



Winter 1-1-1996

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Recommended Citation

Lindsay Brooke King, *Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code*, 53 Wash. & Lee L. Rev. 301 (1996).

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Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code

Lindsay Brooke King*

I. Introduction

In the last decade, municipal and private employers have begun to extend employer-provided spousal benefits to employees' domestic partners.¹ Historically, employers have provided certain benefits to employees' spouses,² but

* The author wishes to thank Professor Gwen T. Handelman for her encouragement and helpful insights in the preparation of this Note.

1. See Jarrett T. Barrios, Note, *Growing Pains in the Workplace: Tax Consequences of Health Plans for Domestic Partners*, 47 TAX LAW. 845, 846-48 (1994) (discussing municipal and private employers' extension of employee benefits packages to domestic partners); Robert L. Eblin, Note, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and Others)*, 51 OHIO ST. L.J. 1067, 1072-78 (1990) (reviewing domestic partner provisions of municipal and private employers); Edward J. Juel, Note, *Non-Traditional Family Values: Providing Quasi-Marital Rights to Same-Sex Couples*, 13 B.C. THIRD WORLD L.J. 317, 327-40 (1993) (discussing both municipal and corporate domestic partnership initiatives); Jay Mathews, *Gay Partners Gain Benefits; Big Firms Quietly Agree to Pay Medical Bills*, WASH. POST, Oct. 2, 1993, at A1 (noting that "Apple Computer Inc., Microsoft Corp., Sun Microsystems Inc., Home Box Office Inc., Warner Bros., the New York-based law firm Milbank, Tweed, Hadley & McCloy and several other companies have agreed . . . to treat partners of gay and lesbian employees as if they were legal spouses and pay a substantial portion of their doctor and dental bills").

2. See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1194 (1992) (listing health insurance and illness, disability, and bereavement leave as examples of benefits normally extended to employees' spouses).

generally have denied benefit coverage to unmarried employees' domestic partners. This employment practice undermined certain laws and policies prohibiting discrimination in the workplace.³ Because benefits packages comprised a large portion of employee compensation,⁴ employees with domestic partners received considerably less in compensation than their married colleagues performing identical work. Although unmarried heterosexual employees, as well as gay and lesbian employees, received similarly diminished compensation packages, heterosexual employees had the option to marry their domestic partners, whereas gay and lesbian employees did not.⁵

Employers feared that extension of benefits, particularly health benefits, to cover domestic partners would result in prohibitively large costs.⁶ Nonetheless, certain employers gradually extended health benefits, as well as other benefits, to domestic partners and discovered that such fears were unfounded.⁷ Since 1985, when Berkeley, California, became the first city

3. See *Health Briefs: University Offers Domestic Partner Benefits*, 22 *Pens. & Benefits Rep.* (BNA) 2339, 2339 (Oct. 23, 1995) (noting that University of Denver began extending health and other employee benefits to employees' same-sex domestic partners to achieve consistency with university's equal employment opportunity policy); *Health Insurance: Duke University Extends Benefits to Domestic Partners of Employees*, 22 *Pens. & Benefits Rep.* (BNA) 250, 250 (Jan. 16, 1995) (noting that Duke University's extension of insurance coverage and other benefits to domestic partners of gay and lesbian employees comported with nondiscrimination policy passed by its board of trustees in 1988, which bars discrimination against employees on basis of sexual orientation); Eblin, *supra* note 1, at 1068 & nn.3-9 (listing states, cities, unions, universities, and private employers that have implemented nondiscrimination laws and policies); *Domestic Partnership Plans Pass 100 Mark*, PARTNERS: MAG. FOR GAY AND LESBIAN COUPLES, Spring 1992, at 11, 13 (discussing Levi-Strauss & Co.'s decision to implement domestic partner benefits and noting that previous denial of benefits to domestic partners contravened company policy prohibiting discrimination).

4. See Eblin, *supra* note 1, at 1070 & n.17 (citing BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT COST INDEXES AND LEVELS 1975-89, at 9 (1989)) (noting that employee benefits now average greater than 27% of total compensation in private sector).

5. See *infra* note 27 and accompanying text (noting that no state currently allows same-sex couples to marry); see also Eblin, *supra* note 1, at 1069 (noting that domestic partnership status holds particular appeal for gay and lesbian couples because they do not have option to receive benefits afforded by marriage).

6. See *infra* notes 56-69 and accompanying text (discussing employers' fears that extending health benefits to domestic partners would result in increased incidences of fraud and high cost increases in employee benefits plans).

7. See *infra* notes 60-61, 65-69 and accompanying text (explaining that employers' fears of fraudulent abuse and increased costs have not materialized).

to extend health benefits to employees' domestic partners, several cities and private employers have followed suit.⁸

One of the major advantages flowing from employer-provided health benefits is the beneficial federal tax treatment resulting to both employers and employees.⁹ Specifically, the Internal Revenue Code of 1986, as amended (IRC or Code), allows the recipient employee to exclude the cost of employer-provided health coverage from compensation subject to income and employment tax.¹⁰ Although married employees also may exclude employer-provided coverage for their spouses,¹¹ unmarried employees may exclude coverage for their domestic partners only if those partners qualify as dependents of the employee.¹² State law determines marital status and may affect dependent status as well.¹³ Although several states recognize

8. See *infra* note 36 and accompanying text (discussing trend of employers to extend spousal benefits to domestic partners).

9. See *infra* notes 79-83 and accompanying text (discussing excludability of employer-provided health benefits); see also Barrios, *supra* note 1, at 860-61 (discussing employers' ability to deduct value of health benefit expenditures for employees under Internal Revenue Code (IRC or Code) § 162(a) regardless of whether benefits are excludable for employees under Code §§ 105 and 106).

10. See *infra* notes 79-83 and accompanying text (discussing excludability of employer-provided health benefits under Code §§ 105(b) and 106). Employment tax — Federal Insurance Contributions Act (FICA) taxation, Federal Unemployment Tax Act (FUTA) taxation, and income tax withholding — consequences tend to follow income tax treatment. See, e.g., Rev. Rul. 75-241, 1975-1 C.B. 316 (noting that value of employer contributions or direct or indirect payments to, or on behalf of, employees under employer plan making provision for employees' "sickness or accident disability or medical or hospitalization expenses in connection with sickness or accident disability" is not includible in definition of "wages" for FICA or FUTA tax purposes or for income tax withholding purposes); Barrios, *supra* note 1, at 860 (discussing employment tax consequences of extending health benefits to domestic partners). Detailed analysis of employment tax issues is beyond the scope of this Note.

By contrast, employees who must purchase health coverage on their own pay tax on all amounts, up to 7.5% of adjusted gross income, spent to provide for medical care. See I.R.C. § 213 (1994) (allowing deduction for medical care expenses exceeding 7.5% of adjusted gross income).

11. See *infra* note 80 and accompanying text (discussing treasury regulation establishing that excludability of employer-provided health benefits extends to coverage provided to employee's spouse).

12. See *infra* notes 84-85 and accompanying text (explaining that absent common-law marriage statute, excludability of employer-provided domestic partner health benefits depends on whether domestic partner qualifies as employee's dependent).

13. See *infra* notes 89-90 and accompanying text (discussing local law exception to dependency status); *infra* note 99 and accompanying text (explaining that Internal Revenue

common-law marriages, no state recognizes same-sex marriages.¹⁴ Furthermore, a person cannot qualify as a dependent of a taxpayer if that person's relationship with the taxpayer "is in violation of local law" within the meaning of IRC § 152(b)(5).¹⁵

This Note explores the meaning of "a relationship . . . in violation of local law"¹⁶ for purposes of determining dependent status under federal income tax law. Part II surveys the evolving employer practice of extending health benefits to employees' domestic partners.¹⁷ Part III discusses the tax treatment of employer-provided health benefits under the Code, as interpreted in private letter rulings issued by the Internal Revenue Service (IRS or Service).¹⁸ Part IV reviews how the courts and the IRS have applied to heterosexual relationships the local law exception to the definition of dependent.¹⁹ Lastly, Part V argues that absent state enforcement of statutes prohibiting unmarried cohabitation, domestic partner health benefits should be excludable from an employee's gross income under Code §§ 105(b) and 106.²⁰

Service (IRS or Service) defers to state law in determining taxpayers' marital status).

14. See BLACK'S LAW DICTIONARY 277 (6th ed. 1990) (defining "common-law marriage"). A common-law marriage is a nonceremonial relationship requiring "a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." *Id.* Currently, only 14 states and the District of Columbia recognize common-law marriage. See Barrios, *supra* note 1, at 854 n.60 (listing states that recognize common-law marriage: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, and Utah); see also *infra* note 27 and accompanying text (noting that no states currently allow same-sex partners to marry); cf. *San Francisco Board Backs Gay Weddings*, WASH. POST, Jan. 30, 1996, at A3 (discussing San Francisco Board of Supervisors' approval of symbolic wedding ceremonies for registered same-sex domestic partners and noting that this effort is at odds with state effort to prohibit same-sex marriages).

15. See *infra* notes 89-90 and accompanying text (citing Code § 152(b)(5) and explaining local law exception to dependency status).

16. I.R.C. § 152(b)(5) (1994).

17. See *infra* notes 21-73 and accompanying text (discussing public and private employers' domestic partnership provisions).

18. See *infra* notes 74-123 and accompanying text (discussing Code's treatment of employer-provided health benefits).

19. See *infra* notes 124-235 and accompanying text (discussing and interpreting case law applying local law exception to definition of dependent).

20. See *infra* notes 236-67 and accompanying text (arguing for excludability from taxpayers' incomes of employer-provided domestic partner health care benefits, absent state enforcement of laws criminalizing unmarried cohabitation).

II. *Extension of Employee Benefits Through Domestic Partnership Provisions*²¹

As American families and the American work force have grown increasingly diverse,²² employers have adjusted their policies in response to the

21. This Note discusses domestic partnership provisions on both the municipal and private employer levels. On the municipal level, two different types of domestic partnership provisions exist. One type of provision involves the municipality acting in its role as government and provides for public registration of domestic partnerships. See Juel, *supra* note 1, at 329 (citing ordinance of Ithaca, New York, as example of domestic partner provision that provides for registration of domestic partners, but does not provide for extension of any other benefits). The sole purpose of such registration provisions is to provide for some official recognition and validation of domestic partnerships. See *id.* (noting that only real significance of such ordinances is to provide some state recognition of relationship's validity); see also *id.* at 319 (noting that general effect of domestic partnership initiatives is to provide beginning of state and societal recognition of domestic partnerships). The extent to which such initiatives will succeed in validating relationships will depend upon whom the municipalities allow to take advantage of the registration programs. Cf. Bowman & Cornish, *supra* note 2, at 1195 n.155 (noting that West Hollywood, Ithaca, San Francisco, and Minneapolis ordinances limit registration to partnerships in which at least one partner is city resident or city employee, whereas Berkeley's registration program allows nonresidents, as well as residents, to register). The second type of municipal domestic partnership provision involves the municipality acting in its role as employer and includes the extension of benefits to domestic partners of municipal employees through city ordinances, see *id.* at 1188-90 (listing examples of cities extending benefits through domestic partnership ordinances, including Berkeley, West Hollywood, Los Angeles, San Francisco, and Laguna Beach, California; Minneapolis, Minnesota; Seattle, Washington; and Madison, Wisconsin), executive orders, *id.* at 1190 (citing New York City as example), and the collective bargaining process, *id.* (citing Santa Cruz, San Mateo County, and Alameda County, California, and Travis County, Texas, as examples); see also *Collective Bargaining: Public Sector Bargaining*, 23 Pens. & Benefits Rep. (BNA) 153, 153 (Jan. 15, 1996) (reporting on several unions' agreement with Los Angeles County Board of Supervisors providing for extension of health coverage for same-sex domestic partners).

22. See Kathy Robertson, *Domestic Partnerships Raise New Questions About Benefit Equity*, 20 Pens. & Benefits Rep. (BNA) 2478, 2478 (Nov. 22, 1993) (discussing diversity of today's work force). Robertson notes:

No longer can an employer assume that a worker's support system is made up of a stay-at-home spouse and a couple of children. . . .

- about 4.2 million households are made up of unmarried couples, according to U.S. Census Bureau figures;
- almost 2.6 million are unmarried heterosexuals, 1.6 million are homosexuals;
- about 8.4 million adults are living in some sort of "domestic partnership," according to a 1991 study by Hewitt Associates; and
- by the year 2000, unmarried individuals will constitute a majority of California's adult population, according to a report by Insurance Commissioner John Garamendi (D).

Id.

changes. Employer policies extending certain benefits to employees' domestic partners developed as a response to the needs and requests of same-sex couples.²³ Gay and lesbian couples have sought means through which to provide for stability in their relationships comparable to the stability provided to heterosexual couples under state marriage laws.²⁴ Marriage triggers a number of rights and privileges, including the extension of certain employer-provided benefits to the spouse of an employee.²⁵ These benefits generally are unavailable to partners of unmarried employees regardless of the sex of the partners or the degree of commitment in the couples' relation-

23. See Juel, *supra* note 1, at 319 (discussing rationale underlying domestic partnership initiatives); *id.* at 337-38 (describing domestic partner benefits policies of Lotus Development Corporation and Montefiore Medical Center as responses to concerns voiced by lesbian employees). However, domestic partnership provisions, particularly on the municipal level, usually include unmarried heterosexual couples in addition to gay and lesbian couples. See, e.g., Barrios, *supra* note 1, at 845 & nn.1-2 (discussing domestic partnership registration program of Berkeley, California, through which Berkeley became first government employer to extend employee health benefits to same-sex partners and unmarried heterosexual partners); Eblin, *supra* note 1, at 1073 (noting that heterosexual couples comprise about 90% of couples filing Affidavits of Domestic Partnership through domestic partnership provision in Santa Cruz, California); *id.* at 1074 (noting that approximately 70% of applications for domestic partner health coverage under Seattle's domestic partner provision have been for opposite-sex partners); *id.* at 1076 (providing New York City's definition of domestic partners — "two people, both of whom are eighteen years of age or older and neither of whom is married, who have a close and committed personal relationship involving shared responsibilities" (quoting New York City Exec. Order No. 123 § 2 (Aug. 7, 1989))); *id.* at 1087 (noting availability of domestic partnership as alternative to marriage for opposite-sex couples).

24. See IRVING J. SLOAN, *HOMOSEXUAL CONDUCT AND THE LAW* 34 (Irving J. Sloan ed., Legal Almanac Series No. 85, 1987) (listing significant state and federal marital privileges that government denies to same-sex couples as result of prohibiting same-sex marriage); Juel, *supra* note 1, at 321 (listing "a host of . . . privileges that are automatically available by law to married couples that are denied to similarly-situated same-sex couples").

25. See Vada Berger, *Domestic Partnership Initiatives*, 40 DEPAUL L. REV. 417, 417-18 (1991) (listing certain privileges granted to married couples). Berger states:

Some of the privileges available to married couples include favored immigration status, the right of hospital, and jail visitation, reduced cost club memberships, the ability to file joint tax returns, exemption from gift taxes, estate tax deductions, extension of health and dental benefits, the right to sue for loss of consortium, and wrongful death, the privilege not to testify against one another, the ability to own property as tenants in the entirety, intestate succession, and entitlement to social security benefits.

Id. (citations omitted); Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 783-86 (1995) (listing several of approximately 150 "rights and benefits" granted under Hawaii law based on marital status and noting that many of these benefits cannot be created through private contract).

ships.²⁶ Because no state allows same-sex partners to marry,²⁷ gay and lesbian employees categorically receive less compensation than do their heterosexual colleagues.²⁸ Benefits packages comprise a substantial portion of employee compensation,²⁹ but courts routinely have refused to find denial of domestic partner coverage to be a violation of equal protection or of antidiscrimination laws and policies.³⁰ Domestic partner provisions attempt

26. See Berger, *supra* note 25, at 418 (noting that unmarried couples, despite degree of commitment in relationships, may not receive privileges granted to married couples).

27. See SLOAN, *supra* note 24, at 33 (describing states' denial of same-sex marriages). Sloan summarizes the current status of same-sex marriage as follows:

The current status can be simply stated. From a legislative viewpoint no state today would knowingly issue a marriage license to a homosexual couple. Furthermore, no state statute expressly affirms the right of homosexual couples to marry. From a judicial viewpoint, the judiciary has unanimously inferred prohibitions of same-sex marriage from silent state statutes, and all courts faced with the same-sex marriage issue have relied on the premise that a lawful marriage, by definition, can be entered into only by two persons of opposite sex. No court has taken the position that state prohibition of homosexual marriage is unconstitutional.

Id.; see also Berger, *supra* note 25, at 418 (noting that states recognizing common-law marriages deny common-law marriage status to same-sex couples); Brown, *supra* note 25, at 794 & n.179 (noting that only four states — Indiana, Texas, Utah, and Virginia — specifically prohibit same-sex marriage); Eblin, *supra* note 1, at 1068 n.10 (noting that although few state statutes specifically prohibit same-sex marriage, courts have uniformly construed gender-neutral marriage statutes to deny marriage to same-sex couples). Furthermore, states that statutorily prohibit sexual orientation discrimination deny marriage to homosexual couples. *Id.* at 1069. But see Baehr v. Lewin, 852 P.2d 44, 67 (Haw.) (reversing circuit court's dismissal of case challenging constitutionality of health department's denial of marriage licenses to same-sex couples), *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993). On remand, the Baehr decision may give some same-sex couples a constitutional right to marry. Sue N. Averill, Comment, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253, 271 (1993). Such a result is likely to pave the way for recognizing the legal marital status of same-sex couples in other jurisdictions "because state laws generally provide that 'if you're married in one state you're married in another.'" *Id.* at 271 & n.160 (citing Henry J. Reske, *Gay Marriage Ban Unconstitutional?*, 79 A.B.A. J. 28, 28 (1993) (quoting William Rubenstein, director of ACLU's Lesbian and Gay Rights Project)).

28. See *supra* notes 4-5 and accompanying text (explaining that unmarried heterosexual employees with domestic partners also receive less in compensation than their married colleagues but that heterosexual employees at least have *option* to marry).

29. See *supra* note 4 and accompanying text (noting that benefits comprise large portion of employee compensation); see also Averill, *supra* note 27, at 280 (noting that families rely on employer-provided benefits that provide securities of health care, retirement, and other financial and emotional support as part of employee's total compensation package).

30. See, e.g., *Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410, 419-20 (Ct. App. 1985) (concluding that denial of dental benefits to same-sex partner of state

to equalize the compensation received by employees who have domestic partners and the compensation received by their married colleagues performing identical work.³¹

Since Berkeley, California, extended benefits to domestic partners in 1985,³² several municipalities,³³ private employers,³⁴ and one state — Ver-

employee was not unlawful discrimination because unmarried employee with same-sex partner was not similarly situated to married employees); *Phillips v. Wisconsin Personnel Comm'n*, 482 N.W.2d 121, 126 (Wis. Ct. App. 1992) (concluding that denial of health insurance coverage to lesbian partner was not discriminatory because disparity in treatment resulted from difference in marital status rather than from sexual orientation); *Averill*, *supra* note 27, at 260 (discussing unpublished California case concluding that employers may lawfully grant benefits to married partners while simultaneously denying same benefits to unmarried partners); *see also* *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520-22 (Ga. 1995) (upholding city ordinance prohibiting discrimination on basis of sexual orientation, but denying city's authority to extend health insurance coverage to unmarried city employees' domestic partners). The Georgia Supreme Court, in *McKinney*, said that the city had exceeded its authority, under the Georgia Constitution and under Georgia's Municipal Home Rule Act, by extending insurance coverage to people who did not qualify as employees' "dependents," as defined by state law. *Id.* at 521. Further, the court explained that the ordinance incorrectly categorized a domestic partnership as a "family relationship." *Id.*

31. *See* *Bowman & Cornish*, *supra* note 2, at 1194-95 (noting that typical employee benefits plans based upon familial relationships poorly serve many employees due to changing constitution of American families and stating that domestic partnership provisions are one means of remedying inequitable employee benefits distribution); *Juel*, *supra* note 1, at 319 (noting that equality rationale is "the primary motivating factor for domestic partnership proponents simply because of the easily quantifiable inequality between same-sex and married couples" with regard to employee benefits packages); *cf. Health Insurance: NYNEX Offers Domestic Partner Benefits to Employees Living with Same-Sex Mates*, 22 *Pens. & Benefits Rep.* (BNA) 2338, 2338 (Oct. 23, 1995) [hereinafter *NYNEX*] (noting that NYNEX Corporation limited its extension of domestic partner benefits to employees' same-sex partners because "marriage is not an option for [same-sex couples] under the law, as it is for opposite sex couples"); *Alan W. Richardson, Sexual Orientation Rights in the Workplace: A Proposal for Revising and Reconsidering California's Assembly Bill 101*, 26 *U.C. DAVIS L. REV.* 425, 430 (1993) (stating that employers discriminate against gay and lesbian employees by withholding employer-provided benefits from domestic partners); *Eblin*, *supra* note 1, at 1070 (stating that same-sex marriage prohibitions discriminate economically against same-sex couples by categorically denying them benefits commonly extended to married couples and noting that domestic partnership provisions, though not substitutes for marriage, reduce this type of discrimination).

32. *See* *Eblin*, *supra* note 1, at 1072 (discussing Berkeley's domestic partner policy). Berkeley adopted its domestic partner policy on December 4, 1984 and began extending dental and medical benefits to domestic partners by mid-1985. *Id.* (citations omitted). However, the city was unable to reach agreements regarding domestic partner coverage with all of its insurance carriers until 1987. *Id.*

33. *See* *LESBIANS, GAY MEN AND THE LAW* 442 n.1 (William B. Rubenstein ed., 1993) [hereinafter *LESBIANS, GAY MEN*] (listing major cities that have adopted domestic partnership

mont³⁵ — have adopted similar provisions. Domestic partner provisions are a growing trend among employers.³⁶ Although these provisions differ in many respects,³⁷ and no single definition of "domestic partner" exists,³⁸ the

provisions, including Los Angeles, San Francisco, Seattle, Minneapolis, and New York City); *supra* note 21 (discussing domestic partnership provisions generally).

34. See Barrios, *supra* note 1, at 847-48 & nn.14-18 (discussing private employers' offering of benefits packages to domestic partners); Aurora Mackey, *Domestic Partner Benefits Are Catching on . . . Slowly*, BUS. & HEALTH, April 1994, at 73, 73 (noting that over 70 major companies — including Lotus Development Corporation, Silicone Graphics Inc., MCA Inc., Microsoft Inc., Viacom Inc., Apple Computer, Inc., and HBO Inc. — offer domestic partner benefits to gay employees); see also *California Bar Covers Domestic Partners*, 22 Pens. & Benefits Rep. (BNA) 1669, 1669 (July 17, 1995) (noting that on October 1, 1995, State Bar of California would become first professional association to extend health benefits to members' heterosexual or same-sex domestic partners).

35. See Deb Price, *Christmas in August for Women Seeking Benefits for Partner*, STAR TRIB. (Minneapolis), July 13, 1994, at E3 (discussing Vermont's lead in extending state health coverage to domestic partners of gay and lesbian or heterosexual state employees). New York almost became the second state to extend health benefits to domestic partners. See Ian Fisher, *Cuomo Decides to Extend Domestic-Partner Benefits*, N.Y. TIMES, June 29, 1994, at B4 (noting that former Governor Cuomo announced that he would extend state health benefits to cover domestic partners, but expressed uncertainty regarding covering unmarried heterosexual partners).

36. See *Health Briefs: Domestic Partners*, 20 Pens. Rep. (BNA) 320, 321 (Feb. 1, 1993) [hereinafter *Health Briefs*] (noting that five San Francisco employers added domestic partnership coverage in 1992, as compared to only one employer in 1991, and that those employers adding domestic partner coverage were among twenty employers considering adding such provisions in 1992); *University Extends Benefits to Same-Sex Partners of Employees*, 20 Pens. Rep. (BNA) 427, 428 (Feb. 15, 1993) [hereinafter *University Extends*] (noting that domestic partner coverage seems to be growing, but slow-moving, trend among employers); see also Mackey, *supra* note 34, at 74 (noting that growth of domestic partner benefits has been greatest in California and on East Coast).

37. See Bowman & Cornish, *supra* note 2, at 1192 (noting that city ordinance requirements differ in language as to type of relationship that must exist between partners in terms of duration of cohabitation and whether relationship includes sexual intercourse and noting that, for example, Berkeley's ordinance requires that "parties intend to remain each other's domestic partner indefinitely," and "Minneapolis requires the parties to be 'committed to each other to the same extent as married persons are to each other'"); Juel, *supra* note 1, at 329 (listing important differences among city domestic partnership ordinances and noting that "[t]he most important aspect in which the municipal ordinances vary is the amount of benefits actually provided to the employee and his or her domestic partner").

38. See *Health Briefs*, *supra* note 36, at 321 (noting that "[n]o clear definition of domestic partner has emerged . . . with each organization using a number of different criteria for defining eligibility for the benefit"); *University Extends*, *supra* note 36, at 428 (stating that lack of standard definition for "spousal equivalent" causes confusion); Eblin, *supra* note 1, at 1069 n.11 (noting differences among domestic partnership provisions in definition of "domestic partner"). Eblin states:

provisions also share certain characteristics.³⁹ Each employer offering domestic partner benefits establishes its own list of criteria to determine eligibility for coverage.⁴⁰ Persons claiming domestic partner benefits and other legal rights must first meet certain eligibility criteria.⁴¹ For example:

Almost all ordinances require that the parties live together, be eighteen years or older, be mentally competent to consent to a contract, and

The definition of "domestic partner" varies widely across those programs that recognize domestic partnership status. [Each program has its own specific criteria.] Given its broadest definition, however, a domestic partnership would include *any* two persons who reside together and who rely on each other for financial and emotional support. Some definitions seem to presume a sexual relationship between the partners, and hence do not allow close blood relatives domestic partnership status. In fact, however, a sexual relationship is not a *requirement*, although it may evidence emotional commitment between the partners.

Furthermore, while "domestic partner" is the most widely-used term in benefit programs, other descriptives include "named partner" and "significant other."

Id.

39. See Barrios, *supra* note 1, at 849 (listing criteria usually required to establish eligibility for domestic partner coverage); Juel, *supra* note 1, at 328 (same). Juel states:

With regard to the initiatives in place at the municipal level, commonalities exist among the requirements and provisions of the various ordinances regarding who may register a domestic partnership, the benefits and obligations incurred through registration, the requirements to qualify, and how termination is handled. Currently, all of the cities that have domestic partnership legislation in place allow both same-sex and opposite-sex unmarried couples to register as domestic partners. Most have registration systems whereby the two partners, at least one of which usually must be a municipal employee, sign sworn affidavits. Domestic partnership affidavits generally state that the two persons have lived together for a certain period of time — usually six months to a year — and that they intend to be each other's sole companion. In these affidavits, the parties are also usually required to swear that they are not related by blood, that they are not currently married to anyone, that they are both over 18 years of age, and that they "accept responsibility for each other's welfare."

Id. (citations omitted).

40. See Alfred G. Haggerty, *Benefit Cover for Domestic Partners Increases; San Francisco Employers Boosted Programs in '92*, NAT'L UNDERWRITER, Feb. 22, 1993, at 21, 21-22 (listing usual criteria for establishing domestic partner benefit eligibility, including maintaining "committed and mutually exclusive relationship, in which each partner is jointly responsible for the other's welfare and financial obligations"; residing together with intent to do so indefinitely; and, in case of same-sex partners, both partners exceed 18 years of age, are unmarried, and are not related by blood).

41. See Bowman & Cornish, *supra* note 2, at 1192-94 (discussing eligibility requirements to enter domestic partnerships).

be related neither by marriage nor by blood closer than would bar marriage in the state in which they are located. All ordinances require that the partners declare that they are responsible for each other's welfare and that they are each other's sole domestic partner.

The requirements that differ, at least in language, relate to the type of relationship that must exist or is assumed to exist between the partners, such as length of time cohabiting or whether sex is part of the relationship.⁴²

Furthermore, most cities require domestic partners to file affidavits of domestic partnership with the city asserting that the partners live together, are neither married nor barred from marriage by state consanguinity requirements, "are each other's sole domestic partner," "share the common necessities of life," and assume responsibility for each other's welfare.⁴³ The partners must also promise to apprise the city of a termination of the partnership, for any reason, within a certain number of days by filing a statement to such effect.⁴⁴ After termination of the partnership, neither partner may enter into another domestic partnership for a specific length of time.⁴⁵ Municipal employers generally extend benefits to both same-sex and opposite-sex employee partners.⁴⁶ Private employers generally employ criteria similar to those of municipalities in extending domestic partner benefits. However, private employers tend to limit coverage to same-sex partners of employees in order to mitigate the inequitable effects of state marriage laws denying same-sex couples the right to marry.⁴⁷

42. *Id.* at 1192 (citation omitted); see also *NYNEX*, *supra* note 31, at 2338 (listing similar criteria that private employer, NYNEX Corporation, requires in extending benefits to employees' same-sex domestic partners).

43. See Berger, *supra* note 25, at 424-25 (listing typical requirements to qualify for city domestic partnership benefits).

44. *Id.* at 425.

45. *Id.*; see also Barrios, *supra* note 1, at 849 (noting that typical required waiting period is six to twelve months).

46. See Berger, *supra* note 25, at 425 & n.67 (listing typical eligibility requirements for cities' domestic partnership provisions and citing purpose of Berkeley's domestic partnership provision as attempting to "equalize benefits of domestic partners of city employees whether unmarried by choice or because they are barred by law from marrying"); Juel, *supra* note 1, at 328 (noting that all cities with domestic partnership provisions provide for registration of same-sex and opposite-sex unmarried couples).

47. See Barrios, *supra* note 1, at 848 (noting that private employers generally have limited domestic partner provisions to gay and lesbian couples due to equitable concerns regarding states' restrictive marriage laws); Juel, *supra* note 1, at 336-38 (describing rationale for domestic partnership policies of Lotus Development Corporation, Levi-Strauss, MCA, and Montefiore Medical Center as response to inequity of denying benefits to same-sex

An individual who meets the eligibility requirements of an employer's domestic partnership program may qualify for a range of benefits.⁴⁸ Some employers provide an extensive variety of spousal benefits to domestic partners in order to help equalize compensation of married and unmarried employees.⁴⁹ Other employers extend only limited benefits to employees' domestic partners.⁵⁰

Although employer domestic partnership provisions are a growing trend, employers have been slow to adopt these provisions for several reasons.⁵¹ First, some employers worry that extending domestic partner

partners due in part to inability of gay and lesbian couples to "share in the legal benefits of marriage"). *But see* Mackey, *supra* note 34, at 73 (citing Ben & Jerry's Homemade Inc. and Levi-Strauss as examples of private employers extending benefits to opposite-sex, as well as same-sex, domestic partners).

48. *See* Berger, *supra* note 25, at 425-27 (discussing different benefits made available to domestic partners by various city employers). Berger notes:

Berkeley, Santa Cruz, and West Hollywood extend health care benefits to domestic partners of their employees. West Hollywood's health care benefits include medical, dental, and vision insurance. Some of these same cities, along with Seattle, Takoma Park, New York, and Madison, provide city employees with bereavement leave. If the domestic partner or a member of the domestic partner's immediate family dies, then the employee may leave work without penalty. Berkeley, Madison, Seattle, and Takoma Park also provide sick leave. When the employee's partner or a member of the partner's immediate family is ill, the employee may stay home to provide care without penalty.

Id. (citations omitted); *see also* "Domestic Partner" Benefits' Extension Subject of Much Discussion, *Little Action*, 18 Pens. Rep. (BNA) 948, 949 (June 3, 1991) [hereinafter *Little Action*] (stating that bereavement and sick care leave are popular benefits that are extended because they are inexpensive); Barrios, *supra* note 1, at 849-50 (listing variety of benefits that employers may extend to domestic partners, including sick leave to care for domestic partner, funeral and bereavement leave, pension plan benefits, relocation assistance, job placement programs, employee assistance programs, and information and referral services).

49. *See* Robertson, *supra* note 22, at 2480 (listing benefits offered to domestic partners at Apple Computer, Inc., such as access to medical plans; mental health care; prescription drugs; vision care; employee assistance program; family, bereavement, and sick leave; adoption assistance; child care resource and referral; access to fitness center; and relocation assistance).

50. *See Family Leave: Chapel Hill Joins Municipalities Offering Benefit to Domestic Partners*, 22 Pens. & Benefits Rep. (BNA) 1163, 1163 (May 8, 1995) (discussing Chapel Hill, North Carolina's domestic partner policy, which allows city employees to take sick leave to care for domestic partners, but noting that town council decided not to extend medical insurance to city employees' domestic partners "pending further research"); *Minneapolis School Workers May Use Sick Leave to Care for Domestic Partners*, 19 Pens. Rep. (BNA) 802, 802 (May 11, 1992) (noting that Minneapolis School Board's domestic partner policy limits extension of benefits to sick and bereavement leave).

51. *See supra* note 36 and accompanying text (discussing recent growth in employers'

benefits will negatively affect customers' and stockholders' perceptions of the employer. This fear is not completely irrational in view of recent public criticism against Apple Computer, Inc. and Minnesota Communications Group for adopting domestic partnership policies.⁵² However, most employers have found the public's reaction to such provisions surprisingly positive.⁵³ Second, some employers are reluctant to offer domestic partnership benefits for fear that such provisions reward illegal relationships.⁵⁴ These employers prefer not to offer benefits to employees engaged in relationships that may violate state and local laws despite the infrequency with which government enforces such laws.⁵⁵

The most common cause of concern among employers in deciding whether to adopt domestic partnership provisions is the fear that the extension of domestic partner benefits will increase the potential for fraud and will result in prohibitively high cost increases in employee benefits plans.⁵⁶

extension of domestic partner benefits); *see also Few Programs Exist Despite Praise for Fairness, Business Value*, 21 Pens. & Benefits Rep. (BNA) 238, 238 (Jan. 17, 1993) [hereinafter *Few Programs*] (noting that Hewitt Associates, Chicago, estimates that only about 50 U.S. private employers offer domestic partner benefits); *id.* (predicting that domestic partnership benefits ultimately will be widespread but that result will take time); *Number of Employers Offering Benefits to Domestic Partners Increases Slowly*, 22 Pens. & Benefits Rep. (BNA) 1335, 1335 (June 5, 1995) [hereinafter *Number*] (noting that fewer than 150 U.S. employers currently offer domestic partner benefits); *cf. Few Programs, supra*, at 238 (noting that about 70% of people in 1989 survey opposed same-sex marriage, but over half favored extension of domestic partner benefits).

52. *See Minnesota Employer Announces Health Coverage for Domestic Partners*, 19 Pens. Rep. (BNA) 15, 15 (Jan. 6, 1992) (discussing public outcry that followed Minnesota Communications Group's extension of health care coverage to employees' domestic partners); Mackey, *supra* note 34, at 76-77 (discussing negative reaction from Williamson County, Texas community to Apple Computer's domestic partner policy).

53. *See Approaching "Elder Boom" Requires New Benefit Programs for Employers*, 20 Pens. Rep. (BNA) 954, 955 (May 3, 1993) [hereinafter *Elder Boom*] (describing reaction by both employees and customers to Lotus Development Corporation's extension of benefits to domestic partners of gay and lesbian employees as 85-90% favorable, although noting some resentment among unmarried employees with opposite-sex domestic partners); Robertson, *supra* note 22, at 2479 (discussing Borland International, Inc.'s surprise at lack of negative feedback in response to company's extension of health benefits to employees' domestic partners).

54. *See Little Action, supra* note 48, at 949 (noting some employers' concerns that domestic partnership policies may violate local and state laws prohibiting cohabitation and certain sexual activities).

55. *See id.* (discussing employers' reluctance to offer benefits to partners of couples in illegal relationships).

56. *See Eblin, supra* note 1, at 1082-83 (discussing employers' fears that domestic partner provisions will result in higher costs and increased potential for employee fraud, but

Because health insurance coverage is the most expensive of employee benefits,⁵⁷ employers have been particularly wary of extending health benefits to domestic partners.⁵⁸ One of the main reasons that employers cite for refusing to adopt domestic partnership policies is a fear that employees will take advantage of the policies by attempting to register mere friends in need of health care coverage who cannot afford the coverage themselves.⁵⁹ However, proponents of domestic partner provisions note that the experience of both municipal and private employers with these provisions has revealed no evidence of fraudulent abuse.⁶⁰ This absence of fraudulent registration is primarily attributable to built-in precautions in employer policies, such as the usual requirement that a couple registering for domestic partner benefits sign affidavits of domestic partnership, which subjects the employee to legal consequences if third parties suffer losses as a result of an employee's fraudulent misrepresentation of status.⁶¹

noting that these fears have proven to be irrational). *But see* Juel, *supra* note 1, at 339-40 (noting inequity of employers' assumptions that gay and lesbian employees have greater tendency than heterosexual employees to lie about nature of their relationships). Juel states:

[P]roponents . . . point out that employers rarely require a heterosexual employee to prove that he or she is indeed *married* to the person he or she seeks to enroll in the employer's health insurance plan for spousal coverage. It would therefore be unfair for employers to adopt an unwarranted presumption that partners to a same-sex couple are more likely to lie about the nature of their relationship than are heterosexual couples.

Id.

57. *See Little Action, supra* note 48, at 948 (stating that average annual cost of health insurance per employee is \$3000).

58. *See Barrios, supra* note 1, at 849 ("Health benefits are the most costly to an employer, and thus are one of the most serious considerations a company makes with regard to its employee benefits policy."); *id.* at 849 n.28 (noting that cost was major factor for Lotus Development Corporation, which became first Fortune 500 company to extend health benefits to domestic partners); Juel, *supra* note 1, at 320 (stating that employers are attempting to decrease extension of health care coverage to employees and their families because of dramatically increasing cost of health insurance); *id.* at 330 (noting that, in extending benefits to domestic partners of city employees, Berkeley and West Hollywood expressed greatest concern over cost of health insurance benefits because costs of offering sick and bereavement leave are negligible).

59. *See* Juel, *supra* note 1, at 339 (discussing employers' fear that domestic partner health insurance coverage will increase fraudulent registration and, consequently, will raise cost of health coverage for all employees).

60. *See id.* (noting lack of any evidence of fraudulent registration in municipalities and private companies that already have domestic partnership provisions and citing *Village Voice* newspaper as specific example of employer that has had domestic partnership policy in place for 10 years but has not experienced any fraudulent registration problems).

61. *See* Berger, *supra* note 25, at 432-33 (discussing requirements of employers'

A potential increase in Acquired Immune Deficiency Syndrome (AIDS)-related health care costs due to a greater number of high-risk eligible beneficiaries also increases employers' skepticism about their ability to provide domestic partner coverage.⁶² Insurers initially feared this potential for increase in AIDS cases as well and, as a result, either refused to provide coverage for domestic partners or increased the cost of policies for employers with domestic partner provisions in place.⁶³ Because of this reluctance, most employers offering domestic partner health coverage, until recently, have been self-insured.⁶⁴ Concerns of employers and insurers about cost increases due to AIDS coverage, however, have not been realized for several reasons. First, the number of gay and lesbian employees enrolling for domestic partner benefits has been considerably lower than anticipated.⁶⁵

domestic partnership provisions that render fraudulent registration unlikely); Eblin, *supra* note 1, at 1083 (listing typical requirements to qualify as domestic partners — including sharing residence for certain duration, financial dependence, and professed emotional commitment excluding all others — that make fraudulent registration unlikely); Juel, *supra* note 1, at 339 (discussing lack of fraudulent registration in experience of employers having domestic partnership provisions).

62. See Berger, *supra* note 25, at 420 n.24 (citing Kathy Bodovitz, *Domestic Partner Debate May Key on Economics*, S.F. CHRON., Oct. 16, 1989, at A4, for proposition that opponents of San Francisco's extension of health benefits to domestic partners fear compromise of city's ability to provide health care benefits due to increase of eligible beneficiaries with high risk of contracting AIDS); *Few Programs*, *supra* note 51, at 238 (noting that high costs of AIDS treatment is concern among employers considering domestic partner benefits); Eblin, *supra* note 1, at 1082 (stating that employers and insurers fear that gay employees will enroll large numbers of domestic partners who have AIDS).

63. See Juel, *supra* note 1, at 331 (citing West Hollywood as example of employer that could not find commercial medical insurance carrier to cover employees' domestic partners and noting that city, therefore, had to create its own insurance company to cover domestic partners); *id.* at 330-31 (noting that Berkeley's insurance carrier levied 1.5% surcharge to cover anticipated increases in claims); Mackey, *supra* note 34, at 76 (noting caution with which insurers moved in providing domestic partner coverage — first levying surcharges to cover additional claims and dropping them only after experience proved them to be unnecessary).

64. See Jack B. Helitzer, *Health Care Coverage for Domestic Partners*, 6 BENEFITS L.J. 245, 250-51 (1993) (noting that employers who extend domestic partner coverage must self-insure as practical matter); *Kaiser to Offer Health Insurance to Firms with More Than 100 Employees*, 21 Pens. & Benefits Rep. (BNA) 672, 672 (Mar. 28, 1994) (noting that firms offering domestic partner health coverage, until recently, had to self-insure and listing firms now offering health coverage to domestic partners through fully insured plans).

65. See Barrios, *supra* note 1, at 850-51 (noting that enrollment of gay and lesbian employees in domestic partnership employer health plans typically is between 0% and 2.5% of total work force); Eblin, *supra* note 1, at 1082 (noting that more heterosexual employees than gay and lesbian employees take advantage of domestic partner provisions); *id.* at 1072-73

Furthermore, the incidence of AIDS is less likely among lesbians than among any other segment of the population.⁶⁶ Most importantly, however, the cost of AIDS treatment for an individual is typically less than the cost of covering other, more common health conditions, such as premature or multiple births,⁶⁷ complications due to smoking or overeating, and cardiovascular problems.⁶⁸ Therefore, domestic partners have posed no greater insurance risk than have heterosexual couples.⁶⁹

Several municipal and private employers now extend health benefits to domestic partners.⁷⁰ As experience with domestic partner programs has

(showing that same-sex partner enrollment is only 15% of total domestic partner enrollment in Berkeley and only 10% of total enrollment in Santa Cruz). In fact, overall enrollment for domestic partner benefits has been surprisingly low among municipal and private employers enacting these provisions. *See Mackey, supra* note 34, at 74-75 (citing results of 1993 survey by Segal Company, a New York employee benefits company). Less than 5% of employees in companies with domestic partnership provisions register for these benefits. *Id.* It is not unusual for this rate to be below 2%. *Id.*; *see also* Juel, *supra* note 1, at 334-35 (discussing reasons for low employee enrollment). Many domestic partners already receive coverage under their own employers' health plans. Juel, *supra* note 1, at 335. Some same-sex couples may not want their relationship to become public knowledge and, therefore, do not register for domestic partner benefits. *Id.*

66. *See Berger, supra* note 25, at 433-34 (allaying opponents' fears that same-sex partner health coverage will result in prohibitively increased insurance costs).

67. *See Elder Boom, supra* note 53, at 955 (noting that average cost of AIDS case is between \$50,000 and \$150,000 — less than average cost of premature or multiple birth case).

68. *See Robertson, supra* note 22, at 2479 (stating that employers should concern themselves more with costs of covering smokers, overeaters, and people with cardiovascular problems than with cost of covering people at high risk for AIDS).

69. *See Number, supra* note 51, at 1335 (noting that costs of covering domestic partners has been lower than anticipated because increased risk of AIDS associated with same-sex male couples is offset by lower risk of same-sex female couples and because same-sex couples have near-zero risk of pregnancy); Robertson, *supra* note 22, at 2480 (stating that domestic partners appear, from claims experience statistics, healthier than population as whole and that costs increase when employers cover heterosexual domestic partners in addition to same-sex partners); Juel, *supra* note 1, at 331 (noting that Berkeley has found that costs of insuring domestic partners and employees' spouses and dependents are equivalent); *id.* at 332 (stating that West Hollywood's city health plan has actually received benefit from covering domestic partners due to additional premium payments generated); Mackey, *supra* note 34, at 74 (noting that experience of Levi-Strauss indicates that insurance costs may even be less for gay and lesbian couples than for heterosexual couples).

70. *See Barrios, supra* note 1, at 847 n.13 (listing U.S. jurisdictions that extend health benefits to employees' domestic partners); Eblin, *supra* note 1, at 1072-75, 1077 (citing Berkeley, West Hollywood, Santa Cruz, Seattle, and Laguna Beach as municipalities that extend health care benefits to domestic partners); Juel, *supra* note 1, at 337-39 (citing Lotus Development Company, Montefiore Medical Center, *Village Voice* newspaper, and Ben and Jerry's Homemade Ice Cream Company as examples of private employers who extend health

allayed employers' initial concerns about prohibitive costs, insurance coverage for domestic partners has become easier to obtain.⁷¹ More employers are likely to institute similar benefits policies in order to remain competitive in attracting and retaining the most qualified work force.⁷² The extension of these benefits may not equalize the treatment of married employees and unmarried employees who have domestic partners, however, due to the unequal tax consequences resulting from domestic partners' receipt of employer-provided health benefits.⁷³

benefits to employees' domestic partners).

71. See Mackey, *supra* note 34, at 77 ("[A]ttitudes have changed dramatically in the last three years, and . . . companies instituting domestic partner benefits today would likely have a much easier time of it. 'Three years ago, insurers were nervous. There were a lot of assumptions made about what the costs would be. That's now been demystified.'"); *id.* at 74 (listing states — including California, Hawaii, Massachusetts, New York, and Wisconsin — that have paved way for domestic partner benefits by removing insurance barriers to domestic partner coverage). But see generally *Public Employees: State Insurance Commissioner Rejects Health Insurance for Domestic Partners*, 22 Pens. & Benefits Rep. (BNA) 2601 (Nov. 27, 1995) (reporting on Georgia Insurance Commissioner John Oxendine's denial of requests by four insurance companies to offer health insurance coverage to unmarried domestic partners). Oxendine said:

To allow unmarried adult couples to have the financial health insurance benefits of being a married couple conflicts with the intent of the Georgia Legislature, is in direct opposition to the public policy of this state, and also runs contrary to the moral and ethical fiber of the state. It is something that I will not do.

Id. at 2601. This decision "does not apply," however, "to self-insured employers." *Id.*; see also *Emory Offers Domestic Partner Benefits*, 22 Pens. & Benefits Rep. (BNA) 1908, 1908 (Aug. 21, 1995) (discussing Emory University's extension of health and dental care coverage to employees' same-sex domestic partners through its self-funded plans).

72. See *Corporate Governance: Group Urges Principles to Assure Workplace Fairness*, 22 Pens. & Benefits Rep. (BNA) 1206, 1207 (May 15, 1995) ("Companies and industries that are most interested in adopting non-discrimination policies and implementing them to their fullest, including domestic partner health benefits, 'tend to be [industries] where there's high competition for skilled workers because it just makes sense.'" (quoting Diane Bratcher, cochairwoman of the Wall Street Project of the Community Lesbian and Gay Rights Institute in New York)); Mackey, *supra* note 34, at 73 (noting that some companies extend domestic partner benefits in order to attract and retain employees by offering best possible benefits packages); *cf.* Juel, *supra* note 1, at 332 (noting that one of main benefits of West Hollywood's domestic partnership program has been increase in employee morale).

73. Although these unequal tax consequences are the focus of this Note, domestic partners fail to achieve parity with married couples in other respects as well. See generally William V. Vetter, *Restrictions on Equal Treatment of Unmarried Domestic Partners*, 5 B.U. PUB. INT. L.J. 1 (1995) (arguing that domestic partnership provisions do not create true equality between domestic partners and married couples due to unequal tax consequences, as well as to burden of proof problems encountered by domestic partners that married couples do not similarly encounter).

III. Tax Treatment of Employer-Provided Health Benefits

IRC § 61 defines gross income as "all income from whatever source derived."⁷⁴ Code § 61(a)(1) specifically includes in gross income "[c]ompensation for services, including . . . fringe benefits."⁷⁵ Generally, any economic benefit received under an arrangement between an employer and an employee constitutes compensation for services, and the employee must include in gross income the value of the benefit received.⁷⁶ Further, subparagraph (a)(4)(i) of Treasury Regulation § 1.61-21 establishes that fringe benefits are includible in the income of the person who performed the services on account of which the employer provided the fringe benefit, regardless of who actually received the benefit.⁷⁷ Therefore, health benefits provided by an employer to an employee's domestic partner would be includible in the gross income of the employee on account of whose services the employer provides the benefits. However, Treasury Regulation § 1.61-21(a)(2) provides that fringe benefits are excludable from gross income to the extent that they comply with requirements of other Code provisions specifically excluding the benefits.⁷⁸

Certain employer-provided health benefits are excludable from an employee's gross income under the Code. Specifically, IRC § 106 excludes the value of employer-provided coverage under an accident or health plan.⁷⁹ That is, neither employer premium payments nor the value of the health insurance covering an employee is includible as income. Treasury Regulation § 1.106-1 clarifies that the exclusion extends to coverage for an employee's spouse and "dependents," as defined in § 152.⁸⁰ Further, payments under self-funded

74. I.R.C. § 61 (1994).

75. *Id.* § 61(a)(1).

76. *See id.* § 102(c)(1) (noting that general provision excluding from income property received by gift "shall not exclude from gross income any amount transferred by or for an employer to, or for the benefit of, an employee"); *Commissioner v. Duberstein*, 363 U.S. 278, 287-89 (1960) (suggesting that only exceptional case of payment by employer to employee amounts to gift and that strong presumption exists that such payment is payment for services and is, therefore, taxable).

77. *See* Treas. Reg. § 1.61-21(a)(4)(i) (as amended in 1992) ("A taxable fringe benefit is included in the income of the person performing the services in connection with which the fringe benefit is furnished. Thus, a fringe benefit may be taxable to a person even though that person did not actually receive the fringe benefit.").

78. *See id.* § 1.61-21(a)(2) (providing for specific exclusion from gross income of certain fringe benefits).

79. *See* I.R.C. § 106 (1994) (excluding value of employer-provided coverage under accident or health plan).

80. *See* Treas. Reg. § 1.106-1 (as amended in 1963) ("The gross income of an employee does not include contributions which his employer makes to an accident or health plan

employer plans also are excludable under Code § 105(b).⁸¹ This section excludes payments from employers or employer plans to reimburse expenses for "medical care"⁸² of the employee, spouse, and dependents.⁸³

In the absence of a state common-law marriage statute, domestic partners cannot qualify as spouses under the Code.⁸⁴ Whether the IRS will allow taxpayers to exclude employer-provided health coverage for a domestic partner not qualifying as a taxpayer's spouse, therefore, depends upon whether the domestic partner comes within the definition of "dependent" under Code § 152.⁸⁵ Section 152 defines dependents of a taxpayer as persons

for compensation (through insurance or otherwise) to the employee for personal injuries or sickness incurred by him, his spouse, or his dependents, as defined in section 152.").

81. See Treas. Reg. § 1.105-11(a) (1981) ("Under section 105(a), amounts received by an employee through a self-insured medical reimbursement plan which are attributable to contributions of the employer, or are paid by the employer, are included in the employee's gross income unless such amounts are excludable under section 105(b)."); *id.* § 1.105-11(b)(1)(i) (defining "self-insured medical reimbursement plan" for Code § 105(b) purposes as plan or arrangement under which reimbursement is not "provided under an individual or group policy of accident or health insurance issued by a licensed insurance company or under an arrangement in the nature of a prepaid health care plan that is regulated under federal or state law in a manner similar to the regulation of insurance companies").

82. See I.R.C. § 213(d)(1) (1994) (defining "medical care"). The Code states:

The term "medical care" means amounts paid — (A) for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body, (B) for transportation primarily for and essential to medical care referred to in subparagraph (A), or (C) for insurance (including amounts paid as premiums under part B of title XVIII of the Social Security Act, relating to supplementary medical insurance for the aged) covering medical care referred to in subparagraphs (A) and (B).

Id.; see also Treas. Reg. § 1.105-2 (as amended in 1975) (noting that Code § 105(b) exclusion does not apply to wages received under wage continuation program although taxpayer may have incurred medical expenses during period of absence).

83. See I.R.C. § 105(b) (1994). This section provides:

[G]ross income does not include amounts referred to in subsection (a) if such amounts are paid, directly or indirectly, to the taxpayer to reimburse the taxpayer for expenses incurred by him for the medical care (as defined in section 213(d)) of the taxpayer, his spouse, and his dependents (as defined in section 152).

Id.; see also Treas. Reg. § 1.105-2 (as amended in 1975) ("[P]ayment to or on behalf of the taxpayer's spouse or dependents shall constitute indirect payment to the taxpayer.").

84. See *infra* note 99 and accompanying text (discussing deference to states in determining individual's marital status for purposes of administering federal tax laws); see also *supra* note 27 and accompanying text (noting that same-sex domestic partner can never qualify as employee's spouse due to denial of same-sex marriages by all states).

85. See I.R.C. § 152 (1994) (defining "dependent"); see also Barrios, *supra* note 1, at 848 (discussing federal tax treatment of employer-provided health benefits).

who receive over half of their support for the taxable year from the taxpayer and who come within one of the nine enumerated categories in the Code section.⁸⁶ A domestic partner would appear to fit into the category described in § 152(a)(9): "An individual . . . who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household."⁸⁷ The regulations clarify that the individual must be a member of the taxpayer's household for the entire taxable year.⁸⁸ An individual who qualifies as an employee's domestic partner under most employers' domestic partner provisions and for whom the taxpayer provides the requisite support would appear to qualify as a dependent — at least after the first full taxable year that the couple shares a household. However, Code § 152(b) provides further qualifications to the general definition of dependent.⁸⁹ Specifically, subparagraph (5) excludes an individual from the definition of dependent "if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law."⁹⁰

86. See I.R.C. § 152(a) (1994) (providing general definition of dependent). The Code states:

(a) General definition. — For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer . . . :

- (1) A son or daughter of the taxpayer, or a descendant of either,
- (2) A stepson or stepdaughter of the taxpayer,
- (3) A brother, sister, stepbrother, or stepsister of the taxpayer,
- (4) The father or mother of the taxpayer, or an ancestor of either,
- (5) A stepfather or stepmother of the taxpayer,
- (6) A son or daughter of a brother or sister of the taxpayer,
- (7) A brother or sister of the father or mother of the taxpayer,
- (8) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law of the taxpayer, or
- (9) An individual [other than the taxpayer's spouse] who, for the taxable year of the taxpayer, has as his principal place of abode the home of the taxpayer and is a member of the taxpayer's household.

Id.

87. *Id.* § 152(a)(9).

88. See Treas. Reg. § 1.152-1(b) (as amended in 1971) (clarifying that person, other than spouse of taxpayer, must be member of taxpayer's household for entire taxable year to qualify as dependent under Code § 152(a)(9)).

89. See I.R.C. § 152(b) (1994) (providing special rules relating to definition of "dependent").

90. *Id.* § 152(b)(5).

Health benefits are the only domestic partner benefits on which the Service has expressed an opinion to date. The IRS has addressed tax treatment of domestic partner health benefits on four separate occasions in the form of private letter rulings.⁹¹ Although the IRS asserts that these letter rulings have no precedential value, the rulings provide insight into how the Service is likely to respond to future taxpayer exclusion claims for these benefits.⁹² Three of these rulings responded to city and county officials' requests for the IRS to analyze the tax consequences of extending health benefits to municipal employees' domestic partners.⁹³ The most recent ruling responded to an international law firm's similar request.⁹⁴

The Service first addressed the excludability of health benefits covering domestic partners in Private Letter Ruling 90-34-048.⁹⁵ This ruling responded to the city of Seattle's request for an analysis of the excludability of city-provided health care benefits to employees and their domestic partners under Code §§ 105 and 106.⁹⁶ The Service began with the observation that such benefits provided to persons other than the employee, or the employee's spouse or dependents, would not qualify for exclusion from the employee's

91. See generally Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996) (discussing tax treatment of employer-provided domestic partner health benefits); Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (same); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (same); Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (same).

92. See I.R.C. § 6110(j)(3) (1994) (providing that written determinations have no precedential value unless otherwise established by regulations); Barrios, *supra* note 1, at 851 (noting that Service is likely to follow analysis from private letter rulings in deciding future cases). But see *Rowan Cos. v. United States*, 452 U.S. 247, 261 n.17 (1981) (citing private letter rulings as evidence of Service's inconsistent analysis); *Hanover Bank v. Commissioner*, 369 U.S. 672, 686-87 (1962) (noting that private letter rulings reveal Service's interpretation of Code and serve as evidence that particular interpretation is allowable under Code).

93. See Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (concerning extension of city's health fund to domestic partners of city employees whereby established trust reimbursed mandatory payroll deductions for employee contributions to health fund); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (concerning county's self-insured medical reimbursement plan funded through employer and employee contributions that allowed election by eligible employees to cover domestic partners); Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (responding to request concerning application of certain Code sections, including §§ 105 and 106, to city's extension of health care benefits to domestic partners).

94. See Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996) (concerning international law firm's amendment to its health care plan funded with after-tax employee and firm contributions that would allow qualified employees to elect to cover domestic partners).

95. Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990).

96. See Barrios, *supra* note 1, at 851 n.41 (noting general public's awareness that Private Letter Ruling responded to request from Seattle, although released version of ruling did not refer to taxpayer involved by name).

gross income.⁹⁷ The ruling further stated that a domestic partner covered by the city's health plan could not qualify as an employee's spouse because the state in question did not recognize common-law marriages,⁹⁸ noting that an individual's marital status as determined under state law governs an individual's marital status for purposes of administering the federal tax laws.⁹⁹

The ruling also discussed the requirements for qualifying as an employee's dependent for purposes of Code §§ 105 and 106. According to the ruling, the Service would consider the totality of the facts and circumstances of each individual case in determining whether an employee's domestic partner qualifies as a dependent under Code § 152(a)(9).¹⁰⁰ The domestic partner must meet the support requirement and qualify as a member of the taxpayer's household under Code § 152(a)(9), taking into account the requirement of Code § 152(b)(5) that the domestic partner's relationship with the taxpayer at no time during the taxable year violate local law.¹⁰¹ Although the letter ruling did not provide examples of local laws that may disqualify a person for dependent status, the IRS did indicate that the local law exception refers to "laws of the state of residence governing the legality of interpersonal relationships."¹⁰²

For those domestic partners who could not qualify as either a common-law spouse or a dependent of the taxpayer, the Service proceeded to analyze the specific tax consequences to the employee taxpayer.¹⁰³ A taxpayer who received employer-provided health coverage for a domestic partner would have to include in gross income, as compensation for services, the

97. See Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (concluding that health benefits provided to persons other than employee or employee's spouse or dependents are not excludable under Code §§ 105(b) or 106).

98. See *id.* (concluding that heterosexual domestic partner cannot qualify as employee's spouse in absence of state common-law marriage statute).

99. See *Von Tersch v. Commissioner*, 47 T.C. 415, 419 (1967) (establishing that state law governs marital status for federal tax purposes); Rev. Rul. 58-66, 1958-1 C.B. 60 (same).

100. See Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (announcing totality-of-facts-and-circumstances test for determining whether domestic partner qualifies as employee's dependent).

101. See *id.* (explaining that totality-of-facts-and-circumstances test for dependency requires that individual meet support requirement and member-of-household requirement under Code § 152(a)(9), as well as local law requirement under Code § 152(b)(5)).

102. *Id.*

103. See *id.* (discussing tax consequences to employee taxpayer for employer health coverage of domestic partner who does not qualify as either common-law spouse or dependent of taxpayer).

fair market value of such coverage, determined by the amount that the covered individual would have to pay for such coverage at individual policy rates in an arms-length transaction.¹⁰⁴ The Service further explained that to the extent that the taxpayer included domestic partner coverage in gross income, the taxpayer need not include amounts reimbursed through such coverage for personal injury or illness.¹⁰⁵ Finally, the ruling indicated that the amount of such coverage included in an employee's gross income also constitutes "wages" for purposes of employment taxes, which the employer must report in the same manner that it reports other wages that it pays to the employee.¹⁰⁶

The Service provided a similar analysis and reached the same conclusions, except as to valuation, in the next two private letter rulings concerning the extension of employer-provided health care benefits to domestic partners.¹⁰⁷ In Private Letter Ruling 91-09-060,¹⁰⁸ the Service revised its position by allowing an employee whose domestic partner receives health coverage under group medical coverage to include in gross income the fair market value of the group medical coverage, notwithstanding the possibility that the value may be less than the amount that the domestic partner would pay for individual coverage in an arms-length transaction.¹⁰⁹ Private Letter

104. *See id.* (concluding that employees must include in gross income fair market value, determined by amount domestic partner would pay at individual policy rates in market, of employer-provided health coverage provided to domestic partner).

105. *See id.* (citing Code § 104(a)(3) for proposition that employee may exclude from gross income payments received through insurance treated as purchased by employee, with value thereof includible in gross income); *see also* I.R.C. § 104(a)(3) (1994) (excluding insurance payments for personal injuries or sickness). Code § 104(a)(3) states:

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include . . . amounts received through accident or health insurance for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee, or (B) are paid by the employer).

Id.

106. *See* Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (noting that amounts includible in employee's gross income constitute "wages" for employment tax purposes).

107. *See generally* Priv. Ltr. Rul. 92-31-026 (July 31, 1992) (concluding that employer-provided domestic partner health benefits are includible in employee's gross income absent domestic partner's qualification as employee's dependent); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (same).

108. Priv. Ltr. Rul. 91-09-060 (Mar. 11, 1991).

109. *Compare id.* (allowing employee to include in income fair market value of group

Ruling 91-09-060 also provided a more thorough description of income and employment tax consequences of domestic partner coverage. Specifically, the ruling explained that employers must withhold a percentage of wages, including wages received on account of domestic partner coverage, for income taxation and for Federal Insurance Contributions Act (FICA) taxation.¹¹⁰ However, the ruling explains that a municipal employer need not pay federal unemployment tax on account of the amounts paid to cover domestic partners.¹¹¹

In Private Letter Ruling 92-31-062¹¹² and Private Letter Ruling 96-03-011,¹¹³ the Service's most recent responses to the domestic partner health coverage issue, the Service reached the same conclusions as to includibility and value as it did in Private Letter Ruling 91-09-060.¹¹⁴ Additionally, in Private Letter Ruling 92-31-062, the Service suggested that the case-by-case analysis by which one determines whether a domestic partner qualifies as a dependent under Code § 152 should take account of "local law[s] that affirmatively recognize[] unmarried cohabitation."¹¹⁵ This language appears to account for domestic partner legislation of the type already in place in several municipalities and in Vermont.¹¹⁶ However, the language of the ruling does not clarify whether the IRS must look solely to states for such legislation or whether affirmative recognition of unmarried cohabitation on

medical coverage provided to domestic partner) *with* Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (providing that employee must include in gross income fair market value of domestic partner coverage, determined according to how much covered domestic partner would have to pay at individual policy rates, regardless of cost to employer).

110. See Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (concluding that amounts includible in employee's gross income for domestic partner coverage constitute "wages" under Code § 3401(a) and, therefore, constitute "wages" for withholding purposes under Code § 3402 and FICA taxation under Code § 3121(a)).

111. See *id.* (noting that amounts included in employees' incomes on account of domestic partner coverage are not subject to FUTA taxes under Code § 3306(c)(7)); Barrios, *supra* note 1, at 853 (explaining that FUTA imposes excise tax on all employers based on total wages but that tax is not applicable to employees of states or their political subdivisions). Therefore, state and municipal employers need not withhold additional amounts under this tax provision on account of employer-provided domestic partner coverage. *Id.*

112. Priv. Ltr. Rul. 92-31-062 (July 31, 1992).

113. Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996).

114. See *id.* (determining that fair market value of group medical coverage extended to domestic partner is includible in employee's gross income if domestic partner does not qualify as employee's spouse or dependent); Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (same).

115. Priv. Ltr. Rul. 92-31-062 (July 31, 1992).

116. See *supra* notes 32-33, 35 and accompanying text (listing jurisdictions that have domestic partner provisions in place).

the municipal level may satisfy the local law requirement as well. Further, the Service did not explain how the local law determination would be made in jurisdictions in which local domestic partnership laws appear to conflict with state sodomy or lewd and lascivious cohabitation laws. One implication is that the Service does not regard such state laws as conflicting with municipal domestic partnership legislation for purposes of defining "relationships" in violation of local law.

Determinations of dependent status based on state law result in inequality in the manner in which federal tax law treats employees in committed relationships.¹¹⁷ First, insofar as same-sex partners may qualify for favorable tax treatment of health benefits only as dependents,¹¹⁸ gay and lesbian employees may not exclude coverage provided to domestic partners if those partners receive less than half of their support from the taxpayer.¹¹⁹ Similarly, in the absence of a common-law marriage statute, an unmarried heterosexual employee's domestic partner may not qualify for favorable tax treatment unless the partner receives the requisite amount of support from the employee.¹²⁰ An employee's spouse, by contrast, need not receive any

117. See James K. Glassman, *IRS Ruling a Mixed Bag on Same-Sex Benefits*, WASH. POST, Feb. 4, 1996, at H1 (noting unfairness that results from unequal tax treatment of domestic partners and married couples). Glassman quotes an attorney for a gay rights group, who opines:

It's inherently unequal and unfair for unmarried employees who receive family health insurance to face a greater tax burden than their married colleagues In essence, this is an issue of equal pay for equal work. Even if employers provide equal benefits, those [unmarried] employees still ultimately receive less compensation because they face a greater tax burden.

Id. (quoting Suzanne D. Goldberg, attorney with Lambda Legal Defense & Education Fund Inc.).

118. See *supra* note 27 and accompanying text (discussing inability of same-sex couples to marry); see also Barrios, *supra* note 1, at 855 (noting that common-law marriage method of qualifying for health benefits exclusions for domestic partners is categorically unavailable to gay and lesbian couples).

119. See *supra* notes 86-87 and accompanying text (discussing I.R.C. § 152(a)(9) (1994)).

120. As a practical matter, however, where an opposite-sex domestic partner does not meet the support test of Code § 152(a)(9), relief from the "marriage penalty" offsets the inequity created by disallowing a dependency exclusion for employer-provided domestic partner health benefits. See WILLIAM A. KLEIN & JOSEPH BANKMAN, *FEDERAL INCOME TAXATION* 38-41 (10th ed. 1994) (describing marriage penalty and noting that it results from single start at bottom of more favorable rate schedule for married couple filing jointly, rather than two separate starts at bottom of less favorable rate schedule if two had remained single); Frederick R. Schneider, *Which Tax Unit for the Federal Income Tax?*, 20 U. DAYTON L. REV. 93, 99 (1994) (noting that combined tax liability of two single income earners increases

specific level of support from the employee taxpayer in order for the taxpayer to exclude coverage provided to such spouse. Second, even if a domestic partner receives the requisite financial support to qualify as a dependent, the domestic partner may not qualify for the exclusion due to local laws that place the relationship between the taxpayer and the domestic partner "in violation of local law."¹²¹

Although, under Code § 152(b)(5), a relationship in violation of local law precludes a person from qualifying as a taxpayer's dependent, the Service has offered only limited guidance as to the meaning of the local law provision. Treasury Regulation § 1.152-1(b) merely restates the language of Code § 152(b)(5).¹²² Courts and the IRS have construed local law to refer to state law, municipal law, or both,¹²³ but have not addressed the question of which jurisdiction to look to if the laws conflict. Moreover, cases and rulings leave certain questions unanswered — which categories of laws apply in determining whether a "relationship" violates local law and, more specifically, whether criminal laws prohibiting *specific acts* cause a domestic *relationship* to fall within Code § 152(b)(5).

when they marry and file joint returns). The "marriage penalty" results when a married couple filing jointly consists of two wage earners who earn roughly equivalent amounts. See William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1502 & n.27 (1994) (explaining marriage penalty and noting its source). Compare I.R.C. § 1(a), (d) (1994) (setting income tax rates for married persons filing jointly and for married persons filing separately) with *id.* § 1(c) (setting income tax rates for unmarried individuals). Where the disparity in incomes between the employee and the domestic partner is sufficient to meet the support requirements of Code § 152(a)(9), the domestic partner is truly economically dependent on the employee, and the marriage penalty would not apply if the couple married.

121. See *supra* notes 89-90 and accompanying text (describing local law exception to definition of "dependent").

122. See Treas. Reg. § 1.152-1(b) (as amended in 1971) (developing meaning of language in I.R.C. § 152 (1994)).

123. See Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996) (citing *Ensminger v. Commissioner*, 610 F.2d 189, 191 (4th Cir. 1979) as authority for deferring to state laws governing interpersonal relationships); Priv. Ltr. Rul. 92-31-062 (Jul. 31, 1992) (citing *Ensminger* as authority for deferring to state laws governing interpersonal relationships and noting that local laws recognizing unmarried cohabitation should inform local law analysis); Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (citing *Ensminger* as authority for deferring to state laws governing interpersonal relationships); Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (same); see also *supra* notes 115-16 and accompanying text (explaining that Service's acknowledgement that local law analysis should include laws recognizing unmarried cohabitation appears to account for municipal domestic partner legislation already in place in several jurisdictions).

IV. Application of the Local Law Requirement to Heterosexual Relationships

In 1957, prior to the enactment of Code § 152(b)(5), the United States Tax Court (Tax Court) ruled that courts should not interpret Code § 152(a)(9) to allow a dependency exemption for an individual who lives with and receives support from a taxpayer if the relationship represents a conscious attempt by the taxpayer to violate criminal laws in the taxpayer's jurisdiction of residence.¹²⁴ In *Turnipseed v. Commissioner*,¹²⁵ the petitioner claimed for a dependency exemption a married woman living with the taxpayer.¹²⁶ The woman was separated, but not legally divorced, from her husband, and she and the taxpayer lived together openly as man and wife for the entire taxable year in question in violation of Alabama's criminal law against adulterous cohabitation.¹²⁷ The woman also received full financial support from the taxpayer throughout the taxable year, as required by Code § 152(a)(9).¹²⁸

Turnipseed represented a case of first impression for the Tax Court.¹²⁹ In denying the taxpayer's dependency exemption claim, the court reasoned

124. See *Turnipseed v. Commissioner*, 27 T.C. 758, 760-61 (1957) (denying dependency exemption for individual meeting requirements of Code § 152(a)(9) because relationship with taxpayer violated state law prohibiting adulterous cohabitation).

125. 27 T.C. 758 (1957).

126. *Turnipseed v. Commissioner*, 27 T.C. 758, 759 (1957).

127. *Id.*; see also ALA. CODE tit. 14, § 16 (1940) (prohibiting heterosexual couples from "living in adultery or fornication"). The Alabama statute stated:

If any man and woman live together in adultery or fornication, each of them shall, on the first conviction of the offense, be fined not less than one hundred dollars, and may also be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than six months; on the second conviction for the offense, with the same person, the offender shall be fined not less than three hundred dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months; and, on a third, or any subsequent conviction, with the same person, shall be imprisoned in the penitentiary for two years.

Id. The state courts have interpreted the statute not to prohibit single or occasional acts of criminal intimacy. See *Wilson v. State*, 39 So. 2d 250, 253 (Ala. Ct. App. 1948). Rather, the parties must continue, or agree to continue, to engage in such acts before courts will deem the relationship criminal. *Id.*

128. *Turnipseed*, 27 T.C. at 759.

129. See *id.* at 760 (noting that case presented new question of whether Code § 152(a)(9) should receive literal interpretation to include as dependent an individual living in illicit relationship with taxpayer).

that although Code § 152(a)(9) extended the definition of dependent to include certain persons who do not have either a blood or marriage relation to the taxpayer, Congress never intended the provision to countenance or encourage relationships maintained in deliberate violation of the laws of the taxpayer's state of residence.¹³⁰ The court applied the general rule that courts should interpret statutes sensibly in order to effectuate legislative intent and to avoid absurd results.¹³¹

Congress adopted Code § 152(b)(5) to become effective in taxable years beginning after December 31, 1957.¹³² Congress, however, provided little guidance as to what laws the courts and the Service should examine in determining whether relationships, as opposed to individuals, violate criminal laws.¹³³ The language of Code § 152(b)(5), on its face, limits the local law analysis to "the *relationship* between such individual and the taxpayer. . . ." ¹³⁴ Several interpretations of this language seem possible. The possibilities include that a relationship violates local law when (1) two or more persons engage in a prohibited activity together, (2) two or more persons engage in a prohibited activity repeatedly or continuously, (3) two or more persons engage in various prohibited activities together, or (4) persons engage in activities that adversely affect legally protected relationships, such as the marital relationship. Congress, offering only a modicum of guidance as to what constitutes a relationship in violation of local law, left this determination to the Service and to the courts.¹³⁵ If a

130. *See id.* (concluding that Congress did not intend for Code § 152(a)(9) to reward taxpayers maintaining illicit relationships that violate criminal laws in taxpayer's jurisdiction of residence). The *Turnipseed* court noted that by adding Code § 152(a)(9), Congress intended to broaden dependency status to include certain relationships not based upon blood or marriage. *See id.* (noting that legislative history provides minimal guidance as to which individuals Congress intended to confer dependency status). For example, Congress clearly intended to bring foster children who live with the taxpayer, but whom the taxpayer has not yet adopted, within the definition of dependent. *See id.* (citing S. REP. NO. 1622, 83d Cong., 2d Sess. 194 (1954)). However, the court explained that by denying the dependency deduction in the present case, it did not intend to imply that the foster child example in the legislative history exhausted the reach of § 152(a)(9). *Id.* at 761.

131. *Id.* at 761.

132. *See* S. REP. NO. 1983, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4791, 4913 [hereinafter SENATE REPORT] (noting effective date of Code § 152(b)(5)).

133. *See infra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)).

134. I.R.C. § 152(b)(5) (1994) (emphasis added).

135. *See infra* note 180 and accompanying text (discussing local law exception and

relationship violating local law referred to either of the first three possibilities above, the § 152(b)(5) exception would deny dependency status to many individuals regularly counted as dependents because of the great breadth of activities prohibited by state criminal laws. However, such broad application of Code § 152(b)(5) does not appear to have been within Congress's intent in enacting this Code section.

Since the adoption of this Code section, courts have had several opportunities to apply the section to heterosexual relationships. The first case considering the local law issue after codification of the local law exception was *Estate of Buckley v. Commissioner*.¹³⁶ In *Buckley*, the Tax Court considered whether a married male taxpayer could claim a dependency exemption for a woman, not his wife, with whom he lived during the taxable years in question.¹³⁷ The taxpayer, after separating from his wife, obtained a Mexican divorce decree.¹³⁸ Soon after obtaining the divorce decree, the taxpayer purportedly married, in Virginia, a woman for whom he claimed a dependency exemption in the case at issue.¹³⁹ The taxpayer then instituted a suit for divorce from his first wife in the Superior Court of Hartford, Connecticut, but the suit was later discontinued by stipulation.¹⁴⁰ The taxpayer's first wife later brought an action for declaratory judgment in the Supreme Court of New York County to establish her marital status for income tax purposes.¹⁴¹ Because the taxpayer's first wife had not received notice of the Mexican divorce proceeding, the Supreme Court of New York County set aside the resulting divorce decree as having been obtained fraudulently.¹⁴² The first wife then brought an action in the Mexican court to have the divorce decree declared null and void.¹⁴³ Because the taxpayer failed to file an answer, the Mexican court declared the original divorce suit brought by the taxpayer to be null and void *ab initio*.¹⁴⁴ Under the laws of the taxpayer's state of residence — New York — his

providing example of common-law spouse in state not recognizing common-law marriage as violation of local law within meaning of Code § 152(b)(5)).

136. 37 T.C. 664 (1962).

137. *Estate of Buckley*, 37 T.C. 664, 673 (1962).

138. *Id.* at 665-66.

139. *Id.* at 668.

140. *Id.* at 666.

141. *Id.* at 668.

142. *Id.*

143. *Id.*

144. *Id.*

Virginia marriage to the woman for whom he claimed a dependency exemption was null and void.¹⁴⁵ The taxpayer cohabited with and supported this woman during the entirety of the taxable years in which the taxpayer claimed a dependency exemption for the woman.¹⁴⁶ In denying the dependency exemption, the Tax Court cited both *Turnipseed* and Code § 152(b)(5) as authorities for the proposition that Congress did not intend to permit exemptions for individuals with whom a taxpayer maintains an illicit — in this case, adulterous — relationship.¹⁴⁷

The Tax Court again addressed the local law issue in *Untermann v. Commissioner*.¹⁴⁸ The facts in *Untermann* were similar to those in *Buckley*. The taxpayer married a woman in Nevada after she obtained a Nevada decree of divorce from her previous husband.¹⁴⁹ The couple took up residence in New Jersey.¹⁵⁰ Several years later, the taxpayer and the woman separated, and the taxpayer obtained a Mexican decree of divorce.¹⁵¹ Shortly thereafter, the taxpayer married another woman, and the new couple took up residence in New Jersey.¹⁵² The taxpayer's first wife then filed an action in New Jersey seeking a declaratory judgment that the Mexican divorce was invalid and seeking to establish her legal status as the taxpayer's wife.¹⁵³ Although the New Jersey Supreme Court dismissed the woman's complaint due to her fraudulent conduct in obtaining the Nevada decree of divorce from her previous husband, the court also declared invalid the taxpayer's Mexican decree of divorce from his first wife.¹⁵⁴ The Tax Court considered whether the taxpayer could claim a dependency exemption for the taxpayer's second wife for the taxable years at issue.¹⁵⁵ In denying the dependency exemption, the Tax Court noted that under the law of the taxpayer's state of residence — New Jersey — his first marriage

145. *See id.* at 672 (declaring taxpayer's second marriage null and void under New York domestic relations law); *see also* N.Y. DOM. REL. LAW § 6 (McKinney 1988) (declaring void any marriage of person previously married, unless other party to prior marriage died or court of competent jurisdiction annulled or dissolved prior marriage).

146. *Buckley*, 37 T.C. at 673.

147. *Id.*

148. 38 T.C. 93 (1962).

149. *Untermann v. Commissioner*, 38 T.C. 93, 94 (1962).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 96-97.

was still in effect.¹⁵⁶ Therefore, the court concluded that the taxpayer was not legally married to the woman for whom he claimed the dependency exemption and that the couple's adulterous cohabitation during the taxable years violated local law.¹⁵⁷

Two 1964 Tax Court memorandum decisions also denied dependency exemptions for women with whom the taxpayers lived in adulterous relationships.¹⁵⁸ In *Davis v. Commissioner*,¹⁵⁹ the Tax Court denied a dependency exemption for a woman with whom a male taxpayer cohabited as husband and wife and who, during the taxable years at issue, was in the process of obtaining a divorce from her previous husband.¹⁶⁰ In *Wondsel v. Commissioner*,¹⁶¹ the Tax Court denied a dependency exemption for a woman with whom the taxpayer cohabited as husband and wife because the Supreme Court of the State of New York — a court in the taxpayer's state of residence — previously had declared null and void the taxpayer's decree of divorce from his prior wife.¹⁶²

156. *Id.* at 96.

157. *See id.* at 97 (denying dependency exemption for woman who cohabited with married taxpayer in adulterous relationship).

158. *See generally* *Wondsel v. Commissioner*, 23 Tax Ct. Mem. Dec. (CCH) 1278 (1964) (denying dependency exemption for woman with whom taxpayer lived in adulterous relationship); *Davis v. Commissioner*, 23 Tax Ct. Mem. Dec. (CCH) 1099 (1964) (same). For further information regarding the *Wondsel* and *Davis* cases, see *infra* notes 159-62 and accompanying text.

Tax Court memorandum decisions differ from regular Tax Court decisions in that memorandum decisions "involv[e] well-established legal issues," whereas regular decisions present important legal issues that the court has not settled. *See* GAIL L. RICHMOND, *FEDERAL TAX RESEARCH: GUIDE TO MATERIALS AND TECHNIQUES* 77 (4th ed. 1990). No official reporters publish memorandum decisions, but several private publishers print them. *Id.*

159. 23 Tax Ct. Mem. Dec. (CCH) 1099 (1964).

160. *See* *Davis v. Commissioner*, 23 Tax Ct. Mem. Dec. (CCH) 1099, 1100 (1964) (denying dependency exemption for woman who lived with taxpayer, but maintained marriage with another man). In *Davis*, the Tax Court considered whether the taxpayer could claim a dependency exemption for a married woman who lived with an unmarried taxpayer. *Id.* During the taxable years in issue, the taxpayer and the woman lived together as husband and wife, but the taxpayer did not marry the woman until a later date. *Id.* In denying the dependency deduction, the Tax Court relied on *Turnipseed* and Code § 152(b)(5) and noted that the woman was in the process of obtaining a divorce from another man during the taxable years involved. *Id.*

161. 23 Tax Ct. Mem. Dec. (CCH) 1278 (1964).

162. *See* *Wondsel v. Commissioner*, 23 Tax Ct. Mem. Dec. (CCH) 1278, 1284 (1964) (denying dependency exemption for woman with whom married taxpayer lived in adulterous relationship). In *Wondsel*, the Tax Court considered whether a male taxpayer could claim

The *Buckley*, *Untermann*, *Davis*, and *Wondsel* decisions all involved cases in which the taxpayer claimed a dependency exemption for an individual who lived with the taxpayer in an adulterous relationship. In denying dependent status to individuals who maintained such relationships, the Tax Court decided these cases consistent with its analysis in *Turnipseed*. Subsequently, however, the Tax Court began to employ a more expansive interpretation of the § 152(b)(5) local law exception by denying dependency status on the basis of presumptions regarding the sexual nature of couples' relationships and on the basis of state statutes prohibiting specific sex acts.

In *Eichbauer v. Commissioner*,¹⁶³ the Tax Court, in a memorandum decision, invoked a state statute prohibiting lewd cohabitation to deny a dependency deduction for an unmarried woman who cohabited with an unmarried male taxpayer.¹⁶⁴ The couple represented their relationship to the community as a common-law marriage.¹⁶⁵ However, the state in which the couple resided did not recognize common-law marriages, and the

a dependency exemption for a woman with whom he cohabited during the taxable years in issue. *Id.* The taxpayer had married his first wife in 1927. *Id.* at 1278. In 1936, the taxpayer entered into a written separation agreement with his first wife, and in 1937, the taxpayer obtained a final decree of divorce from his first wife in the Circuit Court for the Eleventh Judicial Circuit of Florida. *Id.* at 1279. In 1939, the taxpayer married his second wife in Connecticut. *Id.* Two years later, the taxpayer's first wife obtained an order from the Supreme Court of the State of New York that proclaimed the taxpayer's Florida divorce decree void and the taxpayer's subsequent marriage void and declared the first wife to be the taxpayer's lawful wife. *Id.* at 1279-80. In 1946, the taxpayer entered a written separation agreement with his second wife and, soon thereafter, obtained from the Circuit Court of the Eleventh Judicial Circuit of Florida a final decree of divorce from his second wife. *Id.* at 1280-81. Later that same year, the taxpayer married his third wife in New Jersey. *Id.* at 1281. In an action initiated by the taxpayer's third wife, the Supreme Court of Westchester County, New York, ordered the third marriage annulled in 1961 on the ground that the taxpayer still maintained a marriage to his first wife. *Id.* The court considered whether the taxpayer could claim a dependency exemption for his third wife for the taxable years in issue. *Id.* at 1284. In denying the dependency exemption, the Tax Court held that the first Florida divorce decree did not create the status of divorce between the taxpayer and his first wife because the taxpayer, his first wife, and his second wife were all residents of the State of New York when the Supreme Court of the State of New York ordered the Florida divorce decree void. *Id.* at 1282-83. Because the taxpayer's marriage to his first wife never terminated, the taxpayer's marriages to his second and third wives were invalid. *Id.* Citing *Turnipseed*, *Untermann*, and Code § 152(b)(5), the Tax Court determined that the commissioner had properly denied the taxpayer's dependency exemption for his third wife. *Id.* at 1284.

163. 30 Tax Ct. Mem. Dec. (CCH) 581 (1971).

164. *Eichbauer v. Commissioner*, 30 Tax Ct. Mem. Dec. (CCH) 581, 583 (1971).

165. *Id.* at 582.

couple had not legally contracted a marriage in any other state.¹⁶⁶ Therefore, the taxpayer could not claim a spousal deduction for the woman. The court further noted that Congress had addressed the couple's particular situation — a common-law marriage in a state that does not recognize such marriages — in its legislative deliberations and that Congress concluded that neither partner in such a relationship would qualify as a dependent of the other.¹⁶⁷ Therefore, the taxpayer could not claim a dependency deduction for the woman either.

The *Eichbauer* court, however, did not end its analysis with this conclusion. It reinforced its conclusion denying a dependency deduction by referring to Washington's lewd cohabitation statute.¹⁶⁸ The court explained that two persons violate the statute prohibiting lewd and lascivious cohabitation when they live together and commit adultery or fornication or when two unmarried persons live together as husband and wife.¹⁶⁹ The court declared that the relationship between the woman and the taxpayer, because it *may have* violated the lewd cohabitation statute, violated local law so as to preclude the woman's dependency status.¹⁷⁰ The court's presumption, in the absence of any evidence, that the relationship between the woman and the taxpayer involved a sexual element so as to violate the lewd cohabitation statute started courts' slide down the slippery slope of denying dependency status based on the local law exception. *Eichbauer* further explained that the court must deny the dependency deduction despite the failure of the taxpayer's state of residence to prosecute the couple under

166. *Id.*

167. *Id.*; see also *infra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)).

168. *Eichbauer*, 30 Tax Ct. Mem. Dec. (CCH) at 583 (citing WASH. REV. CODE § 9.79.120 (1950), which prohibits lewd cohabitation with someone other than spouse). The statute read: "Every person who shall lewdly and viciously cohabit with another not the husband or wife of such person . . . shall be guilty of a gross misdemeanor." WASH. REV. CODE § 9.79.120 (1950). The crime of lewd and lascivious cohabitation generally entails "[l]iving together in adultery or fornication" or "cohabiting together as husband and wife without being married." 53 C.J.S. *Lewdness* § 5 (1987) (citations omitted); see also 25 WORDS AND PHRASES *Lewd and Lascivious Cohabitation* 36 (1961). The purpose of a lewd and lascivious cohabitation statute is "to prohibit the public scandal and disgrace of the living together of persons of opposite sexes, not married to each other, in such illicit intimacy as to outrage public decency and to have a demoralizing and debasing influence on society." 53 C.J.S. *Lewdness* § 5 (1987).

169. *Eichbauer*, 30 Tax Ct. Mem. Dec. (CCH) at 583; see also *supra* note 168 (discussing crime of lewd and lascivious cohabitation).

170. *Eichbauer*, 30 Tax Ct. Mem. Dec. (CCH) at 583.

the lewd cohabitation statute and despite the acceptance of the couple's relationship by the couple's community of residence.¹⁷¹ Thus, by relying on the statute to deny a dependency deduction, the court directly involved the federal government in the enforcement of the state's lewd cohabitation statute by means of a federal tax penalty.

Another Tax Court memorandum opinion addressed the local law issue in *Martin v. Commissioner*.¹⁷² In *Martin*, the court denied an unmarried male taxpayer a dependency exemption for an unmarried woman with whom the taxpayer lived and whom he supported for just over a single year, after which the taxpayer made the woman leave the residence.¹⁷³ The taxpayer did not contend that the couple had ever legally married.¹⁷⁴ Nevertheless, the couple made no secret of their cohabitation.¹⁷⁵ On the taxpayer's tax return for the year in which the woman lived with him, the taxpayer, although listing his status as single, attempted to claim a spousal exemption for the woman.¹⁷⁶ Because the woman obviously did not qualify as the taxpayer's spouse, the court denied the exemption.¹⁷⁷

The court then analyzed whether the taxpayer could claim a dependency exemption for the woman.¹⁷⁸ In denying the dependency exemption, the court explained that the Report of the House Ways and Means Committee that addressed Code § 152(b)(5) clearly explained that Congress intended to deny dependency exemptions to those persons unrelated to the taxpayer by blood or marriage, but living with the taxpayer, when the couple is not married.¹⁷⁹ However, the court's reading of the House report seems to be an unwarranted interpretation of the actual language in the report, which declared that "a 'common-law wife' where the applicable State law does not recognize common-law marriages would not qualify as a dependent of the taxpayer."¹⁸⁰ The Tax Court reasoned that allowing the taxpayer an exemp-

171. *Id.*

172. 32 Tax Ct. Mem. Dec. (CCH) 656 (1973).

173. *Martin v. Commissioner*, 32 Tax Ct. Mem. Dec. (CCH) 656, 658 (1973).

174. *Id.* at 657.

175. *Id.*

176. *Id.*

177. *Id.* at 658.

178. *Id.* at 657-58.

179. *Id.* at 657 (citing H. REP. NO. 775, 85th Cong., 1st Sess. 8 (1957), reprinted in 1958-3 C.B. 811, 818 [hereinafter HOUSE REPORT], which mirrors language of SENATE REPORT, *supra* note 132).

180. HOUSE REPORT, *supra* note 179, at 7-8, reprinted in 1958-3 C.B. 811, 817-18. The House report states:

tion in this situation would result in allowing the taxpayer two attempts to claim an exemption — the dependency exemption being a fallback position if the relationship between the taxpayer and the person living with the taxpayer did not rise to the level of a common-law marriage.¹⁸¹ According to the court, the legislative history of the Code provision negated such an intent by Congress.¹⁸² The court further supported its conclusion by reference to certain criminal laws of each of the three states in which the couple had lived during the taxable year that rendered *what the court assumed to have been the couple's relationship* violative of local law.¹⁸³ The court cited statutes prohibiting adultery, fornication, and lewd and lascivious cohabitation.¹⁸⁴ Because the taxpayer's relationship with the woman may have violated these criminal statutes, the Tax Court, following *Eichbauer's* lead, concluded that the taxpayer could not claim a dependency exemption for the woman.¹⁸⁵

[A] person who is not a close relative but is living with the taxpayer may not be claimed as a dependent if the *relationship* between the taxpayer and the individual is an illegal one under the applicable local law. For example, this would make it clear that an individual who is a "common-law wife" where the applicable State law does not recognize common-law marriages would not qualify as a dependent of the taxpayer.

Id. (emphasis added). In order to qualify as a common-law spouse in states that recognize common-law marriage, a couple must meet certain statutorily defined requirements. See Barrios, *supra* note 1, at 854 n.59 (noting that states recognizing common-law marriages differ in how they define such unions). Generally, common-law marriage statutes require that the couple agree to be husband and wife, live together, and hold themselves out to the public as husband and wife. See *id.* (citing 1 LYNN D. WARDLE ET AL., CONTEMPORARY FAMILY LAW § 3, at 18 (1988)). Therefore, it seems that Congress's example in the Senate report referred to relationships in which the members, in addition to living together, also make the required agreement between themselves and the required representations to the public.

181. See *Martin*, 32 Tax Ct. Mem. Dec. (CCH) at 657 (explaining that Congress did not intend to allow "two bites at the exemption apple" when relationship does not rise to level of marriage or common-law marriage).

182. *Id.*

183. *Id.* at 657-58.

184. See *id.* (citing ALA. CODE § 14-16 (1959) (prohibiting cohabiting in adultery or fornication); FLA. STAT. ANN. §§ 798.01, .02, .03 (West 1965) (criminalizing adultery, lewd and lascivious cohabitation, and fornication, respectively); ILL. ANN. STAT. ch. 38, paras. 11.7, .8 (Smith-Hurd 1964) (prohibiting adultery and fornication, respectively)). "Fornication" generally refers to voluntary or illicit sexual intercourse between a man and a woman, whether between married or unmarried persons. See 37 C.J.S. *Fornication* § 1 (1943 & Supp. 1995); 17 WORDS AND PHRASES *Fornication* 578 (1958). Generally, a single act of illicit sexual intercourse suffices to constitute the criminal offense of fornication, whereas lewd and lascivious cohabitation generally entails habitual acts of illicit intercourse. 37 C.J.S. *Fornication* § 1 (1943 & Supp. 1995).

185. *Martin*, 32 Tax Ct. Mem. Dec. (CCH) at 657-58.

The Tax Court again addressed the local law exception in *Peacock v. Commissioner*,¹⁸⁶ another memorandum decision. In *Peacock*, an unmarried male taxpayer attempted to claim a spousal exemption for an unmarried woman with whom the taxpayer cohabited.¹⁸⁷ The taxpayer admitted that the relationship between the couple constituted neither a legal nor a common-law marriage.¹⁸⁸ Furthermore, neither of the two states in which the couple had lived during the taxable year recognized common-law marriage.¹⁸⁹ Nonetheless, the taxpayer argued that the woman was his "spouse" within the meaning of the dictionary definition of the term because the couple contracted to raise jointly any children that they might have together.¹⁹⁰ The Tax Court, rejecting this argument, noted that the word "spouse," as used in the Code, refers to a husband or wife legally married to the taxpayer.¹⁹¹

The taxpayer in *Peacock* also argued, in the alternative, that he could claim a dependency exemption for the woman under Code § 152(a)(9).¹⁹² The court denied the dependency exemption on the ground that the relationship between the couple violated an Arizona statute criminalizing open and notorious cohabitation.¹⁹³ Explaining its decision, the court noted that the open and notorious cohabitation offense punishes "open and notorious conduct which offends the moral sense of the public" and that it operates independently of any harm that might result to an injured spouse.¹⁹⁴ Therefore, in order to have violated the statute, the couple must have lived together both openly and continuously.¹⁹⁵ Because the couple had three children born to them while they lived together, the court concluded that the relationship violated the criminal statute and, thus, violated local law within the meaning of Code § 152(b)(5).¹⁹⁶

186. 37 Tax Ct. Mem. Dec. (CCH) 177, 180-83 (1978).

187. *Peacock v. Commissioner*, 37 Tax Ct. Mem. Dec. (CCH) 177, 181 (1978).

188. *Id.* at 179.

189. *Id.* at 181-82.

190. *Id.* at 180-81.

191. *Id.* at 181.

192. *Id.*

193. *See id.* at 182-83 (citing ARIZ. REV. STAT. ANN. § 13-222 (1956) (prohibiting open and notorious cohabitation or adultery)).

194. *Id.* at 182 (quoting *State v. Griffin*, 118 P.2d 676, 677 (Ariz. 1941)).

195. *Id.*

196. *See id.* (noting that couple's failure to publicize unmarried status and woman's use of taxpayer's last name constituted insufficient evidence to prove that relationship did not violate statute).

The most recent decision in which the Tax Court addressed the local law exception to Code § 152(b)(5) was the memorandum decision in *Nicholas v. Commissioner*.¹⁹⁷ In *Nicholas*, the Tax Court concluded that a woman who lived with a male taxpayer and who voluntarily engaged in sexual intercourse with the taxpayer did not qualify as a dependent under Code § 152(b)(5) analysis.¹⁹⁸ The state statute that disqualified the woman from dependent status prohibited unmarried persons from voluntarily engaging in sexual intercourse.¹⁹⁹ The court first concluded that the relationship between the woman and the taxpayer clearly did not amount to a common-law marriage under the applicable state common-law marriage statute.²⁰⁰ Prior to the taxable year at issue, the woman had accepted an engagement ring from the taxpayer.²⁰¹ However, she refused to marry the taxpayer immediately because of difficulties that she had experienced in her previous marriage.²⁰² The woman remained engaged to the taxpayer throughout the entire taxable year at issue, and the couple intended to marry in the future.²⁰³

Given these facts, the court concluded that the taxpayer could not claim a spousal exemption for the woman because the relationship did not arise "out of a contract between two consenting parties" as it lacked a vital element required by the state common-law marriage statute — that the couple "mutually assume marital rights, duties, and obligations."²⁰⁴ According to the court, the woman's reluctance to marry the taxpayer until a future date demonstrated that she was unwilling during the taxable year to assume the legal rights, duties, and obligations of marriage.²⁰⁵ Therefore, the relationship did not amount to a common-law marriage under the applicable Utah law. The court further concluded that the taxpayer could not claim a dependency exemption for the woman because the taxpayer admitted that the couple cohabited and engaged in sexual relations during the taxable year in issue in violation of the state law prohibiting fornication.²⁰⁶

197. 62 Tax Ct. Mem. Dec. (CCH) 467 (1991).

198. *Nicholas v. Commissioner*, 62 Tax Ct. Mem. Dec. (CCH) 467, 469 (1991).

199. See UTAH CODE ANN. § 76-7-104 (1990) (criminalizing fornication).

200. *Nicholas*, 62 Tax Ct. Mem. Dec. (CCH) at 469.

201. *Id.* at 468.

202. *Id.*

203. *Id.*

204. *Id.* at 469 (quoting UTAH CODE ANN. § 30-1-4.5 (1989) (determining validity of unsolemnized marriages)).

205. *Id.*

206. *Id.*

By denying a dependency exemption on the basis of a statute prohibiting fornication, the *Nicholas* court further expanded the Tax Court's interpretation of the local law exception to encompass isolated criminal sex acts.²⁰⁷ Previously, the *Martin* court had presented the possibility of denying dependency status based upon fornication statutes, but the *Martin* decision did not depend on the validity of such an approach.²⁰⁸ The *Nicholas* decision failed to explain how the violation of statutes prohibiting isolated criminal sex acts could place a *relationship* in violation of local law.²⁰⁹

Two other courts also have addressed the local law exception of Code § 152(b)(5). In 1979, the United States Court of Appeals for the Fourth Circuit addressed the local law exception in *Ensminger v. Commissioner*.²¹⁰ In *Ensminger*, the Fourth Circuit concluded that habitual sexual relations between an unmarried male taxpayer and an unmarried woman who lived with and received support from the taxpayer violated local law within the meaning of Code § 152(b)(5).²¹¹ The statute in question prohibited a man and a woman, not married to each other, from "lewdly and lasciviously associat[ing], bed[ding] and cohabit[ing] together."²¹² The court reasoned that denying the dependency deduction in this situation was consistent with the deference that Congress normally gives to the states in matters of "marriage, family life and domestic affairs."²¹³ Thus, the Fourth Circuit interpreted the term "local" in the local law exception to refer to laws of the taxpayer's state, or territory, of residence.²¹⁴ Furthermore, *Ensminger*

207. See Barrios, *supra* note 1, at 856 & n.67 (noting that *Martin's* interpretation of "local law" as including statutes prohibiting specific sex acts expands term to include laws that "have nothing to do with the domestic relationship on its face").

208. See *supra* note 184 (listing several statutes that *Martin* court cited as possibilities to render taxpayer's relationship with woman violative of local law).

209. See Barrios, *supra* note 1, at 857 (distinguishing relationship between individuals from specific sexual acts or sexual relations in which individuals might engage).

210. 610 F.2d 189 (4th Cir. 1979).

211. *Ensminger v. Commissioner*, 610 F.2d 189, 190-92 (4th Cir. 1979).

212. N.C. GEN. STAT. § 14-184 (1978).

213. *Ensminger*, 610 F.2d at 191.

214. See *id.* (noting that Congress leaves determination of legality of interpersonal relationships to individual states). "Congress undertook no determination of the legality of any kind of interpersonal relationship. Section 152(b)(5) leaves that determination entirely to the individual states and assures that Congress will not appear to reward behavior which may be in contravention of state law." *Id.* The court recognized that federal deference to state laws in these matters would result in great diversity and inequality in the taxation of individuals but justified such a result by noting the importance of treating taxpayers in their personal relationships in the same manner that their state of residence treats them. *Id.*; see also Barrios, *supra* note 1, at 855 & n.64 (stating that *Ensminger* resolves ambiguity of term

determined that the term "law" refers to laws governing domestic relations.²¹⁵

The *Ensminger* court explained that Congress and the Tax Court believed that they should not grant federal tax advantages to cohabiting couples who are unmarried under the law of their particular state of residence.²¹⁶ In reaching this conclusion, the court interpreted the legislative history underlying Code § 152(b)(5) to mean that Congress intended to deny dependency deductions for taxpayers' partners if the partners lived in a "quasi-marital relationship, which is illicit under the laws of the state in which they reside."²¹⁷ As was the case in *Martin*, however, this interpretation of Congress's intention seems to be an unwarranted expansion of the legislative history's actual language.²¹⁸

The Fourth Circuit cited the Tax Court's decision in *Turnipseed* as additional support for its conclusion in *Ensminger*.²¹⁹ However, *Turnipseed* involved a married woman living with a man who was not her husband.²²⁰ The adulterous relationship in *Turnipseed*, which the Tax Court deemed a violation of local law within the meaning of the Code exception, is distinguishable from the relationship involved in the *Ensminger* case. An adulterous relationship interferes directly with family life and the marital relationship, which Congress specifically left to be governed by the states.²²¹ The relationship in *Ensminger*, by contrast, did not directly interfere with any marital relationship.

In *Shackelford v. United States*,²²² the United States Bankruptcy Court for the Western District of Missouri considered whether an unmarried female taxpayer who, during the entire taxable year in issue, lived with and supported an unmarried man could claim a dependency exemption for the

"local law" in Code § 152(b)(5) context).

215. See Barrios, *supra* note 1, at 856 & n.65 (citing *Ensminger* as leading authority for proposition that local law analysis includes domestic relations law of taxpayer's state of residence).

216. *Ensminger*, 610 F.2d at 191.

217. *Id.*

218. See *supra* note 180 and accompanying text (explaining that legislative history actually only specifies instance of individual who, in addition to living with taxpayer, holds self out as common-law spouse and makes agreement with taxpayer to be husband and wife).

219. *Ensminger*, 610 F.2d at 191.

220. See *supra* notes 125-31 and accompanying text (discussing *Turnipseed*).

221. See *supra* note 214 and accompanying text (discussing federal government's deference to state laws in matters affecting marriage and domestic affairs).

222. 3 B.R. 42 (Bankr. W.D. Mo. 1980).

man.²²³ If the taxpayer could have claimed the dependency deduction, the commissioner's deficiency assessment against the taxpayer would have been dischargeable.²²⁴ The couple in the case had never represented themselves to be husband and wife, and the public had never known the extent of the couple's intimate relationship.²²⁵ The court examined Missouri's gross lewdness statute to determine whether the couple's relationship violated local law within the meaning of Code § 152(b)(5).²²⁶ The IRS argued that Congress did not intend for Code § 152(a)(9) to provide a dependency exemption when an individual lives with a taxpayer in a relationship that is "inferior" to a common-law marriage.²²⁷ In rejecting the Service's argument, the court explained that in the absence of state legislation to the contrary, the federal bankruptcy court should not make moral determinations about whether relationships that do not qualify as common-law marriages are better or worse than relationships that meet such standards.²²⁸ The court further noted that the Missouri legislature had not prohibited the cohabitation of a man and a woman under the facts presented in the case.²²⁹

223. *Shackelford v. United States*, 3 B.R. 42, 43-45 (Bankr. W.D. Mo. 1980).

224. *Id.* at 43.

225. *Id.*

226. *See id.* at 44-45 (examining MO. ANN. STAT. § 563.150 (Vernon 1953)). The Missouri statute at issue provided:

Every person who shall live in a state of open and notorious adultery, and every man and woman, one or both of whom are married, and not to each other, who shall lewdly and lasciviously abide and cohabit with each other, and every person, married or unmarried, who shall be guilty of open, gross lewdness or lascivious behavior, or of any open and notorious act of public indecency, grossly scandalous, shall, on conviction, be adjudged guilty of a misdemeanor.

MO. ANN. STAT. § 563.150 (Vernon 1953).

227. *Shackelford*, 3 B.R. at 44.

228. *Id.*

229. *See id.* (noting that Missouri's gross lewdness statute, *see supra* note 226, came closest of any state statutes to outlawing couple's relationship). The *Shackelford* court did not specifically state how, under the facts of this case, the couple's relationship did not violate local law. Presumably, the court meant that the couple's *conduct* did not rise to the level of open or gross lewdness necessary to implicate the statute because the couple privately conducted all intimacies in which they may have engaged. However, the court seemed to suggest that a sexual relationship between a man and woman living together outside of marriage, without more, should never be construed as lewdness. *See id.* (suggesting modern society's general acceptance of premarital sexual relations and cohabitation). The court states:

[I]n this day and age, can it be said that merely living together is open, gross lewdness or lascivious behavior? Does this conduct openly outrage decency? Is it injurious to public morals? Would the language in *State v. Bess*, 20 Mo. 420 (1855) "What act can be more grossly lewd or lascivious than for a man and woman, not

The Service also argued that the legislative history underlying Code § 152(b)(5) clearly indicates that Congress did not intend to allow a dependency exemption to a taxpayer who lives in a "sexual relationship with another individual with absolutely no family or quasi-family ties."²³⁰ In rejecting this argument, the court noted that the legislative history discusses only two specific situations — one that involved a foster child and one that involved a common-law marriage.²³¹ The court further explained that a relationship is not illegal simply because a jurisdiction does not affirmatively validate the relationship.²³² The court determined that so long as the couple's conduct did not rise to the level of lewdness that would violate the Missouri statute, the couple's relationship did not violate local law.²³³ Therefore, the taxpayer could claim a dependency exemption for the man with whom she lived.²³⁴

The *Shackelford* decision was the first court decision interpreting Code § 152(b)(5) to take a more limited view of the local law exception after the Tax Court had expanded its reach from invalidating adulterous relationships to invalidating relationships among any unmarried cohabiting partners in sexual relationships. The *Shackelford* analysis reflects a more modern view of sexual relations between opposite-sex partners outside of marriage.²³⁵ This modern view of general acceptance toward unmarried cohabiting couples should influence the Service as it makes its local law determinations as to the excludability of employer-provided domestic partner health benefits.

V. Application of the Local Law Exception to Domestic Partner Health Benefits

The first requirement that a domestic partner must satisfy in order to qualify as a dependent under Code § 152 is to receive at least half of total

married to each other, to be living together and cohabiting with each other," still be applicable today? I think not.

Id.

230. *Id.* at 45.

231. *Id.*; see also *supra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)); *supra* note 130 (discussing legislative intent of Code § 152(a)(9)).

232. *Shackelford*, 3 B.R. at 45.

233. *Id.*

234. *Id.*

235. See *infra* note 256 (discussing states' and public's current view about unmarried cohabitation).

financial support for the taxable year from the taxpayer.²³⁶ If the domestic partner does not qualify as a dependent under this requirement, the taxpayer may not claim the partner as a dependent, and the analysis ends. If the partner does qualify at this stage, the analysis moves to Code § 152(b)(5) to determine whether the relationship maintained between the taxpayer and the dependent violates local law.²³⁷

The courts have not yet had an opportunity to apply Code § 152(b)(5) specifically to domestic partner health benefits plans.²³⁸ One commentator notes that the courts will likely defer to the Service's analysis of the tax treatment of such plans as evidenced in the recent private letter rulings described above.²³⁹ If this is true, it is important for the Service to provide a thorough analysis of the local law exception. The courts have applied an expansive interpretation of Code § 152(b)(5) to deny dependency status to cohabiting heterosexual couples.²⁴⁰ This broad interpretation suggests that the courts, in the absence of a contrary ruling by the Service, are likely to deny dependency status to both same-sex and heterosexual domestic partners based on presumed violations of statutes criminalizing sodomy, fornication, and lewd and lascivious cohabitation.²⁴¹ By contrast, although IRS letter

236. See *supra* notes 86-87 and accompanying text (discussing Code § 152(a)(9), which qualifies member of taxpayer's household who receives over half of financial support from taxpayer for taxable year as taxpayer's dependent).

237. See *supra* note 90 and accompanying text (describing local law exception of Code § 152(b)(5)).

238. See Barrios, *supra* note 1, at 851 (noting that courts have not yet considered domestic partner benefits issue).

239. See *id.* (noting that courts will likely defer to Service's application of Code to domestic partner health benefits in private letter ruling analyses if such analyses represent permissible constructions of Code); *supra* notes 91-116, 123 and accompanying text (discussing IRS's private letter rulings).

240. See *supra* notes 163-221 and accompanying text (discussing cases in which courts have applied broad reading of local law exception).

241. Twenty-three states currently have statutes on their books that criminalize consensual sodomy. See ALA. CODE § 13A-6-65(a)(3) (1994); ARIZ. REV. STAT. ANN. §§ 13-1411 to -1412 (1989); ARK. CODE ANN. § 5-14-122 (Michie 1993); FLA. STAT. ANN. ch. 800.02 (West 1992 & Supp. 1996); GA. CODE ANN. § 16-6-2 (Supp. 1995); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1995); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN., CRIM. LAW §§ 553-554 (1992); MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1990); MICH. COMP. LAWS ANN. §§ 750.158, .338 (West 1991); MINN. STAT. ANN. § 609.293 (West 1987); MISS. CODE ANN. § 97-29-59 (1994); MO. ANN. STAT. § 566.090 (Vernon 1979 & Supp. 1996); MONT. CODE ANN. §§ 45-2-101, -5-505 (1995); NEV. REV. STAT. § 201.190 (1993); N.C. GEN. STAT. § 14-177 (1993); OKLA. STAT. ANN. tit. 21, § 886 (West 1983 & Supp. 1996); R.I. GEN. LAWS § 11-10-1 (1994); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1991); TEX. PENAL CODE ANN. §§ 21.01, .06 (West 1994); UTAH CODE ANN.

rulings do not provide a complete analysis of the local law exception, the rulings generally express an accommodating attitude by the Service toward domestic partnerships.²⁴² However, the Service's position on dependency status for domestic partners is far from clear, and the courts' past expansive interpretation of the local law exception injects an element of uncertainty into how the Service will finally determine the issue.²⁴³

Several factors suggest that the Service should attach little significance to the courts' expansive interpretation of Code § 152(b)(5) in determining how to treat domestic partnerships. First, Congress adopted the local law exception as a response to the *Turnipseed* case.²⁴⁴ The only authoritative decisions interpreting the exception following its enactment considered the same issue that the *Turnipseed* case addressed — a cohabiting heterosexual couple, in which one of the individuals was married.²⁴⁵ The series of cases that expanded the reach of the local law exception to exclude cohabiting unmarried individuals from dependency exemptions constitutes weak author-

§ 76-5-403 (1995); VA. CODE ANN. § 18-2-361 (Michie Supp. 1995); see also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding, in 5-4 decision, state's power to prohibit consensual sodomy).

Several states outlaw unlawful cohabitation. See generally 53 C.J.S. *Lewdness* § 5 (1987) (describing crime of lewd cohabitation and listing states that have lewd cohabitation statutes). Several states also outlaw fornication. See generally 37 C.J.S. *Fornication* § 1 (1943 & Supp. 1995) (describing crime of fornication and listing states that have statutes prohibiting fornication).

242. See Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (suggesting that local law analysis may take account of laws that affirmatively recognize unmarried cohabitation). Compare Priv. Ltr. Rul. 90-34-048 (Aug. 24, 1990) (providing that taxpayer must include in gross income fair market value, determined by value that domestic partner would pay for individual policy in arms-length transaction, of health coverage provided to domestic partner not meeting support requirements of Code § 152(a)(9)) with Priv. Ltr. Rul. 96-03-011 (Jan. 19, 1996) (providing that taxpayer may include in gross income fair market value of group medical coverage extended to domestic partner not meeting support requirements of Code § 152(a)(9), when coverage provided to domestic partner is group medical coverage) and Priv. Ltr. Rul. 92-31-062 (July 31, 1992) (same) and Priv. Ltr. Rul. 91-09-060 (Mar. 1, 1991) (same). But see *Barrios*, *supra* note 1, at 864-65 (concluding that rulings indicate that Service will likely defer to selectively enforced fornication, sodomy, and lewd cohabitation statutes in applying local law exception to domestic partnerships).

243. See *Barrios*, *supra* note 1, at 858 (noting that lack of authoritative Service rulings and court cases renders unclear applicability of local law as disqualifying factor for dependent status of domestic partners); cf. *id.* at 865 n.127 (noting that Service exercises great discretion in deciding among laws to examine in local law analysis).

244. The Tax Court decided the *Turnipseed* case in 1957, and Congress enacted Code § 152(b)(5) in 1958.

245. See *supra* notes 136-57 and accompanying text (discussing *Buckley* and *Untermann*).

ity.²⁴⁶ These facts suggest that Congress intended for the local law exception to receive a more limited application and that the Service should disregard the expansive analysis taken by the courts.

However, although Congress may have intended a narrower interpretation than the exception has received, the legislative history underlying the exception suggests that Congress did not intend to limit the reading of Code § 152(b)(5) solely to the adulterous cohabitation situation addressed in *Turnipseed*.²⁴⁷ The *Eichbauer*, *Martin*, and *Ensminger* decisions relied on the legislative history to deny dependency exemptions for unmarried individuals who cohabited with unmarried taxpayers in states that did not recognize common-law marriages.²⁴⁸ As the *Martin* court explained its interpretation of the legislative history, Congress did not intend to allow a taxpayer "two bites at the exemption apple"²⁴⁹ — a second attempt to obtain a tax benefit by fitting a cohabiting partner into the definition of dependent if the partner could not qualify as a taxpayer's legal spouse. However, as previously discussed, the plain language of the legislative history does not reveal any intention to exalt marriage relationships over any other relationship in which two people cohabit. The language merely states that an example of a relationship that violates local law is a common-law marriage type of relationship in a state that does not recognize common-law marriage.²⁵⁰ Because Congress cites this type of relationship only as an example of a relationship that would violate local law, the courts, using this example as a guideline, had to determine for themselves what other relationships might violate local

246. See *supra* note 158 (discussing weak precedential value of Tax Court memorandum decisions); see also RICHMOND, *supra* note 158, at 77 (noting that tax dispute resolution via federal circuit route allows for forum shopping because U.S. Supreme Court reviews very few Courts of Appeals decisions). The Tax Court will follow circuit court precedent with which the Tax Court disagrees only if the same circuit court has appellate jurisdiction over the particular claim. See *Golsen v. Commissioner*, 54 T.C. 742, 757 (1970) (noting that "efficient and harmonious judicial administration" mandates that Tax Court follow circuit court precedent when that circuit court has appellate jurisdiction over claim).

247. See *supra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)).

248. See *Ensminger v. Commissioner*, 610 F.2d 189, 191 (1979) (citing legislative history of § 152(b)(5) for authority that Congress intended to deny dependency status to unmarried individual cohabiting with unmarried taxpayer); *Martin v. Commissioner*, 32 Tax Ct. Mem. Dec. (CCH) 656, 657 (1973) (same); *Eichbauer v. Commissioner*, 30 Tax Ct. Mem. Dec. (CCH) 581, 582 (1971) (same).

249. *Martin*, 32 Tax Ct. Mem. Dec. (CCH) at 657; see *supra* note 181 and accompanying text (discussing "two-bites" theory).

250. See *supra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)).

law. However, the courts seem to have reached beyond the scope of the guidelines set by this example in determining what constitutes a "relationship in violation of local law" under the Code exception.

The *Shackelford* decision supports the conclusion that a relationship is not automatically illegal absent specific validation of the relationship by the jurisdiction in which the couple resides.²⁵¹ In *Shackelford*, the jurisdiction in which the taxpayer resided did not criminalize the cohabitation of unmarried couples in sexual relationships.²⁵² The court noted, however, that other jurisdictions do criminalize such relationships and that unmarried cohabiting couples in those jurisdictions would not be able to sustain dependency deductions for their partners.²⁵³ However, the local law exception should not act to deny dependency status to cohabiting partners regardless of whether the taxpayer's jurisdiction of residence statutorily prohibits lewd cohabitation or specific sex acts.

In *Ensminger*, the Fourth Circuit revealed the policy that underlies the local law exception to qualification as a taxpayer's dependent.²⁵⁴ The court stated that the local law exception was an attempt by Congress to insure that in applying the federal tax laws, Congress treated the intimate and personal relationships of taxpayers in the same manner in which the taxpayer's state of residence treated them.²⁵⁵ In order to effectuate this congressional policy, courts should look beyond the letter of state law and look at how the states actually apply state laws criminalizing specific sex acts and sexual cohabitation among consenting adults. States rarely enforce these criminal statutes, and the statutes have fallen into disfavor in most jurisdictions.²⁵⁶ Therefore,

251. See *Shackelford v. United States*, 3 B.R. 42, 45 (Bankr. W.D. Mo. 1980) (rejecting Service's argument that unmarried individuals who cohabit in sexual relationship automatically maintain illegal relationship absent common-law marriage statute).

252. *Id.*

253. *Id.*

254. See *Ensminger v. Commissioner*, 610 F.2d 189, 191 (4th Cir. 1979) (stating Congress's intention to allow state governance of interpersonal relationships).

255. *Id.*

256. See *Bowers v. Hardwick*, 478 U.S. 186, 198 n.2 (1986) (noting that statute prohibiting private homosexual sodomy had history of nonenforcement that implied "moribund character" of laws criminalizing private, consensual conduct in today's society); DONAL E.J. MACNAMARA & EDWARD SAGARIN, *SEX, CRIME, AND THE LAW* 187-88 (1977) (noting that jurisdictions that have not repealed laws prohibiting fornication have ceased enforcing those laws and that public no longer supports such laws); William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1680-81 & n.18 (1984) (mentioning state trend to repeal laws prohibiting consensual sexual conduct between heterosexual adult partners and noting that modern

the courts' denial of dependent status to domestic partners on the basis of existing lewd cohabitation statutes and statutes prohibiting specific sex acts constitutes the federal government's enforcement, through federal tax law, of laws that the states have decided no longer to enforce. If the *Ensminger* court was correct in stating that Congress intended not to interfere in states' governance of interpersonal relationships, the proper analysis of the local law exception would take into account states' history of not enforcing these statutes.

Another factor that dictates against bringing lewd cohabitation and criminal sex statutes into the Service's local law analysis is the onerous burden that such an expansive interpretation places upon the taxpayer to prove entitlement to a tax benefit based on dependency. The courts, in the absence of any proof of sexual relations between couples, have been willing to presume that couples violate the criminal statutes provided that the court can establish that the individuals cohabit and are not married.²⁵⁷ In most cases involving federal income tax disputes, the IRS is presumptively correct, and taxpayers bear the burden of proof in contesting tax assessments.²⁵⁸ Therefore, taxpayers claiming deductions, exemptions, or exclusions on the basis of dependency relationships bear the burden of proving that their relationships do not violate local laws.²⁵⁹ In the cases addressing the local law exception, however, requiring taxpayers to justify the legality of relationships that the taxpayers maintain seems to be an overly onerous burden,

society does not have interest in punishing cohabitants); Barrios, *supra* note 1, at 858 (explaining that many states retain laws prohibiting consensual sex acts as part of their criminal codes, but states usually do not enforce these provisions). Many of the states' criminal sex statutes are unclear as to what acts they prohibit and as to which couples they affect. *See id.* at 858 & n.76. Furthermore, some states have specifically held such statutes to be facially invalid. *See id.* at 858 & n.77; *see also* Bowman & Cornish, *supra* note 2, at 1183 n.94 (stating that Supreme Court came close to declaring right to premarital sex in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), by allowing unmarried individuals right of access to contraception); *cf. id.* at 1183 (noting that majority of modern American society no longer considers premarital or extramarital sex inherently immoral).

257. *See supra* notes 170-71, 183-85 and accompanying text (discussing *Eichbauer* and *Martin* courts' presumptions that relationships between taxpayers and claimed dependents in those cases included sexual relations).

258. *See Paschal v. Bleiden*, 127 F.2d 398, 401-02, 404 (8th Cir. 1942) (placing burden of proof on taxpayer in appeal of deficiency assessment); *Willcuts v. Minnesota Tribune Co.*, 103 F.2d 947, 951 (8th Cir. 1939) (same); *Aaron T. Vance*, 36 T.C. 547, 549 (1961) (same); KLEIN & BANKMAN, *supra* note 120, at 88 (noting that Commissioner's determination of deficiency is presumptively correct and that burden is on taxpayer to prove otherwise).

259. *See Eichbauer v. Commissioner*, 30 Tax Ct. Mem. Dec. (CCH) 581, 582 (1971) (stating that taxpayer has burden of establishing that relationship does not violate local law).

as well as an invasion of privacy, because the courts invoke statutes criminalizing specific acts and certain sexual relationships to trigger the exception.²⁶⁰ The burden of proof normally lies with the accusing party when alleging the violation of a criminal statute.²⁶¹ Similarly, the IRS should bear the burden of proving that a taxpayer's relationship with a person claimed as the taxpayer's dependent violates state criminal laws prohibiting certain specific sex acts and sexual relationships before the court denies tax benefits on the basis of such alleged violations unsupported by criminal convictions.

The courts' willingness to invoke laws prohibiting specific sex acts to deny dependency status is also problematic given the statutory language of Code § 152(b)(5). The local law exception inquires into the "relationship" between the taxpayer and the domestic partner.²⁶² Although neither Congress nor the Service has attempted to define "relationship" or to explain how a relationship can violate local law, in common parlance a relationship encompasses more than just specific acts in which a couple may engage.²⁶³ Furthermore, no logical reason exists for inquiring only into acts that constitute sex crimes rather than inquiring into other activities in which the couple engages that may violate other criminal statutes.²⁶⁴ The courts provide no

260. The courts' expansive reading of the local law exception in Code § 152(b)(5) raises invasion of privacy concerns. However, a thorough analysis of these privacy issues is beyond the scope of this Note.

261. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 48 (2d ed. 1986) (noting that fundamental American principle places burden of persuasion on prosecutor in criminal cases to prove defendant's guilt beyond reasonable doubt because of grave consequences that result from criminal conviction).

262. See I.R.C. § 152(b)(5) (1994) (denying dependency status to individuals if "relationship between such individual and the taxpayer is in violation of local law" during taxable year (emphasis added)).

263. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1916 (1993) (defining "relationship" as "state of affairs existing between those having relations or dealings"). This definition contemplates that a relationship encompasses more than whether or not a couple engages in sexual acts.

264. Behavior governed by state law includes a wide range of activity that does not necessarily involve relationships even tangentially. For example, a couple might engage in drug dealing together during the taxable year in question. However, the fact that the couple engages in one or more criminal acts together does not cause the criminal provision at issue to govern "relationships." Furthermore, a couple may maintain a relationship that violates criminal conspiracy statutes. These statutes would seem to be at least as relevant as lewd cohabitation and criminal sex act statutes to the local law analysis because these statutes speak directly to ongoing dealings between individuals. See LAFAVE & SCOTT, *supra* note 261, at 525 (noting that definition of "conspiracy" requires "an agreement between two or more persons"). However, the legislative history of Code § 152(b)(5), by implication, reveals that

justification for looking to one set of criminal statutes in analyzing relationships as opposed to looking to others.

Furthermore, by opening up the local law exception beyond laws governing domestic relations, the courts open the exception to take account of local laws that may appear to contradict the policies underlying particular criminal sex statutes that the courts have invoked.²⁶⁵ For example, several jurisdictions have enacted gay civil rights legislation that affirmatively recognizes gay and lesbian relationships.²⁶⁶ Municipal domestic partnership registration programs also serve as evidence that domestic partner relationships do not violate state laws or state policies regarding relationships.²⁶⁷

Congress did not intend for the local law analysis to reach criminal conspiracy statutes. *See supra* notes 179-80 and accompanying text (discussing legislative history of Code § 152(b)(5)).

265. *See Barrios, supra* note 1, at 857 n.72 (citing Minnesota as example of state that has sodomy and gay civil rights law in effect simultaneously). The sodomy law reflects a state policy that would justify excluding same-sex domestic partners from dependency status, whereas the gay civil rights law reflects a policy that the state intends to protect same-sex couples from discriminatory treatment and would justify granting dependency status to a domestic partner. *Id.*

266. Eight states have enacted civil rights legislation that forbids discrimination on the basis of sexual orientation. *See* CAL. GOV'T CODE § 18500 (West 1995); CAL. HEALTH & SAFETY CODE § 33051 (West Supp. 1996); CAL. INS. CODE § 10140 (West Supp. 1996); CAL. LAB. CODE § 1102.1 (West Supp. 1996); CAL. PENAL CODE § 13519.4 (West Supp. 1996); CONN. GEN. STAT. ANN. § 46a-81c (West 1995); HAW. REV. STAT. §§ 42D-3, 378-2 (Supp. 1992); MASS. GEN. LAWS ANN. ch. 6, § 18 (West 1982 & Supp. 1993); *id.* ch. 151B, § 4 (West 1996); *id.* ch. 272, § 98 (West 1990); MINN. STAT. ANN. §§ 363.02-.03 (West 1990 & Supp. 1996); N.J. STAT. ANN. §§ 10:2-1, :5-4; :5-33 (West 1993 & Supp. 1995); VT. STAT. ANN. tit. 8, §§ 1211, 1302 (Supp. 1995); *id.* tit. 9, §§ 2362, 2410, 2488, 4502, 4503 (1993); WIS. STAT. ANN. § 16.765 (West 1986); *id.* §§ 66.39, 66.395, 66.43, 66.405 (West 1990 & Supp. 1995); *id.* § 101.22 (West 1988 & Supp. 1995); *id.* § 118.13 (West 1991 & Supp. 1995); *id.* § 227.10 (West 1994); *id.* § 230.01 (West 1987 & Supp. 1995); *id.* § 440.77 (West Supp. 1995). The District of Columbia also has enacted gay civil rights legislation. D.C. CODE ANN. § 1-2501 (Supp. 1995). A number of municipalities have enacted gay civil rights legislation as well. *See Note, Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905 & n.1 (1993) (noting that 139 jurisdictions had adopted gay civil rights ordinances as of May 1993). A proposal to amend federal law to prohibit discrimination based on sexual orientation has been pending in Congress since 1974. LESBIANS, GAY MEN, *supra* note 33, at 262 & n.6.

267. *See supra* note 21 (describing relationship validation function of domestic partnership legislation). *But see* *City of Atlanta v. McKinney*, 454 S.E.2d 517, 520-22 (Ga. 1995) (denying Atlanta's authority to extend health insurance coverage to unmarried city employees' domestic partners because such extension exceeds city's authority under Georgia's Municipal Home Rule Act and under Georgia Constitution); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 112-13 (Minn. Ct. App. 1995) (ruling that Minneapolis exceeded authority granted by its home rule charter by passing resolution to extend health benefits to city employees' same-

Realizing that these revisions express a policy of acceptance toward certain nontraditional relationships by the states and municipalities that have enacted them is an indispensable part of the local law analysis because this legislation specifically addresses "relationships." However, adopting a broad interpretation of the local law exception offers no guidance as to which laws should control in jurisdictions that have laws prohibiting particular sex acts and laws affirmatively recognizing certain unconventional relationships.

VI. Conclusion

In enacting Code § 152(b)(5), Congress made a judgment that state laws should govern interpersonal relationships. By neglecting to explain how relationships could violate local laws, Congress left the statute open to various interpretations by the Service and the courts. However, the legislative history reveals only that Congress intended not to disturb the effect of state laws validating or recognizing specific types of relationships. Therefore, when applying the local law exception in determining the excludability of employer-provided domestic partner health benefits, the Service and the courts should look solely to laws governing marriage and domestic relations in order to effectuate the plain meaning and legislative intent of the statute. Provisions examined should include laws granting civil rights to gays and lesbians, as well as state and municipal domestic partner provisions.²⁶⁸ Where such laws exist, and the domestic partner meets the support requirements of Code § 152(a)(9), the Service should exclude employer-provided domestic partner health benefits from employees' gross incomes.

In jurisdictions that do not affirmatively recognize nontraditional relationships, the analysis is more difficult. Although statutes prohibiting unmarried cohabitation arguably govern relationships, congressional intent in enacting the local law exception does not appear to have contemplated the

sex domestic partners because resolution contravened state public policy and violated state law).

268. Although *Ensminger v. Commissioner*, 610 F.2d 189 (4th Cir. 1979), establishes that the state is the appropriate jurisdiction to look to in the local law analysis, *see id.* at 191, domestic partnership ordinances do not conflict with state statutes governing relationships, *see Bowman & Cornish, supra* note 2, at 1202. Therefore, state laws do not preempt the entire field of domestic relations law, and significant room exists for municipal regulation of relationships that state law does not preempt. *See id.* at 1202-03. Domestic partner legislation fills in the gaps of state domestic relations law and focuses on the needs of local residents whom state domestic relations law does not protect. *See id.* at 1202. Therefore, the local law analysis should take account of municipal domestic partnership legislation, as well as state law governing domestic relationships.

application of such statutes to deny dependency status when such application would result in federal interference in state governance of interpersonal relationships. Therefore, absent state enforcement of anticonhabitation statutes, the Service should refrain from invoking these statutes to deny dependency exclusions for domestic partner health benefits. Furthermore, if the states do enforce anticonhabitation statutes regularly, the Service should not invoke those statutes to deny dependency status absent a state conviction of the taxpayer or domestic partner, under which the state proved the couple's violation of the statute by the applicable standard of proof.²⁶⁹ These requirements would avoid the unfairness occasioned by requiring taxpayers to overcome unwarranted presumptions that their relationships involve sexual relations that render the relationships violative of lewd cohabitation statutes. Additionally, these requirements would prevent the federal government from interfering in the states' governance of interpersonal relationships, an area of law that the states have traditionally regulated.

269. The Service's local law analysis should proceed in the same manner whether considering cases of same-sex domestic partners or heterosexual domestic partners. The analysis should not take account of sodomy statutes because such statutes criminalize specific sexual acts rather than govern relationships per se. Furthermore, in the unlikely event that the taxpayer's state of residence generally enforces a state statute prohibiting unmarried cohabitation, the Service should not hold a same-sex relationship violative of the statute absent a state conviction of one of the relationship's parties. Most state lewd cohabitation statutes do not encompass same-sex relationships. See 53 C.J.S. *Lewdness* § 5 (1987) (noting that lewd cohabitation statutes usually prohibit cohabitation of opposite-sex partners not married to each other). However, where state lewd cohabitation statutes do exist, the states are likely to selectively enforce the statutes against same-sex couples only. See Barrios, *supra* note 1, at 859 (discussing disparate impact of local law analysis on same-sex couples and noting that such disparity constitutes additional reason why Service should not include criminal sex statutes in local law analysis).