

BETWEEN THE LINES

January 2005

AB 205

The California Domestic Partner Rights and Responsibilities Act of 2003, was signed into law by former governor Gray Davis and became effective January 1, 2005. It is a comprehensive law granting many new protections to same-sex couples.

It amends the Family Code to provide that registered domestic partners will have the same rights and responsibilities as spouses.

Specifically, Public employers are prevented from discriminating against any person or couple because the person is a registered domestic partner.

In addition, registered domestic partners have the same rights regarding nondiscrimination as those provided to spouses.

For purposes of AB 205, local registration alone is not sufficient to trigger domestic partner rights and California law does not recognize domestic partnership registrations from outside of the state.

AB 2208

NEW DOMESTIC PARTNER BENEFITS

The California Insurance Equality Act was signed into law on September 13, 2004. The act, known as AB 2208, mandates insurance coverage equality for California registered domestic partners.

AB 2208 amends the California Insurance Code which directly impacts insurance policies issued in the state. AB 2208 requires all health insurers and HMOs that provide coverage to spouses to also provide equal coverage for registered dependent domestic partners who have filed a valid Declaration of Domestic Partnership with the State of California's Secretary of State. These coverage provisions are effective for group insurance as of the date of your insurance policy renewal that occurs after January 1, 2005 (February 1 renewals or later in most cases).

Formerly, AB 25 only required health insurers (1) to offer coverage for domestic partners if requested by the employer, and (2) to communicate the availability of domestic partner coverage to employers. AB 2208 mandates that insured plans actually cover registered domestic partners.

For these purposes, the term registered domestic partner means a domestic partner who meets all of the requirements set forth in California Family Code section 297. AB 2208 also adds a new Section 381.5 to the California Insurance Code that extends this requirement of equal coverage for registered domestic partners to all forms of insurance regulated by the California Department of Insurance. These will include all

policies that would provide coverage to a spouse, e.g. medical, dental, vision, life insurance, AD&D, long term care, group auto and homeowners and insured annuities under a pension or profit sharing program. It would not include a typical employee-only plan such as an LTD plan or STD plan.

The new law does not allow for any exceptions or exemptions for any employers who might have religious or moral convictions for not wanting to comply with AB 2208. All plans must comply.

Will ERISA plans be exempted?

The Employee Retirement Income Security Act of 1974 ("ERISA") generally preempts state laws that relate to employee benefit plans. However, the savings clause in ERISA provides that nothing in ERISA shall be construed to exempt or relieve any person from any law of any state which regulates insurance. Therefore, AB 2208 will apply to HMOs and insured employee benefit plans that are otherwise subject to ERISA.

It is possible that AB 2208 may not apply to self insured benefit plans. It is not certain whether the ERISA preemption provision will apply to this California law. This may be tested in court, and we advise employers to consult their legal counsel for guidance on the application of AB 2208 to their self-funded plans.

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Thank You

All of us here at CCB would like to take this opportunity to say a big thank you for your business and thank you for the opportunity of working with you.



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If your insurance coverage is provided under a trust policy situated outside of California, the provisions of AB 2208 may not apply. However, if you are using insured HMO programs for some California employees, these are most likely subject to AB 2208, even if all of your other employee benefits insurance contracts are situated in another state.

How is Federal COBRA and Cal-COBRA affected?

Generally, a domestic partner must meet the IRC Sec. 152(a)(9) definition of a dependent to be eligible for federal COBRA rights.

However, nothing prevents an employer from offering COBRA or a COBRA-like continuation benefit with the insurance carrier's cooperation and approval. Before doing so, a plan sponsor should consider which events will result in a domestic partner's right to continue health coverage. For example, COBRA clearly defines qualifying events, such as divorce or legal separation. The employer's plan document, SPD and communications must clearly define what constitutes a comparable divorce for domestic partners. The plan sponsor may need to prepare special plan and SPD language that describes the COBRA-like coverage available to employees' domestic partners, along with special COBRA-like notices for partners covered under the plan.

Domestic partners are eligible for Cal-COBRA benefits if they work for an employer with 2-19 full-time equivalent employees who is not subject to federal COBRA.

It is not yet clear if Cal-COBRA will allow the up to 18 month extension of coverage following exhaustion of the federal COBRA (AB 1401) for domestic partners. Employers

should consult with their carriers to determine whether they intend to extend such Cal-COBRA coverage to domestic partners.

For example:

Aetna believes that AB 2208 does not apply to either federal COBRA or to Cal COBRA extension coverage to former federal COBRA beneficiaries. However, Aetna will provide COBRA and CalCOBRA extension coverage to subscribers and their eligible enrolled domestic partners.

At this time, it appears that every carrier will address at least some of the COBRA, Cal-COBRA and HIPAA issues differently. This will be problematic for employers changing from one carrier to another. To help, we have asked each carrier a series of questions related to domestic partner issues. We have posted these Q&A's on our web site. Go to www.cabenefits.com, click on "Public" at the bottom left on the home page. From the drop-down arrow, select AB 2208.

Although domestic partners do not qualify for federal COBRA rights, (except Section 152 dependents-see below "How are benefits for domestic partners taxed?") one situation could indirectly cause a domestic partner to become qualified for federal COBRA rights. Under COBRA regulations, the employer must give each qualified beneficiary the same open enrollment rights as similarly situated active employees for whom a qualified event has not occurred. Therefore, if an employee who has a domestic partner becomes a qualified beneficiary and elects COBRA, then the employee could add their domestic partner on to the plan during the next annual open enrollment period.

What about Federal FMLA and California CFRA?

Generally, federal FMLA rights do not extend to serious health conditions of a Domestic Partner. An employer should consult with their health carrier and broker to understand insurance policy provisions with respect to offering continu-

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ing coverage during a leave that is a non-FMLA health leave.

Under California law, employees may use sick leave to care for a Domestic Partner. The California Family Rights Act (CFRA) permits eligible employees to take up to 12 weeks of unpaid leave to care for a parent, spouse or child with a serious health condition. Beginning January 1, 2005, AB 205 extends that right to care for a domestic partner. Paradoxically, it is conceivable that an employee in California who exhausts CFRA leave to care for a domestic partner may still be eligible for an additional 12 weeks under federal FMLA law since the leave taken to care for the domestic partner would not apply to FMLA. An employee who takes 12 weeks leave to care for a spouse would have exhausted all leave under both CFRA and FMLA because they would run concurrently.

The Paid Family Leave (PFL) benefit, which was effective 7/1/04, will also allow up to 6 weeks of wage replacement for an employee to care for a Domestic Partner or bond with a new child.

How are benefits for domestic partners taxed?

AB 2208 mandates equal coverage but does not change the federal tax treatment of employer contributions towards the cost of coverage for domestic partners.

Generally, the value of employer-provided coverage to employees, spouses, children and other tax Code dependents (Section 152) under a group health plan is tax-free to the employee under Code Sections 105 and 106. Based on the 1996 federal Defense of Marriage Act, domestic partners cannot qualify as "spouses" under federal law. Therefore, favorable federal tax treatment will only be available for health coverage for a domestic partner if the domestic partner qualifies under a different section of the tax code (i.e. a tax Code dependent under Section 152).

Under Code Section 152, a domestic partner may qualify as an employee's dependent if the following requirements are met:

1. the domestic partner receives more than 50% of his or her financial support in a calendar year from the employee;
2. the domestic partner has the employee's home as his or her principal place of residence and is a member of the employee's household; and

3. the relationship between the employee and the domestic partner does not violate local law.

Employees with domestic partner coverage should consult a qualified tax professional as to the applicability of federal and state tax laws to their own situation.

A premium paid by the employer for all coverage provided to a Domestic Partner who is not a Code Section 152 dependent is subject to federal income tax, FICA and FUTA tax withholding.

Some states, such as Vermont, California and New Jersey, provide favorable state tax treatment of certain domestic partner coverage. California tax law excludes from gross income amounts paid for domestic partner health coverage. This tax break is only applicable to state income taxes and does not change the taxability of domestic partner benefits under federal tax law. Further, the California state income tax break is available only if the domestic partnership has been registered with the State of California, but not if it was only registered with a local municipal agency.

Employers will need to report the value of domestic partner coverage on employees' W-2s.

Employees who contribute toward the cost of domestic partner coverage may not pay these costs pre-tax under a Section 125 plan.

With this added complexity, employers should review their computer and payroll systems, recordkeeping systems, communications materials, data gathering forms and enrollment forms to make sure they are gathering the necessary information to track and report on domestic partner benefits.

How Does AB 2208 affect HIPAA Portability?

HIPAA portability provisions provide "special open enrollment rights" to spouses and dependents of covered employees outside the normal open enrollment period of a plan. Special enrollment rights occur upon certain qualifying events such as marriage, birth or adoption. DOMA, the Defense of Marriage Act, limits the rights where the individual is a domestic partner. However, because HIPAA provides special enrollment rights for "dependents" as well, a domestic partner who qualifies as a Section 152 dependent may also be entitled to these rights.

California Corporate Benefits reports this information from sources we believe to be accurate. We offer it as information, not specific advice to any individual or company. We cannot give legal or tax advice and we recommend that you to contact your legal counsel or tax professional for advice on these issues.

This is another area where California insurers are likely to extend federal HIPAA portability enrollment rights even though not required. See the Q&A documents mentioned above.

How Does AB 2208 affect Cafeteria Plans?

Federal tax law governs cafeteria plans, also known as Section 125 Plans or flexible benefit plans. IRS rules prohibit salary reduction under these plans to pay for premiums used to cover domestic partners. IRS rules also prohibit reimbursements under medical spending accounts for domestic partners who are not Section 152 dependents under the tax code.

Changes affecting registered domestic partners will not qualify as "change in status events" under Section 125 that would permit changes to participant contributions or coverage elections under cafeteria plans.

What other related issues must be reviewed?

Beyond the specific provisions of your insurance contracts, AB 2208 may impact your human resource or payroll systems. In addition, if you have multiple insurance contracts issued in various states, you may want to consider how this requirement for your California employees impacts your personnel policies and benefits eligibility for employees located in other states.

Employers will want to update their policies prohibiting discrimination and harassment to include domestic partners and to provide training to their employees. Employers should examine the definition of "spouse" wherever it appears in all of their employee benefit plans and personnel policies. Employees need to be mindful that discrimination based on domestic partnership status is unlawful.

Who may be a Domestic Partner?

Only domestic partners who have registered with the state of California qualify under the new AB 2208 law. A Declaration of Domestic Partnership filed with the Secretary of State must state that at the time of filing all of the following requirements are satisfied:

- Both persons have a common residence
- Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity
- The two persons are not related by blood in a way that would prevent them from being married to each other in this state
- Both persons are at least 18 years of age
- Either of the following:
 - Both persons are members of the same sex
 - One or both of the persons meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals. Notwithstanding any other provision of this section, persons of opposite sexes may not constitute a domestic partnership unless one or both of the persons are over the age of 62.
- Both persons are capable of consenting to the domestic partnership.

For purposes of AB 2208, domestic partners may also be eligible if they have an equivalent document issued by a local agency within California or by another state or municipal agency under which the partnership was legally created.

For purposes of AB 205, local registration alone is not sufficient to trigger domestic partner rights and California law does not recognize domestic partnership registrations from outside of the state.

Further details about changes in state procedures for registering or terminating a domestic partnership are located at the Secretary of State's website at: <http://www.ss.ca.gov/dpreistry/>. Frequently asked questions can be found at: http://www.ss.ca.gov/dpreistry/dp_fags.htm.

Employers and carriers may request verification of the declaration of domestic partnership. However, since discrimination is prohibited, an employer or carrier making such requests must also require proof of marriage for spouse coverage.