An Overview of Federal Rights and Protections Granted to Married Couples

There are 1,138 benefits, rights and protections provided on the basis of marital status in Federal law. [1] Because the Defense of Marriage Actdefines "marriage" as only a legal union between one man and one woman, same-sex couples - even if legally married in their state - will not be considered spouses for purposes of federal law.
The following is a summary of several categories of federal laws contingent upon marital status.

Social Security

Social Security provides the sole means of support for some elderly Americans. All working Americans contribute to this program through payroll tax, and receive payments upon retirement. Surviving spouses of working Americans are eligible to receive Social Security payments. A surviving spouse caring for a deceased employee's minor child is also eligible for an additional support payment. Surviving spouse and surviving parent benefits are denied to gay and lesbian Americans because they cannot marry. Thus, a lesbian couple who contributes an equal amount to Social Security over their lifetime as a married couple would receive drastically unequal benefits, as set forth below.

Family Eligible for Surviving Child Benefits Eligible for Surviving Parent Benefits

- Family #1: Married husband and wife, both are biological parents of the child
  - Eligible for Surviving Child Benefits
  - Eligible for Surviving Parent Benefits
- Family #2: Same-sex couple, deceased worker was the biological parent or adoptive of the child
  - Eligible for Surviving Child Benefits
  - **Not** Eligible for Surviving Parent Benefits
- Family #3: Same-sex couple, deceased worker was not the biological parent nor able to adopt child through second-parent adoption
  - **Not** Eligible for Surviving Child Benefits
  - **Not** Eligible for Surviving Parent Benefits

Tax

According to the GAO report, as of 1997 there were 179 tax provisions that took marital status into account. The following is a limited sample of such tax provisions.

Tax on Employer-Provided Health Benefits to Domestic Partners
In growing numbers, both public and private employers across the country have made the business decision to provide domestic partner benefits in order to promoted fairness and equality in the workplace. For example, as of August 2003, 198 (almost forty percent) of the Fortune 500 companies and 173 state and local governments nationwide provide health insurance benefits to the domestic partners of their employees. Federal tax law has not kept up with corporate and governmental who take advantage of it are taxed inequitably.

As policymakers have put an increasing emphasis on delivering health coverage through the tax code and as the cost of healthcare has once again begun to skyrocket, the current inequities in the tax code have placed a burden on the employers who provide healthcare coverage to domestic partners and on the employees who depend upon these benefits to provide security for their families.

1. Burden on Employees

Employers who provide health benefits to their employees typically pay a portion of the premium – if not the entire premium. Currently, the Code provides that the employer's contribution of the premium for health insurance for an employee's spouse is excluded from the employee's taxable income. An employer's contribution for the domestic partner's coverage, however, is included in the employee's taxable income as a fringe benefit.

2. Burden on Employers

An employer's payroll tax liability is calculated based on their employees' taxable incomes. When contributions for domestic partner benefits are included in employees' incomes, employers pay higher payroll taxes. This provision also places an administrative burden on employers by requiring them to identify those employees utilizing their benefits for a partner rather than a spouse. Employers must then calculate the portion of their contribution that is attributable to the partner, and create and maintain a separate payroll function for these employees' income tax withholding and payroll tax. Thus, the employers are penalized for making a sound business decision that contributes to stability in the workforce.

Inequitable Treatment of Children Raised in LGBT Households

Recent data shows that at least 1 million children are being raised by same-sex couples in the United States. The Code contains competing definitions of "child." Certain provisions of the Code defining child penalize for the marital status of their parents and caregivers.

1. Earned Income Tax Credit

Eligibility for the earned income tax credit (EITC) is based in part upon the number of "qualifying" children in the taxpayer's household. *See* 26 USC § 32. The definition of qualifying child under this provision includes only a child who is the taxpayer's (a) biological child or descendent; (b) stepchild of the taxpayer; or (c) adopted child. Certain children of lesbian and gay couples are disadvantaged by this provision. For exampled, a taxpayer and their partner domestic are jointly raising the partner's biological child. The taxpayer works full-time and the child's legal parent stays home to care for the child. The state in which the taxpayer resides does not permit them to adopt through second-parent adoption or to marry the partner and become the child's step-parent. This working family is therefore ineligible for an adjustment of the EITC, and therefore has decreased the resources to devote to the child's care.

2. Head of Household Status

Heads of household, as defined by 26 U.S.C. § 2, are eligible for an increased standard deduction that, among other things, provides taxpayers with increased funds to care for their dependents. The "limitations" section of this

provision explicitly denies the benefit of head-of-household status to taxpayers supporting non-biological, non-adopted children. Thus, a gay or lesbian taxpayer who supports his or her partner's child (and who is ineligible to adopt the child) has fewer post-tax dollars with which to support the child.

3. Child Tax Credit

Taxpayers meeting income eligibility requirements are entitled to a credit against tax for qualifying children in their households. This provision limits the child tax credit to children who meet the relationship test set fourth in the earned income tax provisions, § 32(c)(3)(B). As set forth above, § 32 does not include children of a taxpayer's domestic partner if the children are not related to the taxpayer biologically or through adoption.

All three of these inequities have the effect of penalizing families who choose to have one parent in the work force and the other caring for the children full-time. In addition, they disadvantage such couples and their children by limiting the choice of which parent will be a full-time caregiver. Although similarly situated married couples may choose which parent will fulfill that role without consequence, lesbian and gay couples, as well as other unmarried couples, face negative tax consequences for the same decision.

Tax on Gain from the Sale of the Taxpayer's Principal Residence

Under Internal Revenue Code §121, a single taxpayer may exclude up to $250,000 of profit due to the sale of his or her personal principal residence from taxable income. Married couples filing jointly may exclude up to $500,000 on the sale of their home. Lesbian and gay couples, who are not permitted to marry or to file jointly, are therefore taxed on all gain above $250,000, creating a large tax penalty compared to similarly situated married couples.

Estate Tax

Internal Revenue Code § 2056 exempts amounts transferred to a surviving spouse from the decedent's taxable estate. For same-sex couples who are legally barred from marriage, this exemption is not available, creating an inequity in taxation.

Taxation of Retirement Savings

Under current law, when a retirement plan participant dies, plan benefits must be distributed in a lump sum or remain in the plan to be distributed in accordance with the minimum distribution requirements of § 401(a)(9). This problem does not exist if the beneficiary is the deceased participant's surviving spouse, because the surviving spouse may transfer plan benefits to an IRA or a retirement plan in which he or she is a participant. This entitlement is valuable because (a) it allows the surviving spouse to defer taxation of the proceeds, often until the survivor is in a lower tax bracket; and (b) it protects the surviving spouse from being forced to withdraw from an investment program when its value is depressed. Because gay and lesbian couples are treated as strangers under federal tax and pension law, they cannot transfer plan benefits without incurring significant penalties, and do not have the flexibility to withdraw funds when they choose. The example below demonstrates this inequity:

Michelle and Sarah have been in a committed relationship for over 10 years. They have registered as domestic partners under the laws of the District of Columbia. Throughout their relationship, they have taken every legal step available to formalize their relationship and protect themselves, legally and financially as domestic partners. Michelle participated in her employer's 401(k) retirement plans, naming Sarah as the primary beneficiary. Sarah purchased an individual retirement account (IRA). While driving to her job, Michelle is killed in a car accident. Sarah does not have the option to transfer Michelle's 401(k) funds into her existing IRA because, under current law, only a "spouse" may roll over 401(k) and inherited IRA plans upon the death of a plan participant. Sarah must then take the entire proceeds of the inherited 401(k) in a lump sum and pay taxes on them immediately at a much higher rate, rather than rolling it over into her own name tax free as a surviving spouse can do.

Family and Medical Leave

The Family and Medical Leave Act (FMLA) guarantees family and medical leave to employees to care for parents, children or spouses. As currently interpreted, this law does not provide leave to care for a domestic partner or the domestic partner's family member. Family and medical leave should be a benefit for *all* American workers.

Immigration Law

Currently, U.S. immigration law does not allow lesbian and gay citizens or permanent residents to petition for their same-sex partners to immigrate. Approximately 75% of the one million green cards or immigrant visas issued each year are granted to family members of U.S. citizens and permanent residents. However, those excluded from the definition, under current immigration law of family, are not eligible to immigrate as family. Such ineligible person include (but are not limited to) same-sex partners and unmarried heterosexual couples.

Each year, current law forces thousands of lesbian and gay couples to separate or live in constant fear of deportation. In some cases, partners of lesbian and gays face prosecution by the Immigration and Naturalization Service (INS), hefty fines and deportation and U.S. citizens are sometimes left with no other choice but to migrate with their partner to a nation whose immigration laws recognize their relationship. This creates a tremendous hardship, not only for those involved, but for their friends and family, and leads to a drain of talent and productivity for our country.

Fifteen countries: Australia, Belgium, Canada, Denmark, Finland, France, Germany, Iceland, the Netherlands, New Zealand, Norway, South Africa, Sweden and the United Kingdom recognize lesbian and gay couples for the purposes of immigration.

Employee Benefits for Federal Workers

According to the GAO Report, marital status

affects over 270 provisions dealing with current and retired federal employees, members of the Armed Forces, elected officials, and judges. Most significantly, under current law, domestic partners of federal employees are excluded from the Federal Employees Health Benefits Program (FEHBP). Although married couples are eligible for reimbursement for expenses incurred by a domestic partner are not reimbursable. As of August 2003, nine states and the District of Columbia and 322 local governments offer health benefits to the domestic partners of their public employees, while the nation's largest employer – the federal government – does not.

Continued Health Coverage (COBRA)

Federal law requires employers to give their former employees the opportunity to continue their employer-provided health insurance coverage by paying a premium (the requirement was part of the consolidated Omnibus Budget Reconciliation Act of 1985; hence the common name COBRA). An increasing number of employers, including 198 of the Fortune 500, now offer their employees domestic partner benefits. Although this trend is encouraging, the Federal COBRA law does not require employers to provide domestic partners the continued coverage guaranteed to married couples. Under 29 U.S.C. § 1167, an employer is only required to offer continuation coverage to the employee and to "qualified beneficiaries," defined as the employee's spouse and dependent children, regardless of whether the employee's original benefits plan covered other beneficiaries. Because of the narrow definition of "spouse" under federal law, employees are not guaranteed continued coverage for their domestic partners. [2]

[1] *Defense of Marriage Act: An Update to Prior Report*, General Accounting Office, 2004

[2] Nothing in this law prevents an employer from extending COBRA benefits to domestic partners.

Domestic Partnership Agreement

A domestic partnership agreement is a document that explains the contractual legal rights and responsibilities of each partner when a couple decides to form a long-term committed relationship. For example, in your domestic partnership agreement, you and your partner can determine:

- Whether a particular piece of real or personal property is owned jointly or belongs solely to one partner and how one or both parties took title to that property;
- Whether a gift or inheritance made to one partner is held jointly or individually
- Who is responsible for household duties and chores;
- How to share your income.

In the event of potential disputes or misunderstandings, a domestic partnership agreement can help clarify ownership of property, provide guidance for dividing property in the event of a separation and specify a dispute resolution mechanism such as arbitration. Because some

states do not recognize the validity of domestic partnership agreements, it is recommended that you consult an attorney in your area.