic partner benefits, a local government employer is intruding into the area of domestic or family relations, which is generally regulated at the state level. In North Carolina, the area broadly defined as family law is covered beginning (alphabetically) in Chapter 48 of the General Statutes with the laws regulating adoptions and continuing through Chapter 52, which codifies the Uniform Interstate Family Support Act. Chapter 51 regulates marriage, Chapter 52 delineates the powers

and liabilities of married persons, and Chapter 50 covers divorce. As noted earlier, G.S. 51-1 limits marriage to “a male person and a female person,” while G.S. 51-1.2 provides that marriages between individuals of the same gender are not valid in North Carolina. Additionally, Chapters 28, 29, and 30 of the General Statutes govern the rights of family members in the distribution of a deceased person’s estate.

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

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

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

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

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46. *Schaefer v. City and County of Denver*, 973 P.2d 717 (Colo. Ct. App. 1998).

47. See *Schaefer*, 973 P.2d at 721 (interpreting Colorado Revised Statutes § 14-2-101 *et seq.* (1998)).

48. See *Devlin*, 862 A.2d at 1243–45 (creation of “life partner” status for employee benefits purposes does not give unmarried partners the same rights and responsibilities as married couples and thus is not an attempt to legislate in the area of “marriage”).

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

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

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

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

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

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

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

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50. G.S. 50-20(b)(1).

51. G.S. 50-20(b)(1).

52. G.S. 52-3.

53. G.S. 16.2A.

54. G.S. 28A-4-1.

55. G.S. 29-13 and 30-3.1.

56. G.S. 50-20(b)(4)d.

57. G.S. 50-13.4.

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

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

The argument fails.

**Argument 2: The extension of domestic partner benefits creates a common law marriage.**

**Counterargument 2: North Carolina does not recognize common law marriages.**

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

The argument fails.

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

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

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

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

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

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

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

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

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

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

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

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

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64. See, e.g., Town of Carrboro Code of Ordinances, Section 3-2.1, available at [www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf](http://www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf); *Ralph v. City of New Orleans*, 2009 WL 103895 (La. App. 4 Cir. 2009) at \*4; *Tyma*, 801 A.2d at 151 n. 4; *Devlin*, 862 A.2d at 1237; *Lowe*, 766 So. 2d at 1202.

65. See Joseph Adams and Todd Solomon, *Domestic Partner Benefits: An Employer's Guide*, 2d ed. (Washington, D.C. 2003), pp. 32–39.

66. See *Devlin*, 862 A.2d at 1243–44, 1246–47. See also *Crawford*, 710 N.E.2d at 99 ("Public or private employers who permit their employees to obtain health benefits covering anyone the employee designated, whether a parent, child, cousin, friend, or domestic partner, do not create a new type of marriage; rather they merely extend the existing categories of beneficiaries").

67. See *Lowe*, 766 So. 2d at 1205–06 (county ordinance recognizing domestic partners does not address the panoply of statutory rights and obligations exclusive to the traditional marriage relationship and thus does not create new "marriage-like" relationship); *Leskovar*, 166 P.3d at 1255–56, citing *Heinsma* (mayor's executive order that same-sex marriages of city employees be recognized for benefits purposes does not conflict with state defense of marriage law); *Tyma*, 801 A.2d at 158 (county's recognition of domestic partnership does not create alternative form of marriage, common law marriage, or any legal relationship or confer any other benefits of marriage). See also *Slattery*, 686 N.Y.S.2d at 686–89 (formal requirements regulating marriages are far more stringent than those regulating domestic partnerships and rights acquired by married partners with respect to their spouse's property are unavailable to domestic partners).

constitution. In 2004, Michigan voters approved a so-called marriage amendment to the state constitution that stated that “the union of one man and one woman in marriage shall be the only agreement recognized as a marriage *or similar union for any purpose*” (emphasis added). In a divided decision, the Michigan Supreme Court held that the question of whether health insurance benefits are a benefit of marriage need not be decided because the language of the amendment made clear that same-sex domestic partnerships could not be given legal recognition for any purpose, including the purpose of allowing public employers to provide domestic partner health insurance benefits.<sup>68</sup>

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

The argument fails.

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

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

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

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

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

69. See, e.g., Town of Carrboro Code of Ordinances, Section 3-2.1, available at [www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf](http://www.ci.carrboro.nc.us/tc/PDFs/TownCode/TownCodeCh03.pdf); *Ralph v. City of New Orleans*, 2009 WL 103895 (La. App. 4 Cir. 2009) at \*4; *Tyma*, 801 A.2d at 151 n.4; *Devlin v. City of Philadelphia*, 862 A.2d 1234, 1237 (Pa. 2004); *Lowe v. Broward County*, 766 So. 2d 1199, 1202 (Fla. App. 4 Dist. 2000). See more generally Joseph Adams and Todd Solomon, *Domestic Partner Benefits: An Employer’s Guide*, 2d ed. (Washington, D.C. 2003), pp. 32–39.

70. See the discussion of this statute in Jessica Smith, *North Carolina Crimes: A Guidebook on the Elements of Crime*, 6th ed. (School of Government, University of North Carolina at Chapel Hill, 2007), pp. 207–09. For G.S. 14-184, see p. 213.

law themselves, inasmuch as they would be at least indirectly violating their oath to uphold the law of the state by voting in favor of a domestic partner benefit.<sup>71</sup>

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

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

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

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

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71. Members of both the municipal council and the county board of commissioners take an oath to support and maintain the constitution and laws of North Carolina. See G.S. 160a-61 and 153A-26, respectively. G.S. 14-230 provides that any county commissioner or any official of any county, city, or town who violates his or her oath of office shall be guilty of "misbehavior in office" and shall be punished by removal from office. On the Durham County attorney's advice to the Durham Board of County Commissioners that G.S. 14-184 prevented them from offering domestic partner benefits to opposite-gender domestic partners, see "Benefits Advocates Criticize Decision," Durham Herald-Sun, March 16, 2003, at [http://74.125.47.132/search?q=cache:FnohuN\\_DfUJ:www.glapn.org/sodomylaws/usa/north\\_carolina\\_ncnews027.htm+durham+couth+domestic+partner+benefits&cd=2&hl=en&ct=clnk&gl=us](http://74.125.47.132/search?q=cache:FnohuN_DfUJ:www.glapn.org/sodomylaws/usa/north_carolina_ncnews027.htm+durham+couth+domestic+partner+benefits&cd=2&hl=en&ct=clnk&gl=us).

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

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

U.S. Constitution and the N.C. Constitution.<sup>74</sup> State courts elsewhere have reached conclusions similar to those of the North Carolina courts.<sup>75</sup>

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

The argument fails.

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

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

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

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

### **The Defense of Marriage Act and Federal Law Affecting Employee Benefits**

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

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

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

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74. See Hobbs, 2006 WL 3103008. See also Andrea Weigl, "Judge Rules Against Cohabitation Law," *The News & Observer*, Fri., July 26, 2006, available at [www.newsobserver.com/102/story/462833.html](http://www.newsobserver.com/102/story/462833.html).

75. See, e.g., State v. Cook, 192 P.3d 1085 (Idaho 2008); McDonald v. Commonwealth, 645 S.E.2d 918 (Va. 2007); State v. Clinkenbeard, 123 P.3d 872 (Wash. Ct. App. 2005).

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

### **DOMA and Benefits Required by Federal Law: FMLA**

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

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

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

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

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

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76. See 29 U.S.C. § 2612(a)(1)(C) and (E).

77. See 29 U.S.C. § 2612(a)(3).

### Consider the following situation.

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

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

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

### **DOMA and Benefits Required by Federal Law: COBRA**

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

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

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78. See 29 C.F.R. § 825.220(d).

79. Public employers are covered by COBRA if they have had twenty or more employees on more than 50 percent of the business days in the preceding calendar year. See 42 U.S.C. § 300bb-1(b)(1).

80. See 42 U.S.C. § 300bb-1. In addition to separation from service, other COBRA-qualifying events are a reduction in hours that bring the employee below the minimum number of hours required for health insurance coverage, the employee's enrollment in Medicare, the divorce or legal separation of the employee and his or her spouse, the employee's death, and a child's loss of dependent status under the terms of the employer's health insurance plan. See 42 U.S.C. §§ 300bb-2(2)(A)(iii) and 300bb-3.

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

### **Treatment of Domestic Partner Benefits under Federal Tax Law**

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

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

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

### **Health Insurance Premiums**

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

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81. See 42 U.S.C. § 300bb-8(3)(A).

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

83. See 26 U.S.C. § 125.

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

### ***Domestic Partners Who Qualify as Dependents under the Internal Revenue Code***

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

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

Support includes amounts spent to provide food, lodging, clothing, education, medical and dental care, recreation, transportation, and similar necessities. Tax-exempt income, savings, and borrowed amounts used to support that person are included in the calculation of total support.<sup>85</sup> The definition of *dependent qualifying relative* thus excludes those same-sex spouses or domestic partners who work and earn approximately as much as or more than the employee, even where those domestic partners work for employers who do not offer health insurance coverage or who offer health insurance coverage that the domestic partner cannot afford.

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

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

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84. See 26 U.S.C. § 152(d).

85. 29 CFR § 1-152-1(a)(2)(i) and (ii).

86. Priv. Ltr. Rul. 200339001 (June 13, 2003).

of the cost of the premium for a nondependent domestic partner, the Internal Revenue Service has advised that the difference between the amount of the fair market value of the health insurance premium paid by the employer and the amount paid by the employee is includable in the employee's gross income and is subject to income tax withholding and employment taxes.<sup>87</sup>

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

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

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

## **Conclusion**

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

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

88. See 26 U.S.C. § 105(b).

89. See IRS Notice 2002-45, in Internal Revenue Bulletin 2002-28.

90. See 26 U.S.C. § 223(d)(2).

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

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

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