Taxation of Domestic Partner Benefits: The Hidden Costs

Patricia A. Cain
Santa Clara University School of Law, pcain@scu.edu

Follow this and additional works at: http://digitalcommons.law.scu.edu/facpubs

Recommended Citation
45 U.S.F. L. Rev. 481

This Article is brought to you for free and open access by the Faculty Scholarship at Santa Clara Law Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
Taxation of Domestic Partner Benefits: The Hidden Costs

By PATRICIA A. CAIN*

Introduction

A GOOD TAX SYSTEM IS, among other things, one that distributes the tax burden equitably. The income tax is thought to be a fairer tax than a head tax because it taxes individuals on their ability to pay, a measure that most people think is a good one. Fairness also requires that similarly situated taxpayers be taxed similarly. In tax talk, we call this the principle of “horizontal equity.”

Another goal of a good tax system is efficiency. One attribute of efficiency is market neutrality, a goal that some would say the current tax statutes have abandoned. The Internal Revenue Code (“IRC” or “Code”) does not simply define taxable income as a neutral measure of ability to pay. Rather, it is replete with special provisions that support a number of different economic and social goals. Efficiency goals are served by a tax law that is reasonably easy to administer. And yet, under today’s Code, the filing of individual tax returns has become such a complicated process that there are few individuals brave enough to file.

* Patricia Cain, Inez Mabie Distinguished Professor of Law, Santa Clara University School of Law.

2. Id. at 577.
3. A tax law that is market neutral would simply measure income and not include the numerous tax expenditures that the Internal Revenue Code now contains. The President’s National Commission on Fiscal Responsibility and Reform recently released a draft plan to revise the Code by eliminating all $1.1 trillion of these expenditures. This option is called the “zero plan.” Summaries of the reform can be found on Paul F. Caron, Obama’s Debt Panel Releases Three Tax Reform Options, TAXPROF BLOG (Nov. 10, 2010), http://taxprof.typepad.com/taxprof_blog/2010/11/obamas-debt-panel.html.
4. There are hundreds of examples of this phenomenon. For example, blind people get a higher standard deduction than people with other disabilities. I.R.C. § 63(f) (2006). Investments in low-income housing are encouraged by tax credits. See id. § 42. Employers are encouraged to provide health care for their employees because the value of the benefit is excluded from the employee’s income. See id. §§ 105, 106.
enough to prepare their own returns any more. Even worse, the law has become so complicated, that when taxpayers ask professionals for assistance, there is no assurance that their returns will be completed correctly. Indeed, recent surveys of how well the Internal Revenue Service ("IRS") does in answering taxpayer questions during tax return season shows that twenty percent of the time IRS personnel provide the wrong answer.6

In the midst of this chaos, I raise here, as I have before,7 the special issues that sometimes face gay and lesbian taxpayers. My focus is on committed same-sex couples, usually cohabiting, whether they are in relationships that are state-sanctioned or not. Same-sex couples are never entitled to the tax benefits that are available for married opposite-sex couples. Even if the same-sex couple is married, federal law does not recognize that marriage for tax purposes.8 While it is true that same-sex couples may sometimes experience a benefit from federal non-recognition of their relationships, most of those benefits are ones that are available to the more "able-to-pay" taxpayers.9 The same-sex couples most in need of economic support for their relationships or their families are the primary losers in this tax inequity scheme.

In this article, I will focus on one inequity: the tax treatment of same-sex couples and their children who may benefit from employer health plan coverage provided by the employer of one of the partners or spouses. The first level of inequity is obvious and has been written about before.10 This first-level inequity stems from the fact that em-

5. The need for tax simplification has been addressed regularly by the National Taxpayer Advocate in her annual report to Congress. See, e.g., Nina E. Olson, Preface, in NATIONAL TAXPAYER ADVOCATE, 2009 ANNUAL REPORT TO CONGRESS, at v, xiii (2009) (noting that taxpayers and businesses spend 7.6 billion hours a year complying with tax return and other mandatory filing requirements).
9. For example, two-earner families at the higher end of the income scale avoid marriage tax penalties caused by the current income tax rate structure. Many of these penalties have been lessened for two-earner married couples at lower income levels. Thus the benefit for same-sex couples is more noticeable at top income levels. In addition, two people who are treated as unmarried can claim higher levels of mortgage interest deductions than two people who are treated as married. This results from the peculiar way in which the home mortgage interest deductions rules were drafted. See I.R.C. § 163(h)(3) (2006); see also Patricia A. Cain, Unmarried Couples and the Mortgage Interest Deduction, 123 TAX NOTES 473 (2009).
ployer-provided health plan benefits are often taxable to lesbian and gay employees when the plan covers their family members, whereas such benefits are tax-free when provided to the employee and the employee's spouse. Since same-sex couples can never qualify as spouses, they do not enjoy the automatic tax-free nature of the provided benefit.

Some might argue that the tax treatment of employer-provided health plan benefits violates the goal of efficiency. In effect, they argue, tax-free receipt of the benefit skews the cost of health care overall. Even if this is correct, and I think it is, there are efficiency arguments that support extending this tax benefit to all persons covered by the plan so long as it is available for any persons covered by the plan.\(^\text{11}\)

Thus, as an initial point, I support the position that this first-level of inequity ought to be remedied. Congress should pass the Tax Equity for Health Plan Beneficiaries Act, which would extend tax-free employer-provided health care benefits to all beneficiaries covered by the employer plan.\(^\text{12}\)

But, in the meantime, my purpose in this essay is to address a different issue. That issue involves application of the current law, as written, even with its first-level discriminatory impact on same-sex couples and their families. For, as it turns out, same-sex couples and their children are not only losing out because Congress has failed to change the law. They are losing out because of the way the law, as it is currently written, is being applied in practice. Many gay and lesbian employees and their families are being over-taxed because of the incorrect inclusion of employer-provided health benefits in their taxable income.

How does this happen? Why is the law applied incorrectly to gay and lesbian taxpayers? In part, one might blame the IRS for not providing sufficient guidance. The law is fairly complex. There are a number of rules that need to be understood and it would certainly be helpful if the IRS would post public guidance about how these rules work for alternative families. But the fault also lies in large part with employers. That is because even the employers who have been leaders

11. Benefits that might be targeted for the highly compensated, however, would have to be limited, as they currently are.

12. A bill that would accomplish this was passed in the House of Representatives as part of the recent health plan legislation, but the provision was removed from the bill that passed in the Senate. See Tax Equity for Health Plan Beneficiaries Act, HUM. RTS. CAMPAIGN, http://www.hrc.org/laws_and_elections/5671.htm (last updated Mar. 11, 2011).
in extending benefits to their gay and lesbian employees in an attempt
to treat them more equally often impose unnecessary tax costs by
treating tax-free benefits as though they were taxable when in fact
they are not.

In the absence of clear and reliable guidance provided by the
IRS, we need a strong public education campaign to inform gay and
lesbian employees and their employers of what the current law is. We
need to identify the false information that is communicated publicly
and that results in the incorrect inclusion of employer-provided
health plan benefits in taxable income. This article is intended as the
first step in such a public education campaign.

My purpose in this article is to explain the basics about how em-
ployer-provided health plan benefits are taxed. Because the statutory
law affecting this issue was amended in 2004, this will require explain-
ing both pre-2004 law and the changes that created the post-2004 stat-
utory regime. I will provide examples of how the new law may (and in
some cases may not) have changed the results for families that were
receiving tax-free benefits under the pre-2004 law. Finally, I will share
the results of a simple survey I did in early 2010 in an attempt to iden-
tify how some employers (primarily universities and colleges) were ap-
plying the tax law to the health plan benefits they provided to their
lesbian and gay employees. I was astounded by how many employers
were applying incorrect legal tests to determine tax consequences. My
hope is that by publishing this data, employers who care about getting
it right will review their policies and make the necessary corrections. I
am happy to report, as part of this project, that, having shared an
earlier draft of this article widely with tax professors at various univer-
sities, several universities have already changed their policies to cor-
rect mistakes or miscommunications about what the law actually is.

I. Taxation of Domestic Partner Benefits

A. The Basic Rules

1. Overview

Sections 105 and 106 of the IRC govern the tax consequences of
employer-provided health benefits to employees.13 Under § 106, em-
ployer contributions to health plans on behalf of their employees, usu-

ally made by paying insurance premiums, are exempt from tax.\textsuperscript{14} Under the § 106 regulations, the exemption applies only to health plan coverage that is provided for the employee, his spouse, or his dependents.\textsuperscript{15} Section 105(a) provides that, as a general rule, payments for personal injury or sickness are included in income if the payments can be traced to tax-exempt employer plans.\textsuperscript{16} But there is an important exception, contained in § 105(b), which provides that such amounts will not be taxed so long as they are paid for medical care provided to the employee, the employee’s spouse, or dependents.\textsuperscript{17}

Thus, in order to ensure non-taxation of employer-provided health plan benefits, a taxpayer must determine whether or not his domestic partner is a dependent. A similar determination must be made if the taxpayer’s plan covers children of the partner that are not also children of the taxpayer.\textsuperscript{18}

While the IRS has never issued a public ruling on the taxation of domestic partner health care benefits, whether provided through health plans or through direct payments by employers, it has always been clear from the statutory and regulatory law that the amounts would be taxable if they were paid to someone other than a spouse or

\textsuperscript{14} Section 106 provides: “Except as otherwise provided in this section, gross income of an employee does not include employer-provided coverage under an accident or health plan.” \textit{Id.} § 106.

\textsuperscript{15} The exact language in the regulation is: “The gross income of an employee does not include contributions which his employer makes to an accident or health plan 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.” \textit{Treas. Reg.} § 1.106-1 (2005).

\textsuperscript{16} I.R.C. § 105(a) (2006).

\textsuperscript{17} The exact language of I.R.C. § 105(b) is:

\textit{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 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 215(d)) of the taxpayer, his spouse, and his dependents (as defined in section 152, determined without regard to subsections (b)(1), (b)(2), and (d)(1)(B) thereof. Any child to whom section 152(e) applies shall be treated as a dependent of both parents for purposes of this subsection.}

\textit{Id.} § 105(b).

\textsuperscript{18} This situation occurs frequently for same-sex couples who have not been able to complete a second-parent adoption before the end of the tax year or who live in states where second-parent adoptions are not possible.
dependent of the employee.19 A number of private letter rulings have been issued confirming that position.20 Since benefits paid to non spouses and non-dependents are taxable, the employer must include the value of any such benefits in the gross income of the employee.21 The amount included is the value of the benefits, calculated by determining the amount of the group coverage that is allocable to the non-employee.22 Because this payment is made as compensation for the employee's services, the income will be treated as additional wages and thus subject to payroll taxes.23 The payroll taxes are split between the employer and the employee, with each paying 7.65% on the first $106,800 of income.24 This means if the employer pays $500 a month toward health coverage for a domestic partner, the $6,000 in extra

---

19. Employer-provided benefits are taxable as income to an employee unless there is a specific exclusion. The two exclusions apply to amounts received by the taxpayer/employee, his spouse, and dependents. See supra notes 15 and 17.

20. The first private letter ruling was issued in response to a question from the City of Seattle about how it should report the proposed domestic partner benefits. See I.R.S. Priv. Ltr. Rul. 90-54-048 (May 29, 1990). That ruling concluded that the fair market value of the benefits would be treated as compensation income to the employee unless the benefits were paid to a spouse or a tax dependent under I.R.C. § 152 (2006). Id. The ruling further concluded that the fair market value was to be calculated on the basis of the value to the recipient, i.e., what it would have cost the employee to purchase an individual policy for the partner. Id. The City asked the IRS to reconsider the fair market value question, I.R.S. Priv. Ltr. Rul. 91-11-018 (Dec. 14, 1990), and the IRS concluded that value should be calculated on the basis of the value of the group policy coverage rather than on the basis of the value of individual coverage. Id. See I.R.S. Priv. Ltr. Rul. 92-31-062 (May 7, 1992) (ruling further that: (1) Domestic partners do not qualify as spouses; (2) Domestic partners may qualify as dependents if they meet the requirements under § 152, in particular that the employee provides over half the support and that the relationship does not violate local law; and (3) if the value of the benefits is included in income, then when the insurance pays for medical expenses, those payments will be excluded from income under § 104(a)(3)). See also I.R.S. Priv. Ltr. Rul. 96-03-011 (Oct. 18, 1995) (following the earlier rulings, but ruling further that: (1) the imputed income to the employee whose domestic partner is included in the plan will be subject to payroll taxes as wages, and (2) the inclusion of taxable benefits to domestic partners would not threaten the tax-exempt status of the plan for employees who were covering spouses and dependents).


22. See id.


24. I.R.C. §§ 3101(a)–(b), 3111(a)–(b). The upper limit for earnings subject to Social Security taxes is $106,800 in 2010. The hospital insurance tax of 2.9 (split equally between the employer and employee at 1.45 each) is imposed on wages in excess of this amount. Wages in excess of this amount are taxed to the employee and employer at the rate of 1.45 each (employer and employee both pay) by the imposition of a hospital tax. The contribution base is determined yearly under 42 U.S.C. § 430 (2006). It was $106,800 for 2009 and 2010 and will remain at that amount for 2011. The annual amounts are available from the Social Security Administration online. See Contribution and Benefit Base, Soc. Security Online, http://www.ssa.gov/OACT/COLA/cbb.html (last modified Dec. 29, 2010).
income will cost the employer $459 extra in payroll taxes, and it will cost the employee (assuming an income tax marginal rate of 35%) a total of $2,559 extra in taxes.\(^\text{25}\) These are not trivial sums.\(^\text{26}\) The extra cost to the employer can discourage some employers from extending benefits to domestic partners. On the other hand, gay-friendly employers like Google have adopted plans to pay their gay and lesbian employees who experience this extra cost an additional stipend to cover the taxes.\(^\text{27}\)

2. Qualifying as a Dependent

These additional taxes can be avoided, however, if the domestic partner can qualify as a dependent of the employee.\(^\text{28}\) The definition of dependent is contained in § 152. The dependency exemption deduction is authorized in § 151. For purposes of claiming an exemption deduction, both of these sections must be read together. At the outset, however, it is important to note that a person might qualify as a dependent for purposes of the exclusion from income for employer-provided health care benefits, as well as for purposes of a medical deduction under § 213, but not qualify as a dependent for purposes of the exemption deduction. To make this point more clearly, I will sometimes distinguish between an “exemption dependent” and a “medical dependent.”

The starting place for both types of dependent is the basic definition of “dependent” in § 152. That section was overhauled in 2004 by the Working Families Tax Relief Act.\(^\text{29}\) Before these 2004 amendments to the statute, the definition of dependent in § 152 was precisely the same as “medical dependent.” But § 151 set forth additional requirements for claiming someone as an “exemption dependent.” In

\(^{25}\) The income tax burden is $2100 (35% of $6,000), and the employee will be charged $459 in payroll taxes (6.45% of $6,000). Income tax rates are found at I.R.C. § 1, and Social Security and hospital tax rates are at § 3101 (a)-(b). The cost is even higher if the benefit is taxable under a state income tax.

\(^{26}\) These amounts are not exaggerated. Indiana University includes estimates of the tax costs for its various health plans when they are extended to cover domestic partners who do not qualify as dependents. “The 2010 annual estimate is $2461.44 for an employee enrolling a non-tax-qualified domestic partner in the IU PPO $900 Deductible plan.” Important Information for Same-Sex Domestic Partner Benefits, IND. U. (Jan. 2011), http://www.indiana.edu/~uhrs/pubs/forms/dptaxinfo.pdf.

\(^{27}\) See Tara Siegel Bernard, Google to Add Pay to Cover a Tax for Same-Sex Benefits, N. Y. TIMES, July 1, 2010, at B1.

\(^{28}\) See supra note 20.

general, the 2004 amendments changed this basic structure. Today, the definition of dependent in §152 is precisely the same as an exemption dependent, but §§105, 106, and 213 (the sections that apply rules to “medical dependents”) have been amended. As a result, one now needs to consult both §152 and §§105, 106, and 213 to determine who is a medical dependent. To clarify the impact of these changes, the following parts of this Article will focus on the definitions of medical dependent in the pre and post 2004 law.

B. Definition of Dependent Pre-2004

1. In General

In the early 1990s, when the initial private rulings on taxation of domestic partner benefits were issued, a domestic partner might qualify as a dependent under the “member of the household test,” set forward at that time in (now repealed) §152(a)(9).\textsuperscript{30} A partner’s child could similarly qualify as a dependent under the “member of the household” test.\textsuperscript{31} PLR 9034048 specifically ruled a partner could qualify as a dependent if the partner met the statutory definition in §152(a)(9), provided that the personal relationship between the taxpayer/employee and the partner was not “in violation of local law.”\textsuperscript{32}

\textsuperscript{30.} I.R.C. §152 (a)(9) (repealed 2004).
\textsuperscript{31.} Id.
\textsuperscript{32.} Before 2004, this “violation of local law” rule was contained in I.R.C. §152(b)(5) (2000). Under the current version of this section, the rule is set forth at §152(f)(3), which provides: “An individual shall not be treated as a member of the taxpayer’s household if at any time during the taxable year . . . the relationship between such individual and the taxpayer is in violation of local law.” I.R.C. §152(f)(3) (2006). Many people read this language and think that it may pose a problem for same-sex couples since in most states their relationships are not recognized. Non-recognition of a relationship is not the same thing as having an illegal relationship—i.e., in violation of local law. Illegal relationships include such things as heterosexual open and notorious cohabitation, bigamy, and adultery. See, e.g., Ensminger v. Comm’r, 610 F.2d 189 (4th Cir. 1979) (illegal cohabitation); Ochs v. Comm’r, 52 T.C.M. (CCH) 1218 (1986) (adultery). Taxpayers in such relationships who have claimed their partners as dependents have been challenged successfully by the IRS. Id. In states that do not recognize same-sex marriages, the marriage or relationship itself is not illegal but merely void or not recognized. In that case, the language in §152(f)(3) does not seem to apply. It is worth noting, however, that before this rule was included in the IRC, the Tax Court ruled that to allow a dependency exemption to a male taxpayer for a woman he was supporting in an illicit relationship was not what Congress intended when it provided the “member of the household” deduction. Turnipseed v. Comm’r, 27 T.C. 758 (1957). In other words, as a matter of statutory construction, even without a codified rule regarding the “violation of local law,” the Tax Court ruled that a dependency exemption deduction was not available for a paramour. Id. In that case, however, it should be pointed out that the couple was in fact violating the state laws regarding cohabitation and adultery. See id. The Turnipseed holding was codified by adding the “violation of local Law” rule to
In addition to satisfying the “member of the household” test, a partner could qualify as a dependent only if the remaining requirements of § 152 were met. They were:

(1) The taxpayer had to provide over half the support of the individual.\(^{33}\)

(2) The individual could not be a non-resident alien.\(^{34}\)

2. Partner as “Member of the Household” Before 2004

Before the 2004 amendments, the definition of “member of the household” was contained in § 152(a)(9).\(^{35}\) It provided that a person meeting the following description would qualify as taxpayer’s dependent: “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.”\(^{36}\)

The only other statutorily-imposed limit on the definition of a “member of the household” dependent was contained in § 152(b)(5).\(^{37}\) It provided as follows: “An individual is not a member of the taxpayer’s household 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.”\(^{38}\)

Some commentator have suggested state-level Defense of Marriage Acts (“DOMAs”) might prevent a partner from being claimed as a dependent of a taxpayer because of this “violation of local law” rule.\(^{39}\) It should be noted, however, that, to date, the provision has only been used in cases in which the relationship violated state criminal laws, such as statutes that prohibit bigamy or adultery.\(^{40}\) State-level DOMAs do not criminalize same-sex relationships. Nor do state laws prohibit such relationships. Rather, they merely refuse to recognize

\(^{33}\) I.R.C. § 152(a) (repealed 2004).

\(^{34}\) Id. § 152(b)(3).

\(^{35}\) Id. § 152(a)(9).

\(^{36}\) Id. § 152(a)(9).

\(^{37}\) Id. § 152(b)(5).

\(^{38}\) Id.


\(^{40}\) See Oks v. Comm’r, 52 T.C.M (CCH) 1218 (1986) (applying New York law on adultery to deny a deduction); Turnipseed v. Comm’r, 27 T.C. 758 (1957) (applying Alabama law on adultery and fornication to deny a deduction); see also Ensminger v. Comm’r, 610 F.2d 189 (4th Cir. 1979) (applying North Carolina law on open and notorious cohabitation to deny a deduction). See also supra note 32 for further discussion of this point.
them as having any legal significance. As a result, classification as a dependent under the federal tax laws should not vary from state to state depending on whether or not state law recognizes same-sex relationships.

To summarize, classification as a dependent in the pre-2004 IRC was solely controlled by the § 152 definition. Thus, if the taxpayer and partner met the following tests, the partner could be classified as a dependent:

1. Taxpayer paid over half of the partner's support.
2. Taxpayer and partner shared the same household for the entire tax year.
3. Their relationship was not in violation of local law.
4. The partner was not a nonresident alien.

Classification as a dependent was important for several different purposes under the pre-2004 Tax Code. A taxpayer could claim a dependency exemption deduction under § 151 for certain dependents, who met additional qualifications. The most important additional qualification under § 151, as it existed pre-2004, was the gross income limitation. If a dependent had gross income in excess of the exemption amount, the deduction for a dependency exemption was not available. But this gross income limitation was tied only to the question of whether or not the dependency exemption was available. It was irrelevant to the initial question of whether or not the

41. See, e.g., Alaska Constitution, Article I, Section 25, which provides: "To be valid or recognized in this state, a marriage may exist only between one man and one woman." Alaska Const. art. 1, § 25.
42. I.R.C. § 152(a) (as amended in 2004).
43. Id. Note that support is determined by actual tracing of funds. In addition, if the taxpayer owned the home that the couple shared, the fair rental value of the home to the partner is treated as a support item. See Rev. Rul. 58-302, 1958-1 C.B. 62.
44. I.R.C. § 152(a)(9) (as amended in 2004). Temporary absences from the household do not disqualify the individual from being a dependent. Such absences would include vacations, hospital stays, military service, or business trips. See generally I.R.C. § 152-1(b) (2010).
45. See supra note 40.
47. Note, however, that although the existence of certain dependents would entitle the taxpayer supporting them to file as "Head of Household," a member of the household dependent was (and still is) not a sufficient dependent for this purpose. See I.R.C. § 2(b)(3)(b)(i) (2006) (defining "Head of Household" and excluding consideration of dependents who qualify only as a "member of the household.").
49. Id. § 151(c)(1)(A) (as amended in 2004).
50. Id.
51. Id. §§ 151, 152 (before 2004 amendments).
partner was a dependent. Thus, in every other Code provision that referred to "dependent," only the four requirements listed above were relevant. The key provisions affecting health plan payments made by employers referred to dependents as defined in §152. Before 2004, a taxpayer whose partner satisfied the four requirements listed above would qualify as a dependent "as defined in §152"; thus, health plan benefits received by that dependent from the taxpayer's employer could be received as a tax-free, fringe benefit. In other words, meeting the §152 definition was sufficient to make the partner a "medical dependent."

3. Partner’s Child as “Member of the Household” Before 2004

In cases in which a same-sex partner has not adopted the partner’s child, or is not automatically recognized as the second legal parent of the child under state law, the child could nonetheless qualify as a tax dependent of the non-parent under the pre-2004 "member of the household" test. As with the partner, the child would simply have to meet the four requirements of then §152 as listed above. And if the employer-provided health plan covered the child, the result in such cases, as with the partner, was that the value of those benefits would have been received tax-free by the employee.

II. The Problem Post-2004

A. The Qualifying Child Definition

In 2004 Congress amended §152 to provide two separate definitions for dependent, a "qualifying child" and a "qualifying relative." One purpose of the new law was to create a uniform definition for

52. Id.
53. Id.
55. However, to qualify as an exemption dependent, the partner would have to meet the additional requirement set forth in I.R.C. §151 that the partner’s income not exceed the exemption deduction amount. I.R.C. §152 (2005). This additional requirement is often referred to as the gross income limitation.
56. See, e.g., Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (holding that non-biological mother is legal mother of child born during lesbian relationship even though she had not adopted the child).
A qualifying child that could be used not only for purposes of the dependency exemption deduction, but also for numerous child-related deductions and credits. A qualifying child must meet certain age restrictions. Other children of the taxpayer may qualify as a dependent under the alternative qualifying relative test. As a general rule, a child must be the taxpayer's child to be considered a qualifying child. In limited situations, the child may be someone else's qualifying child, even though there is no legal parent/child relationship, but only if the child is related to the taxpayer as a sibling, step-sibling, or descendant of such sibling.

One important new change in the definition under §152 is that the qualifying child need not receive over half of the annual support from the parent or other taxpayer claiming the child as a qualifying child. Instead, the only requirement is that the child does not provide over one-half of his or her own support. Thus, for example, a grandparent might support a grandchild in order to help out the child's parent, but the child's parent would nonetheless be able to claim the child as a qualifying child for dependency purposes as well as for purposes of claiming additional child-related tax benefits.

B. The Qualifying Relative Definition

The second definition provides that a tax dependent (which can include a child of the taxpayer who is not his or her qualifying child) can be a qualifying relative. And the term qualifying relative now includes unrelated individuals who basically meet the same “member-of-the-household” test that was part of pre-2004 law. Specifically, under §152, a domestic partner (or same-sex spouse) or the partner’s child will qualify as a dependent if they meet the following tests:

61. See, e.g., I.R.C. §§ 2(b), 24, 32 (2005) (“Head of Household” status if qualifying child is member of the household, child tax credit, and earned income credit respectively).
62. The child must either be under the age of nineteen or a student under the age of twenty-four. I.R.C. §152(c)(3) (2006).
63. Id. §152(d)(2)(A).
64. Id. §152(c)(2) (setting forth the relationship test). See id. §152(c)(4)(C) (adding that the taxpayer’s adjusted gross income (“AGI”) must be higher than the parent’s and that no parent can have claimed the child).
65. I.R.C. §152(a) (amended 2004) (which provided, prior to amendment, that: “[T]he 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...”). This language is not present in the new version of §152.
67. Id. §152(d)(2)(A) (for instance, a qualifying child must be under certain age limits, and children above these age limits are qualifying relatives rather than qualifying children).
(1) The taxpayer provides over one-half of the support for the individual.68
(2) The individual is a member of the taxpayer’s household for the entire tax year,69
(3) The individual is a citizen or resident alien,70
(4) The relationship between the taxpayer and the individual does not violate local law,71
(5) The individual’s gross income does not exceed the exemption amount,72
(6) The individual cannot be the qualifying child of any other taxpayer.73

Note that the first four requirements are the same as the four requirements for qualification as a dependent under the test in § 152 before it was amended in 2004. Items five and six in this list of requirements, however, are new. The gross income limitation, previously contained only in § 151 is now part of the initial definition of dependent. The requirement that the individual cannot be the qualifying child of any other taxpayer is new. It is needed under the newly structured definitions in § 152 because an individual can be the qualifying child of a taxpayer who does not necessarily provide over half of the child’s support. As a result, absent this provision a child could qualify as a qualifying child of one taxpayer and also qualify as a qualifying relative of another taxpayer. This provision was needed to prevent taxpayers, in certain situations, from gaming the system by allowing one taxpayer to claim the qualifying-child benefits and the other taxpayer to claim the dependency exemption benefit.74

68. Id. § 152(d)(1)(c).
69. Id. § 152(d)(2)(H).
70. Id. § 152(b)(3)(A).
71. Id. § 152(f)(3). For example, if the partner was married to someone else but cohabiting with the taxpayer, the relationship might violate a state adultery law.
72. Id. § 152(d)(1)(B). For 2010, the exemption amount is found in I.R.C. § 151(d).
73. Id. § 152(d)(1)(D). It would be rare for a partner who is living with the taxpayer for the full year and supported by the taxpayer to meet the definition of “qualifying child” of someone else. This provision is more likely to cause a problem for a taxpayer who wants to claim the partner’s “qualifying child” as the taxpayer’s dependent, because the taxpayer is supporting the child.
74. See Nina E. Olson, Uniform Qualifying Child Definition: Uniformity for Most Taxpayers, 111 Tax Notes 225 (2006), which contains examples of marginal cases that seem to come out wrong under the current provisions. None of the examples involve lesbian or gay families, and none of the examples focus on the problems created by the reference to dependents in the Code provisions that address the taxation of employer-provided health care benefits.
C. Problems Caused by the 2004 Changes

1. The Gross Income Limitation

Before the 2004 changes, the definition of dependent under § 152 did not contain a gross income limitation. That limitation was instead contained in § 151 and was only determinative of whether a dependency exemption deduction could be claimed. Post-2004, however, a partner (or partner’s child) will not qualify as a dependent under § 152, unless the gross income limitation requirement is satisfied. This change has created some confusion over whether or not a partner who has gross income in excess of the limitation amount can still qualify as a medical dependent.

It seems fairly certain that Congress did not mean to eradicate this distinction between medical dependents and exemption dependents in the 2004 legislative changes. The best evidence is that in the same legislation that amended §§ 151 and 152, Congress also amended §§ 105 and 213 to remove the gross income limitation from the definition of medical dependents.\(^{75}\)

Congress failed, however, to say anything in § 106 about the gross income limitation, and whether or not it applied to determine who qualified as a dependent under that provision.\(^{76}\) That omission makes a certain amount of sense given the fact that dependency status for § 106 purposes is provided in the regulations rather than by statute.\(^{77}\) What is needed is an amendment to the regulations that tracks the amended statutory language in § 105. Those regulations have yet to be amended. But if you research the issue closely enough, you will find an IRS announcement stating that the agency intends to amend the regulations to mirror the language about dependents that is included in § 105, and, further, that taxpayers can rely on the representation that the regulations will be amended.\(^{78}\) As a result, current law tracks pre-2004 law, allowing the employee taxpayer to cover his or her partner under an employer’s health plan tax-free—provided the partner qualifies as a dependent—disregarding any gross income the partner may have. The law in this issue has in fact stayed the same.

The problem is that employers have not amended their forms or their guidance to employees. Many employers still say things like “a domestic partner will be a dependent only if § 152 requirements are

---

76. See id. § 106.
satisfied." That used to be true. But now § 152 includes the gross income limitation, which is not a requirement for classification as a medical dependent.

2. The New Qualifying Child Definition

The law does appear to have changed in some other instances. These changes are caused by the introduction of the category of qualifying child. An example will illustrate the problems.

Example: Someone Else’s Qualifying Child

Assume that Ann and Betty are raising Ann’s child, Carl. Ann is the stay-at-home parent and has no income. Carl is just over one year old, and Betty is planning to adopt, but due to time constraints and costs, she has not completed the process by the end of the 2009 tax year. Betty is the sole support of the family, and her employer covers her family on the company’s health plan. Ann is Betty’s dependent under the “member-of-the-household” test outlined above. But what about Carl? He is supported by Betty, is a member of the household, and meets all of the tests as qualifying relative, except one: he is Ann’s qualifying child.

There is no statutory authority here, as there is in § 105, to suggest that the “qualifying child of any other taxpayer” restriction should be waived to determine medical dependency status. The effect of this change is to take away a benefit that existed before the law changed. In other words, a partner’s child who is supported by the taxpayer could be both a medical dependent and an exemption dependent under prior law. But because the partner’s child is the qualifying child of the partner, the child will no longer qualify as any sort of dependent for the taxpayer who is supporting that child.

The IRS has clarified the situation slightly. In a little noticed 2008 announcement, the IRS explained that the § 152 restriction (that a dependent under qualifying relative cannot be anyone else’s qualifying child) will be waived when the parent of the qualifying child does not have sufficient income to require the filing of a tax return. This is consistent with the statutory language, which says that the child cannot be the qualifying child of any other taxpayer. While this does not solve the problem for all same-sex parents where the non-legal parent

79. See id.
is the earner providing health coverage, it does serve to help Betty claim Carl as her medical dependent as well as her exemption dependent, because Carl's parent, Ann, has no income and is thus not a taxpayer.

III. A Recent Wrinkle: Community Income Tax Rules

In order to claim that a partner is a dependent, the taxpayer must prove that he or she contributed over half of the partner's support. In three states (California, Nevada, and Washington) that recognize registered domestic partnerships, the partners are subject to the state's community property regimes. Under Poe v. Seaborn, all community income is split between the two partners for income tax purposes. As a result, even if Betty is the only breadwinner and is supporting her partner, Ann, in California, Washington, and Nevada, Ann will be treated as providing one-half of her own support. While the IRS initially ruled that Poe v. Seaborn would not apply to registered domestic partners, it has recently changed course and agreed that Seaborn does apply. For most taxpayers with unequal incomes, it will be beneficial to split income between the two partners. But if they do so, for consistency's sake, they cannot claim that the earner is providing over half the support to the non-earner. In other words, if they claim the reduced income tax rates that result from income splitting, they will most likely lose the benefit of "medical dependency" status for the partner and any employer-provided benefits will become taxable income.

IV. The Problem for Employers

If domestic partner benefits are not taxable under the dependency rules, then they should not be included in wages on an em-
ployee’s W-2. The difficulty, however, is that an employer cannot know for sure at the beginning of the tax year whether a partner of an employee will qualify as a dependent at the end of the tax year. The employee, however, can make a better estimate of whether that might be the case. If the partner is a stay-at-home parent, for example, it is likely that the taxpayer/employee will be providing more than half of the partner’s support. However, even if the partner has a job outside the home, there are many instances in which the employee with health insurance coverage will in fact be providing more than half the support.

Some employers, understanding the details of the law, have offered their employees the opportunity to sign a declaration of tax dependency status, claiming that the covered partner does in fact meet the IRS definitions of dependent. If the declaration is signed, then the employer will not treat the domestic partner benefit as taxable income to the employee. A private letter ruling concludes that it is reasonable for an employer to rely on such declarations made by their employees.

Given the confusing nature of the “medical dependency” rules, especially in light of the 2004 changes in the law, I was interested in finding out how most employers were handling the tax issues posed for domestic partner benefit plans. Employers should have an incentive to exclude benefits that can be excluded under the dependency rules from gross income. They would not have to treat these amounts as wages, and they would not have to incur the cost of additional payroll taxes on these excluded amounts. Were many employers allowing their employees to file tax affidavits of the sort approved by the IRS in private rulings, and if so, what did those forms look like? Did the employers get the tax law right? Were their forms up to date to take into account the 2004 changes?

To answer these questions, I decided to embark on a small empirical project. That project and its results are described in the remainder of this article.

90. See infra Tables and Appendices.
92. Id.
93. Id.
V. A Small Empirical Project

A. Background

One of the reasons I wondered what employers were doing was that I knew from anecdotal evidence that many employers took the position that domestic partner coverage was taxable. That seemed strange to me since in many cases it would be in the employer's interest to be able to treat the income as exempt. Step one of this project was to collect information from employers that would describe their practices regarding the collection of dependency status information from their employees.

B. Selecting the Class of Employers

Many public employers, especially colleges and universities, provide domestic partner benefits to their employees. The University of Iowa was the first major university to extend such benefits in 1992. Stanford followed suit months later. In addition, many universities share information about business practices and legal matters through their national organizations.

Most universities and colleges have informative web pages that describe their basic benefit packages. That makes it easy to determine the type of benefit coverage provided to domestic partners. And, in many cases, these institutions include on their websites the forms that employees are to fill out to qualify or to claim tax dependency status for their partner. As a result, these employers provided a prime opportunity for gathering information fairly quickly.

My method was simple: I did a Google search for university or college and "domestic partner benefits" and identified those universi-
ties and colleges that provided such benefits. Once a sufficient pool had been identified, the task was to determine how these employers handled the taxation of such benefits. Did they automatically tax them? Did they provide their employees with the option of filing a declaration or certificate of dependency? And if they did provide this option, what information did they give their employees about how to make a determination?

My preliminary screening of the universities and colleges revealed that the employers treated the tax issue in many different ways. In some cases it was difficult to tell whether the benefits were offered only to domestic partners or also to children of the domestic partner. In order to simplify this first step, I elected to concentrate solely on how employers treated the taxation of benefits extended to domestic partners of the employee.

The first round of this study turned up approximately forty-five colleges and universities that clearly offered domestic partner benefits and provided some information about tax treatment. Of this group, many included information online about the tax consequences of these benefits. Some included forms that could be used by employees who wished to claim that the benefits were tax-free. For some it was difficult to tell what their certificates or declarations regarding tax-free status actually said because they were not available online, but only by request. I requested hard copies of these forms from the HR/Benefits offices of these universities. The preliminary results include institutions for which I had tax treatment information in hand by April 1, 2010.

C. Preliminary Findings

I have so far collected thirty-five policies that include information about taxation of benefits. Some of these employers provide useful and current information on the web. Over half of them provide forms for employees to certify that the partner (and in some cases the children of the partner) qualify as dependents for tax purposes. Some of the forms I found on the web were several years old and had not been updated. I have included the information on all of these in the Tables at the end of this paper.

Employers provide varying amounts of information on tax issues. Rarely is the information complete and correct. Out of the employers listed in the Tables, only the University of Oregon provides fully complete and correct information about how to determine if a partner's child qualifies as a dependent. The information sheet for the state of
Oregon, linked to the University of Oregon’s web page, has been updated to include the information provided in IRS Notice 2008-5,\footnote{1.\textit{R.S.} Notice 2008-5, 2008-2 I.R.B. 256.} i.e., that sometimes the partner’s qualifying child can still be the employee’s dependent even though the statute appears to provide otherwise.\footnote{2.\textit{See infra} Appendix B.} For at least one-third of the employers, it was impossible to tell from the readily available material whether they provided benefits for non-dependent children or had separate forms for declaring that a dependent child qualified as a tax dependent. The rest of the employers split fairly evenly between those that referred the employee to § 152 and those that provided a specific test, listing the “qualifying child of another” restriction in the definition of who could meet the test of dependency. In general, the information about inclusion of a partner’s child and the taxation of those benefits was much less reliable than the information regarding partner benefits. Thus, for this stage of the project, I have omitted the treatment of the partner’s child (or children) from the Tables.

As to partner benefits, at least five employers stated that a domestic partner was not treated as a spouse and thus one hundred percent of the benefits would be included in the employee’s income. Often the statement went further and said that the IRS would not recognize a domestic partner as a dependent. Thus, the amounts would all be taxable. That is simply wrong as a matter of law. While employers may not want to get involved in fact determinations as to whether their employees are supporting their domestic partners, it is a total disservice to affirmatively misstate the law. I have coded the employers who fall into this category as “F.”

Six employers misstate the law in another way. They refer the employee to § 152 and then repeat the test stated in that section, including the provision that the partner’s gross income cannot exceed the exemption amount. I have coded these employers as “D.” In the comments I have indicated what amount the employer said was the amount of the gross income limitation. Most of these forms were located on the web through links from the current home page of the institution. It is impossible to tell whether the forms have been updated in hard copy, and so I have listed the year in which they most likely were drafted based on the exemption amount for that year. Based on those dates, they were all updated after the 2004 legislative changes. Apparently none of these employers was aware of IRS Notice
2004-79, explaining that the gross income test is not applicable to determine who is a "medical dependent."\textsuperscript{100}

Eleven of the thirty-five employers provide too little information. They simply refer the employee to § 152, or to Publication 17, Table 3-1, both of which provide definitions of "qualifying relative" that include the gross income limitation. I have coded these institutions as "C."

Six employers are marginally better. They instruct the employee to consult § 152 or the IRS Publication, but then also provide a summary of the test for dependency status as a qualifying relative. The test they state correctly omits the gross income limitation, but the instructions are confusing because they do not explain that even though there is a gross income limitation in § 152, it is not applied for purposes of medical dependency. Sometimes the employer warns that the definitions are difficult to explain and so after stating the correct test, they advise the employee to confirm by consulting § 152. I coded these institutions as "B."

Finally, I coded six employers as "A" because they correctly identified the test and explained that the gross income limitation did not apply for medical dependency status. Nova Southeastern University, for example, refers the employee to the § 152 test, as amended by § 105. The University of Iowa explains the test and says further that the employee does not have to claim the partner as a dependent on the tax return in order to meet the test. Some employers cite IRS Notice 2004-79 explicitly.\textsuperscript{101}

One employer, the University of Vermont, gets a separate code of "X." It is apparently the most cautious employer. It will presume that the benefits are taxable unless the employer submits a written legal opinion that the partner is a tax dependent.

A few sample forms from the surveyed institutions are included in the Appendix to this essay.

VI. Conclusion: What Does this Data Tell Us?

I was surprised by the number of employers offering a "Declaration of Tax Dependency" form that got the law wrong. I was similarly surprised by those that said they would include the amount in taxable income because the IRS refused to recognize domestic partners as dependents.

\textsuperscript{101} See id.
I think this high level of wrong or misleading advice calls for an IRS publication that addresses the issue. To date, the IRS has issued no public document or ruling about these issues. As a result I believe many people are being overtaxed on the receipt of domestic partner benefits.  

This article is intended as a partial remedy for this situation. Since I first circulated a draft of this document in early 2010, several of the institutions listed in the Appendix have either changed or begun the process of changing their tax affidavits or their statements about taxation of benefits. Northwestern University, for example, has added a Declaration of Tax Status to its form that correctly states the test for dependency status of a partner. The form as a whole is still a bit misleading, however, because they have not revised the form for claiming a person is your domestic partner. That form requires the employee to sign underneath a statement that says he or she understands that the employer is required "to report as taxable income the premium value related to covering my Domestic Partner under the employee health, dental or vision benefit plans." I have included an asterisk by Northwestern's "F" ranking to indicate this improvement.

In the absence of an IRS publication on this topic, I am hopeful that this essay will continue to have an impact beyond those institutions that have already been alerted to their misrepresentations about the tax consequences of the domestic partner benefit. Every institution should attempt to state the tax consequences of their benefit packages correctly. To help institutions review their policies, I have included what I think is the most complete and accurate description of the tax consequences of extending domestic partner and domestic partner child benefits in Appendix B of this article. It should serve as a useful starting point for institutions interested in improving the quality of their advice. It is my hope that the publication of this article will reduce some of the hidden costs that are imposed on lesbian and gay families who benefit from employer-provided health insurance.

102. There might also be a number of employees who are being under-taxed by claiming dependency status when it is not warranted, especially in cases of the partner's children. In that situation, the test changed in 2004 to take away dependency status that had existed before 2004, because now, if the child is a "qualifying child" of the partner and the partner is a "taxpayer," then the child cannot be a dependent of the employee through whom the family is receiving health coverage.

# TABLES OF PRELIMINARY FINDINGS

## TABLE ONE—BY NAME OF INSTITUTION

<table>
<thead>
<tr>
<th>Name of University</th>
<th>Taxation of Partner</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona State</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Arizona, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>California, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>City Univ of NY</td>
<td>D</td>
<td>Requires proof (tax return) partner was claimed as dependent.</td>
</tr>
<tr>
<td>Clarkson</td>
<td>D</td>
<td>Gross income of $3500 (tax year 2008).</td>
</tr>
<tr>
<td>Colorado State</td>
<td>D</td>
<td>No amount listed.</td>
</tr>
<tr>
<td>Connecticut, Univ of</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>DePaul</td>
<td>B</td>
<td>Refers to both § 152 and IRS Pub. 17, but states test correctly.</td>
</tr>
<tr>
<td>Farleigh Dickinson</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>D</td>
<td>Gross income of $3650 (current).</td>
</tr>
<tr>
<td>Indiana State</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Indiana, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Iowa, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Johns Hopkins</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Kentucky, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Maine, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Michigan, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>New York Univ</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Northwestern</td>
<td>F*</td>
<td>*Northwestern has amended its forms and would now rate a classification of B or C.</td>
</tr>
<tr>
<td>Nova</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Oregon, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Penn State</td>
<td>D</td>
<td>Gross income of $3300 (tax year 2006).</td>
</tr>
<tr>
<td>Purdue</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Rochester</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Rutgers, State of N.J</td>
<td>D</td>
<td>Gross income of $3650 (current).</td>
</tr>
<tr>
<td>S.U.N.Y</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>SMU</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Temple</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Toledo</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Tulane</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Vermont, Univ of</td>
<td>X</td>
<td>Taxed in absence of written legal opinion on tax dependency.</td>
</tr>
<tr>
<td>Washington, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Wisconsin, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Yale</td>
<td>F</td>
<td></td>
</tr>
</tbody>
</table>
Code

A: The University states the law correctly in all respects, e.g., by explaining that § 152 has been modified by § 105 or otherwise clarifying that the gross income test is not applicable or that the employee does not actually have to claim a dependency deduction to satisfy the test.

B: The University refers only to § 152, implying that the test in that section applies but then provides the substance of the test, correctly omitting the gross income limitation.

C: The University refers only to § 152 or the IRS publication defining dependent, both of which contain the gross income limitation.

D: The University not only refers to § 152 but also states the test incorrectly by including the gross income test.

F: The University states that a same-sex partner cannot be a tax dependent and thus will tax all such benefits.

X: Other
### TABLE TWO—BY CODE

<table>
<thead>
<tr>
<th>Name of University</th>
<th>Taxation of Partner</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona State</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Iowa, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Nova</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Oregon, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Washington, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Wisconsin, Univ of</td>
<td>A</td>
<td></td>
</tr>
<tr>
<td>Arizona, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>DePaul</td>
<td>B</td>
<td>Refers to both § 152 and IRS Pub. 17, but states test correctly.</td>
</tr>
<tr>
<td>Johns Hopkins</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Kentucky, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Michigan, Univ of</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>Rochester</td>
<td>B</td>
<td></td>
</tr>
<tr>
<td>California, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Farleigh Dickinson</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Indiana State</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Indiana, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Maine, Univ of</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Minnesota</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>New York Univ</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Purdue</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>S.U.N.Y</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Temple</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>Toledo</td>
<td>C</td>
<td></td>
</tr>
<tr>
<td>City Univ of NY</td>
<td>D</td>
<td>Requires proof (tax return) partner was claimed as dependent.</td>
</tr>
<tr>
<td>Clarkson</td>
<td>D</td>
<td>Gross income of $3500 (tax year 2008).</td>
</tr>
<tr>
<td>Colorado State</td>
<td>D</td>
<td>No amount listed.</td>
</tr>
<tr>
<td>Illinois</td>
<td>D</td>
<td>Gross income of $3650 (current).</td>
</tr>
<tr>
<td>Penn State</td>
<td>D</td>
<td>Gross income of $3300 (tax year 2006).</td>
</tr>
<tr>
<td>Rutgers, State of N.J</td>
<td>D</td>
<td>Gross income of $3650 (current).</td>
</tr>
<tr>
<td>Connecticut, Univ of</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Northwestern</td>
<td>F*</td>
<td>*Northwestern has amended its forms and would now rate a classification of B or C.</td>
</tr>
<tr>
<td>SMU</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Tulane</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Yale</td>
<td>F</td>
<td></td>
</tr>
<tr>
<td>Vermont, Univ of</td>
<td>X</td>
<td>Taxed in absence of written legal opinion on tax dependency.</td>
</tr>
</tbody>
</table>

**Code**

A: The University states the law correctly in all respects, e.g., by explaining that § 152 has been modified by § 105 or otherwise clarifying that the gross income test is not applicable or that the employee does not actually have to claim a dependency deduction to satisfy the test.
B: The University refers only to § 152, implying that the test in that section applies but then provides the substance of the test, correctly omitting the gross income limitation.
C: The University refers only to § 152 or the IRS publication defining dependent, both of which contain the gross income limitation.
D: The University not only refers to § 152, but also states the test incorrectly by including the gross income test.
F: The University states that a same-sex partner cannot be a tax dependent and thus will tax all such benefits.
X: Other
APPENDIX A

SAMPLE UNIVERSITY FORMS AND POLICIES THAT INCLUDE INCORRECT TAX ADVICE

TULANE BENEFITS

Domestic Partner Benefit Coverage

This publication outlines the advantages of registering your domestic partner with Tulane University, the process by which you may register your partner at Tulane University, and the procedure for obtaining certain fringe benefits.

1. What is a Domestic Partnership?

A Domestic Partnership is defined as two individuals of the same gender who live together in a long-term relationship of indefinite duration, with an exclusive mutual commitment in which the partners agree to be jointly responsible for each other's common welfare and to share financial obligations. The Partners may not be related by blood to a degree of closeness that would prohibit legal marriage in the state in which they legally reside.

2. What are the advantages of registering my domestic partner with Tulane University?

If you are a benefits-eligible employee, your partner may obtain health, dental, and life insurance coverage, and certain other fringe benefits. If you are eligible for tuition waiver benefits for your dependents, eligibility may extend to your domestic partner as defined by the tuition waiver policy.

3. How and when may I register my domestic partner?

You can register a domestic partner at any time. A Statement of Domestic Partnership form is available from the Benefits Office. You and your partner will be asked to sign the affidavit that must be accompanied by the required documentation defined on the face of the statement. After your registration has been reviewed and your documentation approved, you will receive a copy of the Statement signed by a representative of the Tulane University Benefits Office.
4. **How do I obtain Health and/or Dental coverage for my domestic partner?**

If you are a new employee who is eligible for benefits, you can enroll your domestic partner at the same time you enroll yourself, provided that you register your domestic partner and the University approves your registration. Once the University has accepted your registration, you have 31 days from that date to enroll your partner in your health and/or dental coverage. Otherwise, you must wait until the next announced Open Enrollment Period.

5. **What is the cost of adding my domestic partner to my health, dental, and life insurance plans?**

Monthly payroll deductions for health and/or dental coverage are the same as those for employees who cover spouses and dependent children. Check with the Benefits Office for current costs.

6. **What are the tax consequences of adding my domestic partner to my health and/or dental plan?**

The employee contribution for the portion of medical and dental insurance premiums attributable to the domestic partner cannot be made on a pre-tax basis because the IRS does not recognize a domestic partner as a dependent.

7. **Am I eligible to participate in a Medical Flexible Spending Account?**

The IRS, not the University, defines what types of expenses qualify for pre-tax reimbursement. Since the IRS does not recognize a domestic partner as a dependent, a Flexible Spending Account is not available for their medical expenses not covered by health insurance.

8. **How do I obtain a Tulane ID Card for my domestic partner?**

A registered same sex domestic partner can obtain a Family Member ID Card, just as spouses do. After registering with the Benefits Office, an ID card will be issued to your domestic partner by Human Resources.
9. **How can my domestic partner obtain a Reily Membership and library privileges?**

Consult the Reily Membership Office at 865-5431 for details. Registered same sex domestic partners have library privileges. Present your ID card to use the libraries.

10. **How can my domestic partner take advantage of Tuition Waiver benefits?**

In accordance with the Tuition Waiver Policy, tuition benefits are available to domestic partners. After your domestic partner registration is approved, obtain the tuition waiver form from Human Resources and submit the completed form to Human Resources along with the proper documents by the deadlines.

11. **Are children of my domestic partner eligible for benefits?**

No, unless you have legally adopted the children and such children are claimed as dependents on your tax return.

12. **Are there tax consequences if my domestic partner uses Tuition Waiver benefits?**

Yes. As with health and dental benefits, the IRC does not extend non-taxable educational assistance (Tuition Waiver benefits) to domestic partners. The University must include the full value of the tuition benefits used by your domestic partner in your income, and taxes will be withheld accordingly. Tuition Waiver benefits for your dependent children will qualify for non-taxable educational assistance.

13. **What happens to my domestic partner’s medical coverage if I should leave the University?**

If you meet the eligibility rule to continue medical benefits after you leave the University, you will not be able to continue to cover your domestic partner under the University’s Medical Plan. Domestic partners are not eligible to continue health and/or dental benefits under COBRA.

14. **What else should I consider?**

You are encouraged to speak with a tax advisor before enrolling your domestic partner. You may name anyone as a beneficiary on group life insurance. It is not necessary to register a domestic partner to name him or her as the beneficiary. With regard to the Tulane
University Retirement Plan or Supplemental Tax Deferred Annuity Plan, if you are not legally married, you may name anyone as your beneficiary. If you are legally married, you must name your spouse for at least 50% of the account. Change of beneficiary forms for TIAA-CREF and Fidelity are available from the Benefits Office.

15. **What happens if my partner and I end our relationship?**

You must file the form "Statement of Termination of Domestic Partnership" with the Tulane University Benefits Office. You may not file a subsequent Statement of Registration of Domestic Partner until 12 months have elapsed from the date of filing of the Statement of Termination of the previous relationship. (The University will waive the 12 months waiting period only if another Affidavit is filed for the same partner.) You must notify the Benefits Office in writing within 31 days of the date the relationship ends. Your former domestic partner will no longer be eligible for any benefits privileges, and you must remove your former domestic partner from all University benefit plans. Former domestic partners will not be eligible to continue health and/or dental benefits under COBRA.

For all questions concerning benefit coverage, consult the Benefits Department of the Workforce Management Organization. You may make an appointment by calling (504) 865-5280.
STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
OFFICE OF MANAGEMENT AND BUDGET

EMPLOYEE TAX CERTIFICATION FOR
CIVIL UNION PARTNER OR DOMESTIC PARTNER BENEFIT

EMPLOYEE NAME: ____________________________________________

EMPLOYEE SSN: ________________________ PAYROLL NUMBER: __________

CIVIL UNION/DOMESTIC PARTNER NAME: __________________________

CIVIL UNION/DOMESTIC PARTNER SSN: __________________________ ENTER TAX YEAR: __________

After reviewing the dependency requirements stated below, I hereby certify that my civil union partner or domestic partner qualifies as my tax dependent pursuant to section 152 of the Internal Revenue Code and, consequently, the cost incurred by the State of New Jersey to provide health benefits coverage to my dependent partner should be deemed a non-taxable benefit for federal tax purposes.

I fully understand that if conditions change that would cause my civil union partner or domestic partner to no longer qualify as my tax dependent, I must notify Centralized Payroll of that fact in writing immediately. I acknowledge that failure to do so could subject me to criminal prosecution for federal tax fraud.

I am also aware that I will be required to file this Employee Tax Certification for Civil Union Partner or Domestic Partner Benefit form prior to the beginning of each tax year in order for Centralized Payroll to continue to treat the civil union partner or domestic partner health benefits as a non-taxable benefit.

DEPENDENCY REQUIREMENTS

To claim your civil union partner or domestic partner as a dependent for tax filing purposes, the following five requirements provided under section 152 of the Internal Revenue Code must be met:

1. Your civil union partner or domestic partner must be a member of your household during the entire taxable year, and the relationship between you and your partner must not violate local law.

2. Your civil union partner or domestic partner must receive more than half of his or her support from you. In making this determination, the amount you contribute towards your civil union partner's or domestic partner's support must be compared with the amounts received for support of your partner from all other sources, including any amounts supplied by him, or her and including earnings.

3. Your civil union partner or domestic partner must not file a joint tax return for the tax year in which you are claiming the partner as a dependent.

4. Your civil union partner or domestic partner must have gross income less than the exemption deduction amount ($3,650 for tax year 2010).

5. Your civil union partner or domestic partner must be a U.S. citizen, a U.S. national, or a resident of the U.S., Canada, or Mexico at some time during the calendar year in which you are claiming the partner as a dependent.

Before making this certification, we strongly suggest that you consult with a tax advisor to determine whether you may claim your civil union partner or domestic partner as a dependent for federal tax purposes.

SIGNATURE: ____________________________ DATE: ________________________

RETURN THIS SIGNED FORM TO YOUR PAYROLL OFFICER
Yale University
Civil Union Partner Policy for Faculty and Staff
Effective April 1, 2006
Amended August 2, 2006

Background:

As a result of the enactment of Connecticut’s new civil union law, which became effective October 1, 2005, the University has changed its policy regarding benefits for same sex couples.

Effective Date of change:

April 1, 2006

Eligibility requirements:

New Staff
The University will require that a same sex couple join in a civil union in order to be eligible to enroll in the University’s medical and/or dental benefits.

Existing same-sex couples
For those same-sex couples currently enrolled in the University’s medical and/or dental benefits, under current policy, no action is required at this time. As with all qualifying events under our benefit plans, if you currently do not have a same sex partner covered under the University’s medical or dental plan and wish to add a same sex partner outside of Open enrollment period, you may do so by attesting to the civil union within 30 days from the date of union.

Tax implications or exemptions

Because same sex unions are not recognized by the federal government, the partner benefits will continue to be subject to federal tax. Under Connecticut state law, the partner benefits will be afforded the same tax treatment as that provided to married couples provided the couple has a civil union recognized by Connecticut law.

For same sex couples moving from out-of-state, the University will recognize civil unions that are valid in other jurisdictions.

For more information please visit the following websites:

http://www.jud.state.ct.us/lawlib/Law/civilunion.htm

Revised 080206
APPENDIX B

OREGON'S INFORMATIONAL FORM STATING THE LAW CORRECTLY

State of Oregon  
Public Employees' Benefit Board Summary Plan Description

**Domestic partners and their dependents**

You may cover a domestic partner and dependents who meet certain requirements. Adding a domestic partner who is not a tax dependent will increase your tax withholding, and you will take home less pay.

PEBB provides benefits to domestic partners that are comparable to those offered to married spouses, where legally possible. You may enroll your domestic partner in all benefit coverage available to a spouse either within 30 days of a Qualified Status Change or during the open enrollment period. A domestic partner's children are also eligible for enrollment. Federal laws may require differences in administration of benefits. For example, Medicare will pay as primary coverage for a domestic partner who becomes eligible for Medicare while covered under an employee's coverage.

The member and the domestic partner are eligible if they have

- Registered a certificate of their domestic partnership under Oregon law; or
- Signed and submitted to the member’s agency a notarized Affidavit of Domestic Partnership declaring that both meet all the following criteria:
  - Are both at least 18 years of age;
  - Are responsible for each other’s welfare and are each other’s sole domestic partners;
  - Are not married to anyone;
  - Share a close personal relationship and are not related by blood closer than would bar marriage in the State of Oregon;
  - Currently share the same regular permanent residence; and
  - Are jointly financially responsible for basic living expenses defined as the cost of food, shelter and any other expenses of maintaining a household. Financial information must be provided if requested.

NOTE: An employee who has a registered certificate of domestic partnership must submit only the appropriate PEBB update forms to the agency either within 30 days of meeting the qualifications or during the open enrollment period to add coverage for a domestic partner. An employee who establishes the partnership through an Affidavit of Domestic Partnership must submit both the affidavit and appropriate PEBB forms to the agency either within 30 days of meeting the qualifications or during the open enrollment period.

**Affidavit of Domestic Partnership Process**

Eligible employees must submit an enrollment or midyear change form and a notarized affidavit to enroll domestic partners and children within the allowable time for the enrollment type. Agencies will not process a domestic partner or a partner's children enrollment until the enrollment documentation submission is complete. If requested, the member and domestic partner must be able to provide at least three forms of verification of their joint responsibility, with information dated to confirm eligibility at the time of enrollment.

**Children of Domestic Partners**

Children of eligible domestic partners may be covered by the member’s plans, whether or not the enrollment includes the domestic partner.

- An employee who has registered a domestic partnership must submit only the appropriate PEBB forms to the agency to add coverage for a domestic partner's children either within 30 days of meeting the qualifications or during the open enrollment period.
State of Oregon
Public Employees' Benefit Board Summary Plan Description

- If the employee does not have a registered certificate of domestic partnership, the employee must submit the completed, notarized Affidavit of Domestic Partnership to the agency with the paper enrollment or midyear change form.

Tax Considerations

Before enrolling a domestic partner or a partner’s children for coverage, employees should know there may be important tax considerations. Payroll will add an imputed value to the eligible employee’s taxable wages for the fair market value of the insurance premium for coverage of the domestic partner and domestic partner’s children, unless the employee notifies payroll that the domestic partner qualifies as a tax dependent under IRS rules.

Following is information provided by the Oregon Department of Justice Attorney General’s Office regarding this topic.

Domestic Partner and Domestic Partner Children as Dependents for Pre-Tax Health Benefit Purposes

Domestic Partners Eligible for Health Coverage

Group health coverage, including medical and dental benefits, is available for a domestic partner (and a domestic partner’s children) of the State of Oregon’s eligible employees. Refer to the applicable summary plan description (SPD) and enrollment materials for a definition of domestic partner and the procedures you must follow to enroll your domestic partner and or domestic partner children for coverage.

Tax Consequences of Domestic Partner Coverage

Under federal tax law, if your (non-spouse) domestic partner does not qualify as your tax dependent for health coverage purposes (as defined below), then the value of your domestic partner’s coverage will be included in your gross income, subject to federal income tax withholding and employment taxes, and will be reported on your Form W-2. This includes any portion of the premiums that your employer pays for your domestic partner’s health coverage. (The value of coverage varies, depending on the medical and dental coverage options you elect)

If your domestic partner qualifies as your tax dependent for health coverage purposes, then no portion of the premiums paid by your employer will be included in your income or be subject to federal withholding or employment taxes.

Note that if your domestic partner fails to qualify as your tax dependent for health coverage purposes for any portion of the calendar year because of a change of abode, household, or support during the year, the value of your domestic partner’s coverage for the portion of the year prior to the change will be included in your gross income and related income tax and employment tax withholding will be charged to your pay as rapidly as possible. The catch-up on withholding will reduce your take-home pay and such reduction could be for some periods. The catch up on withholding to your agency payroll must be completed before the end of the current tax year.

You should also note that state tax treatment of domestic partner health coverage will differ. See OAR 150-316.007-(B) Policy -- Application of Various Provisions of Tax Law to Domestic Partners, or call the Oregon Department of Revenue at 503-378-4988 or toll-free from an Oregon prefix at 1-800-356-4222 for more information about state tax treatment.

Although coverage is also available for children of an eligible employee’s domestic partner under your employer’s group health plan, a domestic partner’s child is unlikely to qualify as an employee’s
State of Oregon
Public Employees’ Benefit Board Summary Plan Description

tax dependent for health coverage purposes. Thus, the value of such coverage generally must be
included in your gross income.

Who is a Dependent Domestic Partner for Pre-Tax Health Coverage?
IRS Publication 501 contains information on how to determine a dependent. In general, the
following conditions must be met (in addition to meeting PEBB domestic partner eligibility
requirements) for your same-sex or opposite-sex domestic partner to qualify as your tax dependent
for pre-tax health coverage purposes under federal tax law.

- You and your domestic partner have the same principal place of abode for the entire calendar
  year;
- Your domestic partner is a member of your household for the entire calendar year (the
  relationship must not violate local law);
- During the calendar year you provide more than half of your domestic partner's total support
- Your domestic partner is not your (or anyone else’s) qualifying child under Code 152 c; and
- Your domestic partner is a U.S. citizen, a U.S. national, or a resident of the U.S., Canada, or
  Mexico.

Your domestic partner could be your federal tax dependent for health coverage purposes even if you
do not claim an exemption for him or her on your Form 1040. If your tax year is a year other than
the calendar year, use the other year instead. Your employer will also consider your opposite-sex
domestic partner to be your federal tax dependent for health coverage purposes if he or she meets the
above requirements for the first portion of the year, then you marry, and he or she remains your legal
spouse for the remainder of the year.

To determine whether you provide more than half of your domestic partner’s total support, you must
compare the amount of support you provide with the amount of support your domestic partner
receives from all sources, including Social Security, welfare payments, the support you provide, and
the support your domestic partner provides from his or her own funds. Support includes food,
shelter, clothing, medical and dental care, education, and the like. If you believe you might provide
more than half of your domestic partner’s support, you should use the support worksheet in IRS
Publication 501 (Exemptions, Standard Deduction, and Filing Information) before you complete the
Certification described below.

When is a Domestic Partner’s Child Considered a Dependent for Pre-Tax Health Coverage?
Determining whether a domestic partner’s child is a dependent is more complicated than
determining if a domestic partner is a dependent. Seeking the advice of a tax professional is
recommended before certifying that a domestic partner’s child(ren) is/are dependent(s). This is
because in addition to PEBB’s requirements for dependent children, generally all of the following
must be met for your domestic partner’s children to qualify as your tax dependent(s) for pre-tax
health coverage under federal tax law:

- The child is your domestic partner’s child, adopted child, child placed for adoption, or eligible
  foster child
- The child is a member of your household who shares your principal place of abode. (Note that
  the child is not a member of your household if your relationship with the child violates local
  law.)
- You provide over half the child’s support for the calendar year.
- The child is NOT a Qualifying child of any other taxpayer*
State of Oregon

Public Employees’ Benefit Board Summary Plan Description

- The child is a U.S. citizen, national or resident of the U.S. or a resident of Canada, or Mexico; or is an adopted child and you are a U.S. citizen or national.

*Note: Under IRS Notice 2008-5, a domestic partner’s child is not a qualifying child of the domestic partner if the domestic partner (or any other person with respect to whom the child potentially would be a qualifying child, such as child’s other parent) is not required to file a federal income tax return and either does not file such a return, or does so solely to obtain a refund of withheld income taxes.

Filing a Certification of Dependent Domestic Partner Status

If your domestic partner qualifies as your tax dependent for health coverage purposes, you can avoid having the value of your domestic partner’s health coverage treated as taxable income. To avoid taxation, you must complete and return the Certification of Dependent Domestic Partner Status, indicating that your domestic partner qualifies as your federal tax dependent for health coverage purposes. Because the determination of whether a person is a tax dependent for health coverage purposes turns on facts solely within your knowledge, your employer cannot make this determination for you. You should make this determination in consultation with your tax professional. You will be asked to complete a Certification each year at open enrollment. For any year in which your employer does not receive a Certification from you, your employer will assume that your domestic partner does not qualify as your federal tax dependent for health coverage purposes for that year.

This information is only a summary of the tax provisions governing the tax status of a domestic partner (or the domestic partner’s children) for health plan purposes, and is not intended nor should it be relied upon as legal or tax advice. Due to the complexity of these tax rules and the potential impact of any imputed income you may incur, you should seek advice from a competent tax professional before certifying as to the tax status of the person being enrolled.

Removing a Domestic Partner and Domestic Partner’s Children from Coverage

On dissolution of a domestic partnership, you must remove the domestic partner and partner’s children from coverage within 30 days of the date of dissolution. If you terminate a Domestic Partnership by Affidavit, you must complete and submit a Termination of Domestic Partnership form and any other necessary midyear change forms. You may also terminate coverage for a domestic partner and partner’s children within 30 days of and consistent with a qualified midyear change event.