

this route, once chosen, is likely to ensure a substantial expenditure of money over a long period of time with uncertain results.

The Arbitrator's Role

It is, of course, the arbitrator's responsibility to interpret and apply the contract as intended by the parties. In doing so, however, the arbitrator must bear in mind public policies established by legislation, such as the ADA, and must make the presumption that the parties did not intend to violate the law in making their agreement. It is appropriate for the arbitrator to consider the ADA and other discrimination laws and to seek a resolution of the grievance which is, to the extent possible, loyal to the contract but allows both parties to meet their obligation to comply with the ADA and other laws banning discrimination.

PART II. FAMILY BENEFITS AND HOMOSEXUAL EMPLOYEES' COHABITANTS

STEVEN BRIGGS*

As most of us realize, the term "family" has taken on an expanded meaning in our lifetimes. In the 1940s family meant mom, dad, and the kids—and mom and dad were married to each other. Divorce was not openly discussed in polite circles. Even in the 1950s the thought of unmarried persons of the opposite sex living together "in sin" was considered shocking. Television programs of the era portrayed the perfect family as husband and wife with two or three children. That is not true today. To underscore this point, just compare the families in "Father Knows Best" and "Leave It to Beaver" with those portrayed in "One Day at a Time" and "Three's Company." By the 1970s there were 47 divorced adults for every 1,000 who were married and living with a spouse. By 1990 the number of those divorced had tripled. Today 1 in 4 American adults spend at least part of their lives living with a person of the opposite sex without the sanction of marriage.¹ And 1 in 4 infants

*Member, National Academy of Arbitrators; Associate Professor of Industrial Relations, DePaul University, Chicago, Illinois.

The author is indebted to Tim Scott, for his capable research assistance, and to Ken Thompson, Chairman of the Department of Management at DePaul University, for funding the research.

¹Weber, *Redefining the Family*, Ins. Rev. (May 1992), 12. The corresponding ratio for those between the ages of 30 and 34 is an almost unbelievable one out of two.

today are born out of wedlock. The corresponding figure for 1970 was about 1 in 10.²

These figures are troublesome indeed to those who view the changing structure of the American family as evidence of general moral decline. To those with a more permissive approach to life and, perhaps, with a greater tolerance for individuality and free choice, these statistics merely reflect changing times and the evolution of societal structure. Alternative family structures today enjoy a new social legitimacy. Indeed, the Academy's own officially sponsored "Spouses/*Companions*" functions at this conference are a sign of open acceptance that unmarried persons of the opposite sex choose to travel together.

Another change has taken place in American family structure. According to the 1990 U.S. census, there were 3.2 million unrelated adults of the same sex who shared a household. The Census Bureau makes no effort to determine the nature of these relationships, but others have estimated that the homosexual population in the United States numbers approximately 18.5 million with an annual income of \$514 billion.³ Although they are still in the minority, homosexuals constitute a significant segment of our society not only in number but also in purchasing power. They are economically powerful, they are organized, and they are no longer timid about identifying themselves and fighting for rights they believe have been denied them.

A Culture War

We are in the midst of a culture war.⁴ Like most wars it is characterized by political rhetoric from both sides. Like most wars the objective of both sides is basically economic. Like most wars there are both psychological and physical casualties. Unlike any war in history, however, battle lines in the present culture war are drawn, not on the basis of nationality or geography, but on the basis of sexual preference.

Homosexuals are organized around a social agenda and are taking affirmative steps to achieve it. In late April 1993, for example, roughly 300,000 gay men and lesbian women marched on the White House. On April 22 they sponsored a "Cure AIDS" rally. On

²*Id.* at 12.

³Advertising Age (Jan. 18, 1993), 35.

⁴The phrase "culture war" is borrowed from Hunter, *Culture Wars: The Struggle to Define America* (Basic Books, 1991).

the 23rd they sponsored a business fair, a gay and lesbian Parents Coalition meeting, and a lesbian and gay filmfest. On April 24 they displayed the latest version of the now famous Project AIDS Quilt. On the 25th they sponsored an interfaith religious service. And on April 26 gay, lesbian, and bisexual veterans rallied at the Pentagon.⁵ One volunteer leader of these demonstrations explained their purpose this way: "The only reason we have . . . people coming to D.C. is because they're fed up with not having their civil rights and they're fed up with the rise of violent homophobia around the country."⁶

While not formally organized to the same extent, heterosexuals as a class seem to have a social agenda as well. According to one scholarly source, they attempt to uphold the belief that homosexuals are different from them and therefore somehow less worthy.⁷ This bias is illustrated vividly in current state laws prohibiting certain sexual acts between homosexuals but permitting them between heterosexuals.⁸

Who is winning the culture war? All the available evidence suggests that the efforts of homosexuals to gain rights once denied them have paid off. In the United States homosexuals may incorporate their organizations under state incorporation laws⁹ and obtain tax exempt and tax deductible status for them.¹⁰ They may wear badges and buttons in public schools with impunity from disciplinary action.¹¹ They may compel television and radio stations to include members of the homosexual community in making determinations as to "community needs."¹² Even more than a decade ago, a homosexual male high school student won the right to bring a male date to the school prom.¹³

Expansion of homosexual rights is not limited to the United States. Under the 1960 Criminal Code in Russia, for example,

⁵300,000 March on White House, Chicago Tribune, Apr. 27, 1993. Just five years earlier a similar White House demonstration drew only two-thirds as many participants.

⁶Gay Marchers Seek A New Era of Rights, Chicago Tribune, Apr. 22, 1993, at 1, 17.

⁷Link, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 Loyola L.A. L. Rev. 1055 (1990).

⁸In Kentucky heterosexuals may engage in sodomy and oral/genital relations with legal impunity, but homosexuals may not. See KY. STAT. ANN. §510.100 (1985), amended by *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

⁹*Gay Activists' Alliance v. Lorenzo*, 38 A.D.2d 981, 329 N.Y.S.2d 181 (3d Dep't 1972), *aff'd*, 31 N.Y.2d 965, 341 N.Y.S.2d 108 (1973).

¹⁰Internal Revenue Service Ruling 78-305, IRD 1978-33.

¹¹For a complete discussion of homosexual rights, see Dorsen, ed., *The Rights of Lesbians and Gay Men* (Southern Ill. U. Press, 1992) (American Civil Liberties Union Handbook).

¹²The Advocate, Apr. 17, 1980.

¹³*Fricke v. Lynch*, 491 F. Supp. 389 (D. R.I. 1980), *vacated and remanded*, 627 F.2d 1088 (1st Cir. 1981).

homosexuality was a crime for which a person could be imprisoned for up to five years. The "crime of homosexuality" language of the Code was eliminated in April 1993, when President Boris Yeltsin signed an amended Criminal Code into law.¹⁴

Some argue that gay rights have gone too far.¹⁵ The homosexual community argues that they have not gone nearly far enough, pointing to the employment arena as an example.

The Family Benefits Issue

Consider the case of the two "Rons." Ron R. was a 55-year-old public high school art teacher and successful free-lance artist. He had lived with Ron B., who did not have a conventional job, for approximately 20 years. Ron B. maintained the household and fabricated Plexiglas displays for Ron R.'s artwork. The Rons were committed to each other in a completely monogamous homosexual relationship. They had a joint checking account, owned a house and several cats, took the daily newspaper, did their grocery shopping together, and cared for each other during times of illness. Those who knew them considered them a couple; indeed, even though they were of the same sex and were not married, many considered the Rons a family.

But Ron R.'s employer did not consider them a family. It denied Ron B. family benefits under the collective bargaining agreement. He had no dependent medical coverage over the 20 years he and Ron R. lived together. In 1992 when his lifetime companion suddenly died of a heart attack, Ron B.'s claim for surviving "spouse" medical insurance benefits was denied. Moreover, since Ron R. had died without a will, his biological family inherited all of his assets. Today Ron B. lives in poverty. He is 62 years old, suffers from depression, and is virtually unemployable since he has no formal work history. Most of his adult life was spent in a supportive role to Ron R. For Ron B. and thousands like him, the economic cost of being a homosexual has been enormous.

What Are "Family" Benefits?

Family benefits are those which address the welfare of employees' dependents. Because of the cost to an employer and importance to

¹⁴*Russia Lifts Its Ban on Homosexuality*, Chicago Tribune, May 30, 1993, at 1-18.

¹⁵For an extended discussion of this viewpoint, see Magnuson, *Are Gay Rights Right? A Report on Homosexuality and the Law* (Mar. 1985) (special report for the Berean League Fund).

the individual, health insurance coverage is by far the most significant benefit. Dental and vision insurance are other examples. Sick leave is another, where an employee is allowed time off with pay to care for a sick family member. Bereavement and/or funeral leave also falls under the rubric of family benefits, to the extent that employees are paid for time off in connection with the death of a family member. In addition, some employers extend the use of recreational facilities, housing, and employee discounts to employees' families.

Domestic Partner Benefit Plans

It is important to recognize that domestic partners are not mere roommates. They are persons who live with another in a long-term, committed, and exclusive relationship. Domestic partners may be of the same or opposite sex. As the meaning of family has expanded and as unmarried persons living together have become more open and indeed even flamboyantly overt about establishing families of choice, some employers have granted traditional family benefits to their employees' domestic partners.

The Private Sector

The extension of family benefits to domestic partners is a relatively new phenomenon. The first such program came about through the collective bargaining process in 1982, when District 65 of the Distributive Workers' Union gained domestic partner health insurance benefits for employees of *The Village Voice*, a New York newspaper.¹⁶ The collective bargaining agreement is silent on this negotiated benefit, which the parties themselves characterize as a "side agreement." Currently the domestic partners of 18 out of 231 employees are covered; 5 of the partnerships are homosexual. Since the insurance coverage was secured through a union-administered health insurance plan, domestic partners of management employees are not eligible. Subsequent attempts by the employer to find an insurance carrier for management employees' domestic partners have not been successful.¹⁷

Another example of private-sector negotiated domestic partner benefits comes from Local 26 of the Hotel Employees and

¹⁶Wojcik, *Newspaper First to Offer Domestic Partner Plan*, Bus. Ins. (Mar. 11, 1991), 30.

¹⁷Van Sloys, *Domestic Partners and Employee Benefits: 1991* (Hewitt Assocs., 1993).

Restaurant Employees Union of Boston. On January 26, 1993, the local culminated 2½ years of bargaining with a multiemployer unit. The agreement covers five major hotel chains—Marriott, Hilton, Omni, Sheraton, and Saunders—and is also applicable to employees in about 34 smaller bargaining units. It includes a health plan with free dental and vision care, a legal services plan, a tuition reimbursement plan, a pension plan, and a first-in-the-nation housing assistance plan.¹⁸

Apple Computer will extend medical and dental benefits to same-sex domestic partners of its U.S. employees beginning July 1, 1993. This move follows its summer 1992 extension of fitness-center privileges, day-care use, and family and bereavement leave to domestic partners of all employees. A \$500 baby bonus for a biological or adopted child was also made available to domestic partners at that time. When asked why medical benefits will be available only to same-sex domestic partners, Apple spokesperson Yolanda Davis said, "That was decided because, basically, heterosexual partners have the ability to marry legally and become eligible for benefits whereas same-sex partner don't have the ability to do that."¹⁹

Another private-sector employer limiting domestic partner benefits to same-sex couples is Montefiore Medical Center in the Bronx, New York. Hospital spokesperson Barbara Janes said limiting such benefits to partners of gay and lesbian employees is not unfairly discriminatory because there is a legal impediment to homosexual marriage not faced by heterosexuals. The following benefits are available: medical and dental insurance, dependent life insurance, long-term care coverage, vision and hearing coverage, blood bank access, and paid time off for the birth or adoption of a child.²⁰

The Montefiore plan evolved from the original request of Dr. Katherine O'Hanlan, an oncologist, who approached her employer in December 1988 seeking spousal benefits for her female domestic partner. When the hospital balked, O'Hanlan engaged the assistance of the American Civil Liberties Union. The hospital settled with O'Hanlan on an individual basis and did not extend the benefits she had won to other homosexual employees'

¹⁸*Benefit Coverage for Domestic Partners Extended Under Boston Hotel Agreement*, 1993 Daily Lab. Rep. (BNA) (Feb. 1), No. 19: A-1.

¹⁹*Apple Extends Domestic Partner Benefits*, 1993 Daily Lab. Rep. (BNA) (Feb. 2), No. 20: A-18.

²⁰Gilbert, *Major N.Y. Hospital Offers Domestic Partner Benefits*, Nat'l Underwriter (Apr. 8, 1991), 2, 16-17.

domestic partners. When a second lesbian couple then sought the benefits, the hospital agreed to extend them to domestic partners of all gay and lesbian employees.²¹

Giant apparel manufacturer Levi Strauss has also extended medical and dental benefits to employees' domestic partners. Effective June 1, 1992, the company's unmarried employees may apply for these benefits. Domestic partners of either sex are eligible. Plan provisions for unmarried couples are virtually the same as those for married couples. The same employee contributions, enrollment procedures, and coverage limitations apply. The only difference is a \$70 per month surcharge if the nonemployee member of the partnership is eligible for coverage through another employer but declines it in favor of the Levi Strauss plan. The company also extends medical coverage to the domestic partner and eligible dependents in the event of the employee's death or layoff. Coverage does not continue if the employee resigns.²²

Overall, the number of private employers offering family benefits to employees' domestic partners is still small. Growth in the last year has been fairly rapid, however. One source reported that in 1991 there were "fewer than a dozen" employers in the United States that extended employee benefits to domestic partners.²³ Today there are at least 37 U.S. private-sector employers providing some form of domestic partner coverage.²⁴

The Public Sector

Several West Coast governmental bodies provide domestic partner benefit coverage. The City of Berkeley, California, extended health benefits to employees' domestic partners in 1985. Since then 110 domestic partners have applied for coverage. Only 18 of the partnerships are homosexuals.²⁵

As a result of labor negotiations with the Service Employees International Union, the City of Santa Cruz, California, granted medical, dental, and vision benefits to domestic partners in 1987. During the ensuing few years two other unions won domestic partner benefits from the City. Currently, only about 30 of the City's 650 employees have sought and received these benefits for their partners.²⁶

²¹*Id.* at 16.

²²*Levi Strauss Offers Domestic Partner Benefits*, Nat'l Underwriter (Mar. 23, 1992), 21, 23.

²³Wojcik, *Few Offer Benefits to Unwed Couples*, Bus. Ins. (Mar. 11, 1991), 1, 30.

²⁴Van Sloys, *supra* note 17.

²⁵*Id.* at 16.

²⁶*Id.*

In May 1990 the City of Seattle, Washington, adopted an ordinance providing medical coverage to domestic partners. The move came after Seattle's Human Rights Department decided that the City was violating its own laws against discrimination by not providing domestic partner coverage. Only 2 percent (200) of the City's 10,000 employees applied for coverage. Half of them were homosexual. Opponents of the ordinance argued that it was an unwarranted use of tax dollars to support immoral life-styles. Supporters argued that it was designed to extend normal family-type benefits to all employees, irrespective of sexual orientation. In a November 1990 referendum, the electorate voted to retain the domestic benefit ordinance.²⁷

The City of West Hollywood adopted a plan extending benefits to domestic partners in 1989. Having a large gay population, the City had intended to offer domestic partner benefits upon its incorporation five years earlier, but could not find an insurance carrier willing to provide coverage. The City ultimately resorted to a self-insured plan. When it could not secure stop-loss insurance for medical expenses associated with catastrophic illnesses, it capped coverage at \$20,000 in annual medical claims. Only about 3 percent (5) of the City's 170 employees have applied for domestic partner coverage, and no AIDS-related claims have been reported.²⁸

In terms of sheer numbers, the City of San Francisco leads the way in domestic partnership benefits coverage. Its domestic partner benefit plan covers 35,000 active employees and an additional 14,000 retirees. Approximately 15 percent (7,350) of these people are gay or lesbian. As of late 1991, however, only 161 partners and 16 dependent children had signed up for coverage.²⁹

The City of Chicago is currently embroiled in turmoil over whether to extend three-day bereavement leave to city employees when their unmarried same-sex or heterosexual partners die. Chicago Budget Director Karen Danczak-Lyons believes that the proposed ordinance "is going to have an impact in terms of lost productivity, though it is very difficult to put a dollar value on it because it includes no specific directions on how people will register and how it will be administered."³⁰

²⁷*Id.* at 18.

²⁸*Id.* at 17.

²⁹*Id.* at 15. See also Simon & Daly, *Sexual Orientation and Workplace Rights: A Potential Land Mine for Employers*, 18 Employee Rel. L. J. 29, 52 (1992).

³⁰Furore, *Unmarried Couples Beginning to Gain Cities' Recognition*, Chicago Tribune, May 30, 1993, at 6-1, 9.

Domestic partnerships in Philadelphia are also encountering resistance. The Catholic diocese, the Black Clergy of Philadelphia, and the Majlis As-Shura Council of Mosques have combined their resources in a campaign to defeat them.³¹

In spite of resistance the number of public employers extending family benefits to employees' domestic partners is increasing. To date about 25 public-sector employers do so, including 1 state (Massachusetts), 13 cities, 5 counties, a few school districts, and a few other jurisdictions.³²

Higher Education

The academic labor market is extremely specialized, and at any given time the demand for professors in a specific academic discipline can outstretch the supply of applicants with the appropriate terminal degree. These conditions make competition among colleges and universities fierce, particularly in growing fields of academic expertise. Institutions of higher education are therefore always on the lookout for new ways to attract qualified faculty. According to one source, extending family benefits to the domestic partners of faculty members will afford a recruiting advantage to those institutions willing to do it.³³ Approximately 25 colleges and universities have adopted domestic partner benefit plans. The list spans both the public and private sectors, and is generally confined to the eastern and midwestern portions of the United States.³⁴

Under a policy effective February 1, 1993, eligible gay and lesbian employees of the University of Chicago have been registering their same-sex partners for benefits such as health and dental insurance, tuition benefits, and library and gym privileges. University officials estimate that about 1 percent of their 6,200 employees will eventually apply. According to Assistant Vice President for Human Resources Henry Webber, the plan was adopted in response to "requests from individuals on campus, as well as a general belief that this would be a progressive move on the part of the [employer] and would improve the competitive position of the university."³⁵

Stanford University's domestic partner benefit plan also took effect on February 1, 1993. Under its terms same-sex domestic

³¹*Id.* at 9.

³²Van Sloys, *supra* note 17.

³³D'Emilio, *AAUP Committee on Discrimination Policy*, 78 *Academe* 7 (1993).

³⁴Van Sloys, *supra* note 17.

³⁵*University of Chicago Extends Benefits to Same-Sex Partners of Employees*, 1993 *Daily Lab. Rep.* (BNA) (Feb. 12), No. 28: A-5.

partners of faculty are eligible for health insurance, dental benefits, survivors' benefits, library privileges, and the right to audit university courses. The university requires formal recognition of the relationship by a certificate establishing the partnership and stating that the couple's commitment includes mutual financial responsibility. According to Vice President for Faculty and Staff Services Barbara Butterfield, the university is expecting between 40 and 60 people to sign up for the plan.³⁶

The University of Iowa implemented its domestic partner insurance coverage in January 1993. The experimental plan is scheduled to run for a three-year trial period. Same-sex domestic partners are eligible for health, dental, vision, and hearing aid insurance coverage. So far, only 8 of 15,000 eligible employees have registered their domestic partnerships for benefit coverage.³⁷

Legal Issues

Homosexual employees, seeking family benefits for their spousal equivalents, argue that denial of these benefits is discriminatory because it is based on marital status. But there is no federal law prohibiting such discrimination. Most states prohibit discrimination on the basis of marital status, but only a few states and local governments prohibit discrimination based on sexual orientation. Indeed, gays and lesbians are excluded from the scope of Title VII of the Civil Rights Act.

To date there has been no far-reaching court decision holding that domestic partners are entitled to employee benefits.³⁸ The problem faced by homosexuals is compounded by the fact that they may not marry and are not entitled to common law or spouse recognition in any jurisdiction.

Domestic Partnership Ordinances

Several municipalities permit unmarried homosexual couples to register as domestic partners but began doing so only recently. The City of Minneapolis began this registration on January 31, 1991; the City of San Francisco followed suit, perhaps symbolically, on

³⁶Stanford, *Chicago Grant Benefits to Gay Partners*, 78 *Academe* 6 (1993).

³⁷*Id.* at 7.

³⁸Laarman, *Employer Health Coverage for Domestic Partners—Identifying the Issues*, 18 *Employee Rel. L.J.* 567 (1993).

February 14 (Valentine's Day). Chapter 62.1 of the San Francisco Municipal Code states:

The purpose of this ordinance is to create a way to recognize intimate committed relationships, including those of lesbians and gay men who otherwise are denied the right to identify the partners with whom they share their lives.

New York City provides an interesting example of how the courts implicitly encourage the passage of a municipal domestic partnership ordinance. In *Braschi v. Stahl*,³⁹ the New York Supreme Court expanded the definition of "family" to include "two adult lifetime partners whose relationship is long-term and characterized by an emotional and financial commitment and interdependence."⁴⁰ Although the case involved rent-controlled apartments and the court specifically restricted its decision to the issue of whether Braschi's domestic partner could take over the rent-controlled apartment upon his death, the ruling is heralded as a step in the direction of mandated benefits for employees' domestic partners.

On December 11, 1990, the City of East Lansing, Michigan, approved the extension of health, dental, and certain leave benefits to its employees' domestic partners; seven employees requested coverage. Opponents obtained a restraining order against the City's implementation of the plan, arguing that it was fiscally irresponsible to extend city-paid benefits to such a "high risk group" (i.e., to homosexuals, because of their higher HIV infection rate). They also argued that the plan was illegal because it condoned felonious behavior.⁴¹

Most of the domestic partnership ordinances in U.S. cities are fairly similar. Almost always they include the following requirements: (1) some system of registration and dissolution of the partnerships, (2) a minimum period that the relationship must have been in existence (usually one year), and (3) a waiting period between the registered dissolution of a previous partnership and the registration of a new one (the range is from six months to

³⁹*Braschi v. Stahl*, 143 A.D.2d 44, 531 N.Y.S.2d 562 (1988).

⁴⁰This case is discussed in *Alternative Lifestyles Redefine "Family" Coverage*, Employee Benefits Plan Rev. (Nov. 1989), 20, 22.

⁴¹Van Sloys, Domestic Partners and Employee Benefits: 1991 (Hewitt Assocs., 1993). In Michigan, homosexual relations constitute a felony, and it is a misdemeanor for an unmarried heterosexual couple to live together as husband and wife. See *Hackney v. City of East Lansing*, Lambda Update (Spring 1991), 14; *Domestic Partner Health Coverage*, Bus. Ins. (Apr. 1, 1991), 2.

one year.)⁴² Most domestic partner ordinances require that the partnerships are monogamous, that the partners are at least in part responsible for each other's welfare, and that they are at least 18 years of age. Several require that the partners be mentally competent to enter into a contract and that they not be related by blood closer than that barring marriage. Some municipal ordinances specify the type of emotional relationship or commitment that must exist between the partners. The City of Berkeley, for example, mandates that the partners intend to remain each other's domestic partner indefinitely.⁴³ The City of Minneapolis requires that registered domestic partners be "committed to each other to the same extent as married persons are to each other."⁴⁴ Interestingly, the majority of municipal domestic partnership ordinances require cohabitation—a requirement not imposed upon those who marry.⁴⁵

While homosexuals are able to register as domestic partners in selected cities,⁴⁶ the benefits gained from doing so are limited. For most, the partnership registration merely bestows legal recognition or legitimacy on the relationship. To qualify the partnership for health and other benefits normally associated with employment, one of the partners must generally be an employee of the municipality adopting the ordinance.

Tax Considerations

There are tax implications to domestic partnership benefits for homosexuals. If the employee and domestic partner are considered common-law spouses under state law,⁴⁷ the domestic partner is considered a spouse for tax purposes and the employer-provided benefits are not taxable.⁴⁸ However, homosexuals do not enjoy

⁴²For a complete and scholarly review of the legal issues surrounding domestic partnerships, see *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 Colum. L. Rev. 1164 (1992).

⁴³Berkeley, California, Affidavit of Domestic Partnership (Nov. 15, 1986), reprinted in District of Columbia, Commission on Domestic Partnership Benefits for D.C. Government Employees, Final Report and Recommendations (1990).

⁴⁴Minneapolis, Minnesota, Code of Ordinances, tit. 7, ch. 142, §142.20 (1991).

⁴⁵See, e.g., Seattle, Washington, Municipal Code §4.30.030(A)(2)(a) (1989).

⁴⁶The first was Berkeley in 1984. Added to those already discussed are Los Angeles, Santa Cruz, and Laguna Beach, California; Washington, D.C. (still facing legal attack); Takoma Park, Maryland; Ann Arbor, Michigan; Ithaca, New York; Madison, Wisconsin; San Mateo and Alameda Counties, California; and Travis County, Texas.

⁴⁷Common-law spouses are recognized under the laws of Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and the District of Columbia. Ohio changed its previous common-law status in 1991, grandfathering those common-law marriages already in existence.

⁴⁸Internal Revenue Service Rule 58-66, 1958-1 C.B. 60.

legal common-law spouse status in any state. Domestic partners may qualify as dependents under Internal Revenue Service (IRS) rulings. To do so, they must reside with the covered employees from whom they receive at least half of their support. However, the IRS does not grant dependent status if the domestic partner relationship is illegal under local law.⁴⁹ This restriction once again prevents homosexuals from obtaining the same tax benefits as are available to heterosexuals.

Implications for Employers

The Advantages

Employers can benefit by extending family benefits to the domestic partners of their homosexual employees. First and foremost is the equity consideration. Since homosexuals are not allowed to marry, they may not generally qualify for employer-provided family benefits. Denying them access to these benefits merely because they are not legally married places homosexuals in a catch-22 position. Progressive employers may wish to avoid the potential negative publicity associated with fostering such a no-win situation for homosexuals.

Denying family benefits to homosexuals because they may be different from "normal" and their values may differ from those of the employer is a form of discrimination long abhorred by the U.S. legal system. Thus, socially conscious employers can gain a psychic reward by providing homosexual employees with the same family benefits as are available to heterosexual employees.

As noted earlier, this can also create a competitive advantage. Well-educated and experienced gay and lesbian workers in domestic partner relationships are likely to be attracted to an employer who provides family benefits to them. Thus, employers can secure and retain a segment of the work force not as strongly attracted to competitors. The economic advantages of a no-discrimination policy have been well documented.⁵⁰

The extension of family benefits to domestic partners can provide the employer with another advantage, namely, the cultural diversity associated with attracting and retaining homosexual employees. The value of a culturally diverse workforce has been

⁴⁹For a complete discussion of the tax implications of domestic partnerships, see Laarman, *supra* note 38.

⁵⁰See Becker, *Human Capital* (National Bureau of Econ. Res., 1964).

increasingly recognized in recent years. Employers who manage diversity in positive ways can experience heightened levels of creativity and productivity from their employees.⁵¹

The Disadvantages

Many employers argue that, in these times of rapidly escalating health care costs, it makes no sense to extend family benefits to the domestic partners of homosexual employees. This is particularly true considering the high cost of treatment for AIDS patients. Some employers feel that homosexuals constitute "a population with a higher potential set of catastrophic health problems, including AIDS."⁵² But employers who have adopted domestic partner plans have not experienced significantly higher costs.⁵³ When the City of Berkeley, California, first offered domestic partner coverage, one of the health maintenance organizations (HMOs) providing the coverage imposed a 2 percent loading charge to cover expected additional claims and costs. The charge was dropped after three years of experience failed to justify it.⁵⁴

Benefits Manager Sally Gottlieb of Apple Computer studied the cost increases experienced by several private- and public-sector employers who offered domestic partner coverage. She concluded: "The cost is really not huge on this."⁵⁵ And Jim Young, director of human resources for the Minnesota Communications Group, summed up the experience of participating insurance companies: "Eight years of actuarial experience disproved the theory that providing coverage to domestic partners would increase the costs."⁵⁶

Many employers fear that extending benefit coverage to employees' domestic partners could evolve into coverage for other "nontraditional" dependents, such as a partner's mother, children, or other relatives. The biggest concern, however, is that an employee could have several domestic partners in serial order, stemming from a lack of commitment to any one of them. Others envision a situation where a homosexual employee with numerous

⁵¹For an excellent discussion of this idea, see Thomas, *The Concept of Managing Diversity*, *Bureaucrat* (Winter 1991-92), 19. See also Thomas, *Beyond Race and Gender* (AMACOM, 1991).

⁵²Gilbert, *Major N.Y. Hospital Offers Domestic Partner Benefits*, *Nat'l Underwriter* (Apr. 2, 1991), 2, 17.

⁵³*Health Care for Unmarried Partners*, INC. (Apr. 1993), 31.

⁵⁴Van Sloys, *supra* note 41, at 7.

⁵⁵*Apple Extends Domestic Partner Benefits*, 1993 *Daily Lab. Rep.* (BNA) (Feb. 2), No. 20: A-18.

⁵⁶*Domestic Partners and Employee Benefits*, *Focus* (June 1992), 1, 2.

AIDS-ravaged friends invites them, one at a time, to live with him and get "on the dole."

While the above concerns could materialize if an employer developed a domestic partner plan in haphazard fashion, none of the employers studied reported such outcomes. This is undoubtedly due to the restrictions imposed upon qualification for coverage.

Requirements for Coverage

Employers who extend family benefits to domestic partners place specific prerequisites upon qualification for coverage. While most do not place a restriction on the gender of the partners, some require that the domestic partner be of the same sex as the employee.⁵⁷ Employers adopt the "same sex" requirement generally for equity-based reasons. They feel that, since heterosexual employees qualify for family benefits because they voluntarily choose to marry, homosexual employees who are prohibited by law from marrying should qualify in some other way.

Montefiore Medical Center requires domestic partners to be of the same sex as the employees with whom they have a relationship. The Center also requires that the partners live together and "share the common necessities of life." The partners must provide the following evidence to qualify for domestic partner benefits:

1. A sworn affidavit in which they declare that they are each other's sole domestic partner.
2. Proof of cohabitation, including passports, drivers' licenses, and designations for delivery of mail.
3. Proof of financial interdependence, including joint checking accounts, credit cards in both names, and designation of each other as authorized signatures on their respective safe deposit boxes.
4. Proof of responsibility for each other's common welfare, including executed powers of attorney and/or health care proxies for financial, medical and personal decisions, and the naming of each other as beneficiaries or executors for insurance policies and wills.⁵⁸

At the University of Chicago, where benefit qualification requires the partners to be of the same gender, the couples must submit a "Statement of Domestic Partnership" attesting to the following conditions: (1) they are the sole domestic partner of each other and intend to remain so indefinitely, (2) they are of the same

⁵⁷Stanford University; University of Chicago; University of Iowa; Montefiore Medical Center; Lotus Development; MCA Inc.; Viacom International; Silicon Graphics; Milbank, Tweed, Hadley & McCloy; and Next Computers.

⁵⁸Gilbert, *supra* note 52.

sex and neither is married, (3) they are at least 18 years of age, and (4) they are mentally competent to consent to contract.⁵⁹ Requirements for domestic partner benefit eligibility at Apple Computer are similar.⁶⁰

Most employers offering family benefits to domestic partners require that the relationship between the partner and employee meet a specific definition of "domestic partner," such as the following:

- A relationship resembling a family or household with close cooperation between the parties, each having specified responsibilities.
- A committed non-platonic, family-type relationship of two unrelated partners.
- Two unrelated individuals who share the necessities of life, live together, and have an emotional and financial commitment to one another.
- Cohabitation, significant others, spousal equivalents, nontraditional dependents, live-in companions.⁶¹

Implications for Arbitrators

Grievance arbitrators have yet to hear a case involving the extension of family benefits to employees' domestic partners. In part, the reason for this lack of experience is that the issue is very new. It is also due to the fact that few domestic partner benefit plans have been negotiated between unions and employers.⁶² Of those few negotiated plans, some are side deals not included in the collective bargaining agreement.⁶³ Given the recent and growing acceptance by employers of domestic partner benefit plans, the emergence of these provisions in collective bargaining agreements is highly likely.

It is also likely that unions and employers will include specific definitions of the term "domestic partner" in negotiated benefit plans and will bargain narrowly crafted eligibility requirements. Given the inevitable ambiguity accompanying the negotiated phrase, employers and unions will have disputes about the interpretation and application of domestic partner benefit clauses. Employers will

⁵⁹*University of Chicago Extends Benefits to Same-Sex Partners of Employees*, 1993 Daily Lab. Rep. (BNA) (Feb. 12), No. 28: A-5.

⁶⁰*Supra* note 55.

⁶¹Van Sloys, *supra* note 41 (Introduction).

⁶²Plans have been negotiated for unionized employees by *The Village Voice*; Levi Strauss; City of Santa Cruz; City of Seattle; City of Cambridge, Massachusetts, and City of San Francisco.

⁶³*The Village Voice*; City of Seattle.

no doubt be loathe to expand coverage beyond what they believe has been negotiated, and unions will take the position that employers have an unrealistically narrow recollection of the scope of the parties' intent. Thus, in the next few years grievance arbitrators will be called upon to tell the parties exactly what they meant when they agreed to extend certain family benefits to employees' domestic partners.

And what about the first interest arbitrator called upon in the public sector to decide whether the contract should include a benefits clause for employees' domestic partners? What if the proposed clause covers partners of homosexual employees only? Unions today can present equity-based arguments for these clauses, and in the ensuing few years they may also argue that such clauses must be adopted to maintain parity with the benefit packages offered by other employers in the community.⁶⁴

Arbitrator Preparation

Are grievance arbitrators as a class experienced enough to hear and decide domestic partner benefit issues? They have certainly heard similar issues in the past. For example, grievance arbitrators have traditionally been called upon to decide family benefit eligibility questions, specifically with regard to the types of relations that constitute either "dependents" or the "immediate family." They have decided the medical benefit eligibility status of employees' foster children,⁶⁵ of their unmarried pregnant daughters,⁶⁶ of their dependent stepchildren,⁶⁷ and even of stepchildren who live only part time with their employee stepparent.⁶⁸

Grievance arbitrators have heard numerous cases involving the rights of homosexual employees, generally involving allegations of discrimination against homosexual grievants. A thorough reading of these cases suggests that grievance arbitrators are tolerant of homosexuality and have judged the appropriateness of one sexual preference over another.⁶⁹

⁶⁴Many public-sector interest-arbitration statutes require the arbitrator to compare the wages, hours, and conditions of employment in the jurisdiction of dispute with those of other employees in the same community.

⁶⁵*Klein Tools*, 88-2 ARB ¶8429 (Poindexter, 1988).

⁶⁶*Sheller-Globe Corp.*, 80-2 ARB ¶8613 (Kindig, 1980).

⁶⁷*Monarch Sidney*, 81-2 ARB ¶8485 (Kossoff, 1981).

⁶⁸*Pacific Southwest Airlines*, 79-2 ARB ¶8503 (Jones, 1979).

⁶⁹*Ser, e.g., City of Berkeley*, 88 LA 603 (Staudohar, 1987); *Louisiana Pac. Graphics*, 88 LA 597 (LaCugna, 1986); *United Indus.*, 88 LA 547 (Baron, 1986); *New York State Dep't of Corrections*, 86 LA 793 (LaManna, 1985); *Town House Apartments*, 83 LA 538 (Roumell, 1984); *Arizona Portland Cement Co.*, 79 LA 128 (Weitzenbaum, 1982); *U.S. Customs Serv.*, 77 LA 1113 (Rocha, 1981); *County of Orange, Cal.*, 76 LA 1040 (Tamoush, 1981).

In the interest arbitration arena, neutrals have decided many controversial issues. Much political and philosophical debate has been generated by agency-shop provisions, no-smoking clauses, and "me-too" clauses in police and fire agreements. Interest arbitrators have proven their ability to weather these storms and adhere to statutory criteria in making their decisions. Arbitrators undoubtedly have the technical skills to decide domestic partner issues, and most have been generally nonbiased in homosexuality matters. However, domestic partner issues are likely to present new challenges.

The Specific Arbitral Issues

Consider the following language adopted unilaterally by an employer as the operable definition of "domestic partner" for benefit eligibility purposes:

Domestic partners are defined as an employee and another unrelated adult person living together in the same household, in a committed, non-platonic, and long-term relationship, who share the necessities of life and have financial dependency upon one another.

Obviously, this language is replete with ambiguity. But it is certainly no more ambiguous than the phrase "just cause" or the term "reasonable" found in almost every negotiated collective bargaining agreement. Thus, it is likely that, as more and more unions and employers bargain over the domestic partner benefits issue, the language will be similar to that quoted above. Arbitrators will have to decide whether employees and their significant others are truly "living together." What if they only stay under the same roof on weekends, yet both receive mail there? What is a "committed" relationship? Does it mean they may not have an "open" relationship, similar to that fashionable in some circles in the 1970s? What is the proper definition of a "nonplatonic" relationship? And, given today's divorce rate, what is "long term" in the context of any relationship?

In my view, these questions will be present at the arbitral threshold in the near future, if not tomorrow. They become even more complicated and controversial when the domestic partners are homosexual. The arbitrator who has personal biases one way or another on these issues needs to recognize and manage them to ensure that they do not improperly influence grievance and interest arbitration awards.