

## **DOMESTIC PARTNERSHIP BENEFITS: THE RIGHT THING FOR A GOVERNMENT EMPLOYER TO DO**

Many municipal governments, like many private companies, have modified policies and programs in recent years to adapt to shifting social and economic patterns. Major changes, both in America's family structures and in the American workforce, have prompted elected officials and corporate executives to take another look at policy decisions that were made in past decades and that may no longer be responsive to present needs.

This report is adapted from an *amicus curiae* brief filed by Spectrum Institute and AFSCME (AFL-CIO Local 1644) in the Georgia Supreme Court in *City of Atlanta v. McKinney* (1995) 265 Ga. 161, 454 S.E.2d 517. The city's decision to extend benefits to municipal employees (including police officers and firefighters) was challenged in court by elements of the religious right. Although the Supreme Court found defects in the ordinance and therefore struck it down, a majority of the justices indicated that the defects could be corrected by the city. As a result, it is expected that a revised ordinance soon will be introduced in the city council and that domestic partner benefits will be extended to city employees in 1996. The revised ordinance should survive if challenged in court.

Whether the issue of domestic partner benefits is examined by a city council, a state legislature, or a court, any public official faced with a decision to pass such a policy -- or to uphold it in the face of a legal challenge -- will want to know whether extending such benefits to unmarried couples is a reasonable thing to do. This question is best answered by viewing the issue from the larger demographic context of family diversity and by acknowledging the trend toward "family friendly" workplaces in which employers create programs that help employees balance their work and family obligations. Like single parents and married employees, workers with domestic partners need help in balancing their obligations too.



## Family Diversity in America

The reasonableness of the decision of a municipality to pass a domestic partnership ordinance becomes apparent when that decision is viewed in a national and historic context.<sup>1</sup> Several decades ago, the traditional nuclear family dominated the demographic scene in America. These families consisted of households with two or more children and two parents - a stay-at-home mother and a go-to-work father -- who remained married to each other throughout their lives.<sup>2</sup> Most married couples were from the same economic class, the same race, and the same religious denomination. Public policies were based on the assumption that most families fit this homogeneous pattern.

Today, however, family diversity is the reality of how people live. America's classic nuclear family with a breadwinning husband, housewife, and one or more kids, now is the exception, numbering only 10 percent of the nation's households.<sup>3</sup> The typical family of the 1990s is more likely to show a husband and wife without children, a single mother with youngsters, a career woman who lives alone, or an adult with a roommate or domestic partner.<sup>4</sup> The proportion of American households composed of married couples with at least one child fell from 40 percent in 1970 to 26 percent in 1990.<sup>5</sup>

Delayed marriage and divorce are more commonplace, giving rise to more single-parent families. A new census report has revealed that one-half of all black children, nearly one-third of Latino children, and one-fifth of white children are currently living in a single-parent family.<sup>6</sup>

The extended family is making a comeback along with the rise in single-parent families. About 20 percent of children living with a single mother have an adult male, related or unrelated, living in their household.<sup>7</sup> Overall, more than 12 percent of all children live in an extended family situation, where at least one additional adult -- a grandparent, other relative,

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<sup>1</sup> Determining the validity of a city ordinance involves two issues. One is whether the local government possesses the authority to enact the ordinance and the other is whether the exercise of that authority is clearly reasonable. (*Porter v. City of Atlanta*, 259 Ga. 526, 384 S.E.2d 631 (1989).) Part I of this brief shows that the taxpayer appellees have failed to meet their burden of proving that the domestic partnership ordinances are unreasonable. (*Wofford v. City of Gainesville*, 212 Ga. 818, 96 S.E.2d 490 (1957).) Part II of the brief shows that their burden of proving that the ordinances are invalid also has not been met. (*Save the Day Committee, Inc. v. Mayor and Council of Savannah*, 227 Ga. 436, 181 S.E.2d 351 (1971).)

<sup>2</sup> Alvin Toffler, *The Third Wave* (1980); Marvin Harris, "Growing Conservatism? Not in Family Patterns," *Los Angeles Times*, December 23, 1981.

<sup>3</sup> Martha Minow, "All in the Family & in All Families: Membership, Loving, and Owing," 95 *W. Va. L. Rev.* 275 (Winter 1992/1993).

<sup>4</sup> *Ibid.*

<sup>5</sup> Margater L. Usdansky, "U.S. Households Shrinking, 1 in 4 Americans Now Lives Alone, 1990 Census," *Atlanta Journal*, May 1, 1991, p. A/3. This 26 percent includes married couples where one or both spouses work outside of the home.

<sup>6</sup> Elizabeth Shogren, "Traditional Nuclear Family Nearly the Exception, Census Finds," *Los Angeles Times*, August 30, 1994, p. A/1.

<sup>7</sup> Carrie Teegardin, "Back-To-Nest Movement Keeps Single Parents Out of Poverty," *Atlanta Constitution*, May 13, 1992, p. A/1.; Elizabeth Shogren, "Traditional Nuclear Family Nearly the Exception, Census Finds," *Los Angeles Times*, August 30, 1994, p. A/1.

or a nonrelative -- live in the household.<sup>4</sup>

Remarriages, which account for about 20 percent of all current marriages, have placed stepfamilies on the demographic map.<sup>5</sup> This trend caused the Census Bureau to count stepfamilies for the first time in 1990. About 15 percent of all children currently live with a stepparent.<sup>6</sup> Given present rates of divorce and remarriage, sociologists predict that between one-quarter to one-half of children will eventually live in stepfamilies.<sup>7</sup>

Family diversity has brought with it an increase in unmarried couple households. In 1990, 2.9 million opposite-sex couples were living together, up 80 percent from 1980 and up 454 percent from 1970.<sup>8</sup> More than 31 percent of these couples have children.<sup>9</sup> The 1990 census also counted 1.6 million households with unmarried partners of the same sex.<sup>10</sup>

### Policy Responses to Workplace Diversity

Years ago, the paycheck or weekly wage represented the total remuneration for an employee's services. With the advent of the industrial revolution, pension plans with long deferred vesting were introduced in an attempt to keep an employee tied to a particular job.<sup>11</sup> During World War II labor shortages, salary alone was no longer a sufficient inducement to attract the desired personnel; something more had to be offered. Employers began to offer other "fringe benefits" to compete for the limited labor supply.<sup>12</sup>

Benefits were designed, in other words, as a tool to attract and hold the desired type and number of employees. Contemporary analysts still acknowledge that benefits plans "should aid (or at least not impede) the hiring of desired people."<sup>13</sup> However, with changes in family structures came changes in the nation's workforce. As a result, benefits plans designed 30 or

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<sup>4</sup> Elizabeth Shogren, "Traditional Nuclear Family Nearly the Exception, Census Finds," *Los Angeles Times*, August 30, 1994, p. A/1.

<sup>5</sup> The Phillip Morris Family Survey (April 1987).

<sup>6</sup> Elizabeth Shogren, "Traditional Nuclear Family Nearly the Exception, Census Finds," *Los Angeles Times*, August 30, 1994, p. A/1.

<sup>7</sup> Paul Glick, "Remarried Families, Stepfamilies, and Stepchildren: A Brief Demographic Analysis," 38 *Fam. Rel.* 24-27 (1989); "Studies in Marriage and the Family," U.S. Census Bureau, Current Population Reports, Series P-23, No. 162 (1989) at p. 28.

<sup>8</sup> Deborah Schupack, "Challenges of Adulthood Can Break Up Young Couples," *Atlanta Constitution*, July 13, 1994, p. B/4.

<sup>9</sup> Jan L. Berstein, et al., "Moving On After Moving In: The Case for Including Unmarried Partners in New Jersey Family Law," 157-DEC *N.J. Law* 29 (Nov/Dec 1993), at p. 2 of Westlaw database.

<sup>10</sup> Hon. Mac D. Hunter, "Homosexuals as a New Class of Domestic Violence Subjects under the New Jersey Prevention of Domestic Violence Act of 1991," 31 *U. Louisville J. Fam. L.* 557 (1992/1993), at p. 8 on Westlaw database.

<sup>11</sup> Isidore Goodman, "An Overview of Employee Benefit Plans," *Pension Plan Guide*, No. 395, part II (Commerce Clearing House, Inc., 10-22-86).

<sup>12</sup> Isidore Goodman, "The Compensation Package," *Pension Plan Guide*, No. 354, part II (Commerce Clearing House, Inc. 1-8-82).

<sup>13</sup> Jeffrey Mamorsky, *Employee Benefits Handbook* (Warren, Gorham & Lamong, 1987).

40 years ago no longer meet the work and family needs of today.

Most people support the principle of equal pay for equal work. In one national survey, 88 percent of respondents agreed with this concept, stating that people who do the same job should receive the same pay.<sup>19</sup> Translating this ideal into a reality has required employers to revise their benefits plans, since between 27 to 33 percent of employee compensation now takes the form of benefits rather than salary.<sup>20</sup>

A dramatic increase in women in the workforce also has stimulated changes in employee benefits plans. In 1950, only 12 percent of women with children under six were in the paid workforce, while in 1986 that figure reached 54 percent.<sup>21</sup> While women make up more than 44 percent of the current American workforce,<sup>22</sup> by the year 2000 it is anticipated that the number of working women and men will be equal.<sup>23</sup> Women have been the driving force that has moved more employers to offer parental leave<sup>24</sup> and childcare.<sup>25</sup>

Another indicator of the concern for meeting the changing needs of families is the growth in flexible benefits or cafeteria plans. Under these programs, each employee receives a set amount of money to spend on benefits, which can be used to select from a variety of benefits offered by the employer. In a 1989 survey done by Hewitt Associates, an employee benefits consulting firm, 1,000 of the largest employers in the nation, including 26 percent of the Fortune 500 companies, had established flexible benefits plans.<sup>26</sup>

The federal government has authorized flexible benefits plans that allow employees to select from various benefits (such as disability, accident, and sickness benefits, group term life insurance, dependent care assistance, group legal services) or to take vacation pay or cash instead.<sup>27</sup> The Internal Revenue Service also permits municipal employers to provide health benefits to employees with domestic partners, with a proviso that the benefit will be nontaxable

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<sup>19</sup> Roper Organ., Opinion Research Corp., 1986, National, 1,009 Adults, Question #279, as reported on the Dialog database of Westlaw.

<sup>20</sup> Robert L. Eblin, "Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)," 51 *Ohio St. L. J.* 1067, 1070, citing Bureau of Labor Statistics, U.S. Dept. of Labor, *Employment Cost Indexes and Levels 1975-89* (1989) at p. 9; and District of Columbia Commission on Domestic Partnership Benefits for D.C. Government Employees, *Final Report and Recommendations* (July 1990), at p. 7, citing a 1989 Employee Benefits Survey by the U.S. Chamber of Commerce.

<sup>21</sup> Cynthia L. Remmers, "Pregnancy Discrimination and Parental Leave," 11 *Indus. Rel. L. J.* 377 (1989), at p. 48 of Westlaw database.

<sup>22</sup> *Ibid.*

<sup>23</sup> Richard Chanick, "Gender Mender: Transcending Gender Differences Allows for Better Management," 13 No. 3 *ALA News* 28 (April/May 1994) [a publication of the Association of Legal Administrators].

<sup>24</sup> A survey done by the National Chamber of Commerce Foundation revealed that 77 percent of the 700 firms surveyed had some type of parental leave policy. (See Remers, *supra*, 11 *Indus. Rel. L.J.* 377 (1989).)

<sup>25</sup> About 11 percent of employers with ten or more employees now offer childcare as a benefit. (Nancy E. Dowd, "Work and Family: Restructuring the Workplace," 32 *Ariz. L. Rev.* 431, 446 (1990).)

<sup>26</sup> See p. 7 of District of Columbia Commission on Domestic Partner Benefits, at fn. 19 above.

<sup>27</sup> Daniel C. Schaffer, "Tax Law as Health Policy: A History of Cafeteria Plans 1978-1985," 8 *Am. J. Tax Pol'y* 1 (Spring 1989); Thomas A. Jorgensen, "Flexible Compensation and Cafeteria Plans," C838 ALI-ABA 1033 (July 5, 1993); Michael R. Flyer, "Employee Benefits and Executive Compensation After the Revenue Reconciliation Act of 1993," C892 ALI-ABA 315 (March 3, 1994).

to the employee if the unmarried partner receives more than 50 percent of support from the employee.<sup>27</sup> If the employee does not meet this test of dependency, the benefit may still be given but it is taxable to the employee.<sup>28</sup> Thus, current federal tax policy gives employers leeway to respond to the needs of a diverse workforce.

### Employers Respond with Domestic Partner Benefits

The emergence of domestic partner benefits is another response of employers to an increasingly diverse workforce. The extension of such benefits by municipalities is an appropriate response to a resolution adopted by the U.S. Conference of Mayors in June 1984 which urged cities to "address any existing pay inequities within their jurisdictions."<sup>29</sup> To guarantee that an employee who has a domestic partner will receive equal pay for equal work, existing benefits packages are being revised to include sick leave and bereavement leave, as well as health and dental benefits for domestic partners.

More than two dozen cities, counties, and other municipalities now offer domestic partner benefits.<sup>30</sup> Some offer sick leave and bereavement leave<sup>31</sup>, while others also offer health and dental benefits.<sup>32</sup> Some 13 colleges and universities recognize domestic partners for a variety of purposes.<sup>33</sup> In early 1993, about 36 private corporations offered domestic partner

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<sup>27</sup> Mary Patricia Truethart, "Adopting a More Realistic Definition of Family," 26 *Gonz. L. Rev.* 91, fn. 37. The ruling was issued on May 29, 1990, in response to a request from the Seattle City Attorney regarding the legality of that city's domestic partner benefits plan under the Internal Revenue Code. (See "Recognizing Non-Traditional Families," Series on Work and Family, Special Report No. 38, Bureau of National Affairs (February 1991), appendix, p. 31.) A ruling even more favorable to municipal employers who offer domestic partner benefits was issued in December 1990. (Joanne Wojcik, "Few Offer Benefits to Unwed Couples," *Business Insurance Weekly*, March 11, 1991.)

<sup>28</sup> *Ibid.*

<sup>29</sup> Gail C. Kaplan, "Pay Equity of Pay Up: The Inevitable Evolution of Comparable Worth Into Employer Liability Under Title VII," 21 *Loy. L.A. L.R.* 305, fn. 348.

<sup>30</sup> "Domestic Partners: Should Unmarried Partners Get a Wider Range of Benefits?," *The CQ Researcher*, published by Congressional Quarterly Inc. (Sept. 4, 1992); Rebecca L. Melton, "Legal Rights of Unmarried Heterosexual and Homosexual Couples and Evolving Definitions of 'Family,'" 29 *J. Fam. L.* 497 (1990/1991); Robert L. Eblin, "Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)," 51 *Ohio St. L. J.* 1067 (1990); Craig A. Bowman, "A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances," 92 *Colum. L. Rev.* 1164 (June 1992); Mary Patricia Truethart, "Adopting a More Realistic Definition of 'Family,'" 26 *Gonz. L. Rev.* 91 (1990/1991); David G. Richardson, "Family Rights for Unmarried Couples," 2-SPG *Kan. J. L. & Pub. Pol'y* 117 (Spring 1993).

<sup>31</sup> Alameda County (CA), Ann Arbor (MI), Cambridge (MA), Ithica (NY), Tacoma Park (MD), Travis Co. (TX) and West Palm Beach (FL) are counted among these municipalities. (*Ibid.*; also see pp. 10-13 of "Domestic Partnership Atlanta," *A Report to the Mayor*, at fn. 19 above.

<sup>32</sup> San Francisco (CA), Los Angeles City (CA), Seattle (WA), Santa Cruz (CA), Laguna Beach (CA), New York City (NY), and Berkeley (CA) are counted in this category. (*Ibid.*) The city of Los Angeles started with sick and bereavement leave a few years ago, but this year expanded the program to offer health and dental benefits as well. (Bettina Boxall, "Benefits for Unmarried Partners Lauded," *Los Angeles Times*, November 17, 1993.)

<sup>33</sup> William B. Rubenstein, "Legal Issues Facing the Non-Traditional Family," 232 *Practicing Law Institute / Est 9*, PLI Order No. D4-5250 (April-May 1994).

benefits to their employees.\* That number increased to 50 by the end of the year.\* Unions have played a major role in securing these benefits.\*

**Cost of Domestic Partner Coverage.** Public and private employers alike have reported no unanticipated costs from domestic partner coverage." Santa Cruz and Berkeley, for example, have found that domestic partner costs were equivalent to adding a like number of spouses to their health plans.\* After three years of experience, Berkeley's medical provider dropped a 1.5 percent surcharge it initially charged on medical premiums for domestic partners after it found no adverse claims consequences.\* Seattle also reported no unanticipated financial consequences.\* Employers and consultants from 17 health benefits plans told the Bureau of National Affairs that their initial concerns regarding high costs and risks of such coverage have proven to be unfounded.\* Levi-Strauss, one of the largest private employers to offer health benefits to domestic partners, reported that "significantly fewer claims have been

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\* Jeffrey Ralph Pettit, "Help! We've Fallen and We Can't Get Up: The Problems Families Face Because of Employment-Based Health Insurance," 46 *Vand. L. Rev.* 779, 787 (April 1993); "Domestic Partners: Should Unmarried Partners Get a Wider Range of Benefits?," *The CQ Researcher*, published by Congressional Quarterly Inc. (Sept. 4, 1992).

\* *BNA Employee Relations Weekly*, Vol. 12, page 31, January 10, 1994. When Blue Cross and Blue Shield of Massachusetts decided to offer domestic partner benefits to its own employees beginning January 1, 1994, a spokesperson told the Boston Globe that "By offering this coverage, Blue Cross and Blue Shield is demonstrating to employees that we are committed to supporting the needs of a diverse work force." He also cited growing evidence that "the claims experience for domestic partners has been the same as for married or single employees." "Business Briefly," *Boston Globe*, November 9, 1993, Business Section, p. 42.

\* For example, various locals of the Service Employees International Union and the American Federation of State, County, and Municipal Employees, as well as other locals affiliated with the AFL-CIO have been instrumental in securing domestic partner benefits for their members.

\* Suzanne B. Goldberg, "Employment Benefits and Insurance: Working with Your Client to Achieve Full and Equal Benefits," 232 *Practicing Law Institute PLI/Est* 157 (April-May 1994).

\* Robert L. Eblin, "Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)," 51 *Ohio St. L. J.* 1067, 1082 (1990). The taxpayer appellees to the instant case are simply wrong in their assertion that Berkeley could not find a health insurance carrier to provide domestic partner coverage. (See Brief of Appellees, p. 3, fn. 2.)

\* "Domestic Partner Benefits on the Upswing," *Employee Benefits Management: Directions* (CCH Report No. 44, October 27, 1992); "Domestic Partnerships Raise New Questions About Benefit Equity," *BNA California, Employee Relations Report*, Vol. 3, November 15, 1993, p. 63.

\* *Ibid.* In fact, Seattle reported that the claims experience of the 350 domestic partners enrolled in the plan has been "better than for spouses to date, and much less than was budgeted." (Joanne Wojcik, "Few Offer Benefits to Unwed Couples," *Business Insurance Weekly*, March 11, 1991.) According to a report issued by the City of Seattle in July 1993, domestic partners had "lower overall claims costs and fewer medical visits" than married employees and their spouses. And, though the city's insurers initially charged extra premiums of up to 3.6 percent, they found the surcharge was "unnecessary," the study said. (Kimberly Blanton, "To Insure or Not to Insure," *Boston Globe*, October 12, 1993, Business Section, p. 39.)

\* "Recognizing Non-Traditional Families," Series on Work and Family, Special Report No. 38, Bureau of National Affairs (February 1991).



filed by domestic partners of Levi-Strauss employees than the workplace population as whole."<sup>42</sup>

Medical coverage for domestic partners is usually accomplished through self-insured plans of public and private employers, with a growing number of HMOs providing coverage. However, that is expected to change in the near future with larger and more established insurance companies entering the market. For example, success in writing excess insurance for companies that are self-insured has led Massachusetts Mutual Insurance Co. to file with insurance regulators in each state to insure domestic partners directly.<sup>43</sup> Such coverage may soon be available in Georgia, in the wake of an Attorney General opinion authorizing Massachusetts Mutual to provide health and accident coverage to domestic partners, so long as the policy considers domestic partners as "dependents" and not "spouses."<sup>44</sup>

**Public Opinion.** The public tends to support the extension of employment benefits to domestic partners. In addition to overwhelming support for the concept of "equal pay for equal work,"<sup>45</sup> most people define "family" as "a group of people who love and care for each other," rejecting the restrictive notion that a family is limited to persons related by blood, marriage or adoption.<sup>46</sup> In one national poll, 53 percent of respondents agreed that an unmarried man and woman who live together for a long time constitute a family.<sup>47</sup> In a national survey conducted by CNN/Time, 54% of respondents agreed that same-sex couples should be allowed to receive medical and life insurance benefits from a partner's policy, while a similar poll by Newsweek showed 67 percent of respondents approving such benefits.<sup>48</sup>

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<sup>42</sup> "Domestic Partnerships Raise New Questions About Benefit Equity," *BNA California, Employee Relations Report*, Vol. 3, November 15, 1993, p. 63.

<sup>43</sup> Kimberly Blanton, "To Insure or Not to Insure," *Boston Globe*, October 12, 1993, Business Section, p. 39.

<sup>44</sup> The opinion states that "If coverage for domestic partners was provided for in the contract separately from that afforded spouses, and other requirements such as dependency have been met," there would be no legal impediment to extending coverage to domestic partners as dependents of employees for purposes of group accident and health plans. (Ga. Opn. Atty. Gen., Official Opinion No. 94-14 (March 21, 1994).) The taxpayer appellees have distorted the conclusion of this Attorney General opinion by making it seem as if such coverage may not be extended by Massachusetts Mutual when in fact the opposite is true so long as domestic partners are treated as dependents and not as spouses. (See Brief of Appellees, p. 5, fn. 3.)

<sup>45</sup> 88 percent support this concept. (See Roper Organ., Opinion Research Corp., 1986, National, 1,009 Adults, Question #279, as reported on the Dialog database of Westlaw.)

<sup>46</sup> In a 1989 national survey of 1,200 randomly selected adults conducted by Mellman and Associates for Massachusetts Mutual Life Insurance Company, only 22 percent picked the blood-marriage-adoption definition while three-quarters of the respondents chose the broader definition of family. (David G. Richardson, "Family Rights for Unmarried Couples," 2-SPG *Kan. J. L.* 117 (Spring 1993); Marjorie E. Kornhauser, "Love, Money, and the IRS: Family, Income-sharing, and the Joint Income Tax Return," 45 *Hastings L. J.* 63 (Nov. 1993) at p. 53 of the Westlaw database.)

<sup>47</sup> The poll was conducted by Roper Organization in February 1992 and published by The American Enterprise in July/August 1992. (See "Domestic Partners: Should Unmarried Partners Get a Wider Range of Benefits?," *The CQ Researcher*, published by Congressional Quarterly Inc. (Sept. 4, 1992).)

<sup>48</sup> See *The CQ Researcher*, at fn. 47 above [CNN/Time poll]; "Gays Under Fire," *Newsweek*, September 14, 1992, p. 35.