# RESTRICTIONS ON EQUAL TREATMENT OF UNMARRIED DOMESTIC PARTNERS

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## I. INTRODUCTION

With the growth in the number of non-traditional homes, there has been an increase in the number of individuals and organizations requesting employment benefits for unmarried domestic partners ("domestic cohabitants," "spousal equivalents")[1] of employees. Even though national public opinion has not focused on this issue, the number of requests is not insignificant. This employment benefits issue is not limited to same-sex couples.[2] Historically, unmarried couples, heterosexual or not, have not qualified for employment benefits equal to the benefits of married couples. Benefits such as health and accident insurance have been limited to the employee, his or her legal spouse and blood relatives.[3] Local and state anti-discrimination laws, as well as voluntary action by some employers, are contributing to an increase in the number of employers offering benefits to unmarried partners similar to those offered to married couples.[4] Such plans, however, do not provide true equality, and they may create unexpected problems and taxes for employers and employees.

This article first discusses the efforts and plans to provide equal benefits for married and unmarried couples. Next, it discusses the Internal Revenue Service ("I.R.S.") rulings concerning taxability of some of these benefits and the background of statutory provisions and court decisions on which the I.R.S.

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[1] As with other issues infused with ideological and political rhetoric, the "proper" term frequently depends on the person defining propriety. This article is not intended to support or attack any person's politics, ideology or orientation. The term "domestic partner" has been chosen because it is the one used most consistently in legislation and journalism. In this article, the term is intended to include all adult persons who live together in a relationship that has many or all of the characteristics traditionally associated with married heterosexual couples. Unfortunately, the term "partner" carries inappropriate legal connotations. It has a formal legal meaning, particularly for tax purposes, that includes a "doing business" component not normally present in domestic situations; merely sharing expenses is not a legal partnership. Perhaps legislation and policy use "partner" to emphasize the shared expenses requirement, intending to preclude benefits for persons who merely live in the same dwelling.

[2] In states such as Oregon, where same-sex couples can marry, the issue relates solely to distinctions between couples who are married and those who are not. *See, e.g.*, Ross v. Denver Dep't of Health & Hosp., 883 P.2d 516 (Colo. App. 1994).

[3] This limitation results primarily from the treatment of benefits in the Internal Revenue Code, discussed in part III, *infra*.

[4] *See* discussion *infra* part II.

rulings rely. The conclusions are essentially inevitable: (a) requirements used to distinguish domestic partners from roommates create inequality; (b) until Congress amends the Internal Revenue Code ("I.R.C."), employee health insurance benefits for unmarried partners will produce additional taxable income to the employee, and additional expenses for the employer, creating a second level of inequality.

## II. Domestic Partner Benefits Provisions

Among the recent announcements concerning benefits coverage:

- Then-Governor Cuomo of New York announced at a June 1994 reception hosted by the state Office of Lesbian and Gay Concerns that the state will begin offering health benefits to "domestic partners" of state employees.[5]
- In February 1994, the Los Angeles City Council extended health and dental benefits to "domestic partners" of city employees, and in May 1994, similar action was taken with respect to disability insurance, catastrophic leave benefits, and employee assistance program benefits.[6] "The City Council also directed the city attorney to prepare a ballot measure to amend the city charter to allow surviving unmarried domestic partners of city employees to receive pension benefits."[7] Persons wishing to take advantage of those benefits would have to sign an affidavit stating that they have been together for at least a year, and they would also have to meet "certain other requirements."[8]
- Northern Telecom Inc., a Canadian headquartered company, introduced "domestic partner" health benefits as part of its "flexible medical plan."[9] To qualify, an unmarried couple must have lived together "in an emotionally committed relationship" for at least a year, and must provide information about joint financial dealings.[10]
- Since 1993, Viacom International employees have been able to add "spousal equivalents" to their coverage under the company's self-insured indemnity option plan.[11] Eligibility requires documentation of cohabitation

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[5] *New York to Negotiate Benefits for State Workers*, 21 Pens. & Ben. Rep. (BNA) 1331 (July 1, 1994). Implementation of the plan apparently requires agreement by state employee unions but not the legislature. *Id.*

[6] *Los Angeles City Council Approves Additional Benefits*, 21 Pens. & Ben. Rep. (BNA) 976 (May 18, 1994) [hereinafter *Los Angeles*].

[7] *Id.*

[8] *Id.* The scope of the action was rather limited because it covered only non-union employees; similar benefits for union represented employees await collective bargaining.

[9] *Northern Telecom to Offer Benefits to Unmarried Partners of Employees*, 21 Pens. & Ben. Rep. (BNA) 835 (Apr. 25, 1994) [hereinafter *Northern Telecom*].

[10] *Id.* It would be interesting to see how the personnel department intends to determine if a relationship has the requisite "emotionally committed" nature.

[11] *Viacom to Offer Health Coverage to Same-Sex Partners of Employees*, 19 Pens. & Ben. Rep. (BNA) 2051 (Nov. 16, 1992).

and financial interdependence.[12]

- In May 1992, MCA Corp. announced that it would soon provide health benefits to employees' same-sex partners, but not heterosexual domestic partners.[13]

Estimates of the number of employers that provide domestic partner benefits vary. An article published in BNA's *Pension & Benefits Reporter*[14] quoted a benefits consulting firm, Hewitt Associates of Chicago, as estimating that about fifty private employers in the United States offer domestic partner benefits.[15] However, while announcing the introduction of domestic partner bills in the California State Assembly, Assemblyman Richard Katz stated that over 130 major U.S. corporations provide health benefits for employees' domestic partners.[16] The BNA article notes that although sixty-three percent of employers have policies prohibiting sexual orientation discrimination, only two percent of those companies provide domestic partner benefits.[17]

Not all of the recent changes in employment benefits programs increase domestic partner benefits. Measures have been introduced in various states and localities that may limit employers' ability to provide benefits to same-sex couples.[18] For example, in May 1994, sixty-two percent of Austin, Texas voters approved the repeal of the city's extension of insurance benefits to domestic partners of city employees.[19] Additionally, in April 1994, a Fulton County,

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[12] *Id.* At the time of the announcement, November 1992, none of the HMO plans available at Viacom allowed spousal equivalent coverage.

[13] *MCA to Offer Health Coverage to Same-Sex Partners of Employees*, 19 Pens. & Ben. Rep. (BNA) 888 (May 25, 1992). The article noted some disagreement on the legality of a plan that allowed benefits to same-sex partners but not opposite-sex partners. A San Francisco A.C.L.U. attorney is quoted as stating that the view that the plan might be illegal is the "minority view." This is another expression of the opinion apparently held by many "rights" advocates to the effect that it is appropriate to discriminate against persons who belong to any group other than the championed group. MCA's announced plan obviously discriminates against heterosexual employees.

[14] *Few Programs Exist Despite Praise for Fairness, Business Value*, 21 Pens. & Ben. Rep. (BNA) 238 (Jan. 17, 1994) [hereinafter *Programs*].

[15] *Id.*

[16] *California Legislation Introduced to Recognize Domestic Partnerships*, 21 Pens. & Ben. Rep. (BNA) 477,478 (Feb. 28, 1994). One of the introduced bills would establish a state level registry for unmarried couples. *Id.* To qualify, couples would have to be over 18, not be blood relatives, share a common residence and have joint responsibility for living expenses. *Id.*

[17] *Programs, supra* note 14, at 239. The Vermont Labor Relations Board found that the University of Vermont violated its own policy prohibiting discrimination by refusing to provide benefits for same-sex couples. Grievance of B.M., S.J., C.M., and J.R., Vt. Labor Rel. Bd., No. 92-32 (1993), *noted in Programs, supra* note 14, at 239.

[18] Most of these, however, merely prohibit or limit laws making it illegal to discriminate against persons based on sexual orientation. These measures do not require discrimination or preclude equal treatment. Some measures only limit governmental actions.

[19] *Programs, supra* note 14, at 239. The proposition approved by the voters limited

Georgia superior court ruled that Atlanta's extension of health coverage to unmarried partners of city employees was invalid because it violated Georgia state statutes and the Georgia Constitution.[20]

In the programs providing benefits to domestic partners, complete parity with married couples is not achieved. The previously mentioned programs all require (a) some degree of relationship longevity, often six months or a year; (b) actual cohabitation; and (c) objective or sworn proof of joint financial responsibility. Married couples may have to prove that they are legally married, but there is rarely any minimum time requirement or actual cohabitation requirement. While state statutes may require mutual support between spouses, proof of compliance is rarely required before an employee can obtain benefits for his or her spouse.

The discussed plans also may not allow benefits to domestic partners who have the traditional American family except for the marriage license. That traditional family includes one spouse, traditionally the female half of the heterosexual couple, who does not work outside of the home. How can a couple prove shared financial responsibility when only one has income?

The problem with equal treatment arises because most plans attempt to distinguish between domestic cohabitants who are essentially equivalent to married couples and those who are not equivalent (here called "roommates" for lack of a better term). Without some limitation, any person living at an employee's address could be included in the employee's benefit package. Defining the limitation presents significant problems. The plans usually use minimum longevity, emotional commitment, intimacy, or shared financial responsibilities, either singly or in some combination, to define the limitation.[21] Usually, roommates share some expenses, such as rent and utilities. Thus, shared expenses is not a failsafe indicator. Length of cohabitation also does

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city employees' benefits to an employee's husband, wife, and immediate family. The previous city program provided benefits for persons who shared an employee's household and resources and maintained a "close, personal, intimate" relationship. Again, it would be interesting to see how the latter requirement was verified. Persons opposing the repeal accused their opponents of using gays and lesbians as a punching bag for ulterior (reactionary, right, Christian) political purposes. No facts were cited that proved or implied that 62% of Austin's voters were ultra-conservative Christians. *See id.*

Apple Computer Inc. experienced problems in Texas. *Id.* at 238. Opposition to Apple's application for a development-related tax break in Williamson County, Texas cited the company's medical and dental benefits for same-sex partners. *Id.*

[20] McKinney v. City of Atlanta, CA No. E-16763 (Superior Ct. Fulton County Apr. 28, 1994), *reported in Atlanta Health Coverage Ordinance Unconstitutional, Georgia Court Rules*, 21 Pens. & Ben. Rep. (BNA) 895 (May 2, 1994). The court ruled that the measure was inconsistent with Georgia's Municipal Home Rule Act, "exceeding the city's authority to deal with the status of individuals." *Id.* There were indications that the city would appeal the decision.

[21] *See, e.g., Los Angeles, supra* note 6, at 977; *Northern Telecom, supra* note 9, at 836.

not guarantee a marriage-like arrangement. Sexual intimacy may be a distinguishing factor but it defies objective verification. The Supreme Court has held that the government has no business intruding into the bedrooms of married or unmarried couples.[22] It is unlikely that the courts would allow employers or insurance companies any greater access.

Most attempts to solve the roommate problem effectively continue discrimination between married and unmarried couples. Many, if not most, benefit plans do not require married couples to prove intimacy as a condition of obtaining or continuing coverage. Similarly, married couples usually do not have to prove cohabitation. The problem really comes down to the difference in legal status. Common law holds a husband liable for his wife's necessary expenses, including medical and funeral expenses.[23] There is no comparable legal responsibility for unmarried domestic cohabitants.[24]

## III. Tax Ramifications

Domestic partners raise some interesting income tax issues. Probably the most publicized is the so-called "marriage penalty." Two income earning individuals pay less income tax if they are unmarried than they would pay if they are married, particularly if one or both of them can qualify for "head of household" status.[25] The amount of the "penalty" varies with the parties' incomes and number of dependents. In contrast, domestic partner health benefits *increase* the employee's taxable, but not real, income.

Under I.R.C. § 106,[26] employer contributions for health and accident insurance are excluded from the employee's gross income.[27] However, that exclusion is limited to contributions made for coverage of the employee and his or

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[22] Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[23] *See, e.g.*, City of Detroit v. Eisele, 108 N.W.2d 763, 764 (Mich. 1961); *In re* La Freniere's Estate, 36 N.W.2d 147, 148 (Mich. 1949).

[24] Even the proposed or enacted domestic partner registration provisions do not trigger the same legal responsibilities as does marriage. *See, e.g.*, proposed California legislation cited *supra* text accompanying note 16.

[25] For example, if two persons, each with $30,000 in taxable income, file a joint return, their tax is $12,004. If those same persons file independently, and one qualifies as head of household, the total tax is $10,079. *Compare* I.R.C. § 1(a) (1988 & Supp. V 1993) (relating to married individuals filing joint returns) *with* I.R.C. § 1(b) (relating to heads of household) *and* I.R.C. § 1(c) (relating to unmarried individuals). All references to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended through December, 1994, which is codified at Title 26 of the U.S. Code.

[26] I.R.C. § 106 (1988 & Supp. V 1993).

[27] Some of the currently proposed national health plans appear to repeal or limit exclusion of employer paid health benefits from the employee's taxable income. A repeal would eliminate the problem discussed in this article. Perhaps it would be interesting to learn which groups are advocating that particular provision.

her dependents, as defined in I.R.C. § 152.[28] In a series of letter rulings, the I.R.S. has consistently taken the position that amounts paid for domestic partners' health benefits are not excluded from the employee's gross income.[29]

The I.R.S. position is that employer-paid health insurance coverage of a domestic partner is taxable income to the employee if his or her cohabitant cannot be claimed as a dependent because of I.R.C. § 152(b)(5).[30] That section prohibits an otherwise valid dependency claim if the parties' relationship is "in violation of local law."[31] In each letter ruling, the requesting government entity was prohibited from, or chose not to practice, employment discrimination based on marital status.[32] As a result, an employee could include a domestic partner in his or her employer's medical insurance benefit program or could receive reimbursement for that person's medical expenses through a similar program.[33]

Each letter ruling concluded that the value of the benefit attributable to the cohabitant must be included in the employee's gross income.[34] The employer must, therefore, report the value of those benefits in the same manner and subject to the same employer payments and payroll deductions as regular wages.[35] Although the I.R.S. letter rulings responded to inquiries from state, county and city officials concerning tax treatment of employee benefits, there is no reason to believe that the rules do not apply to all employers.

The I.R.S.'s conclusions concerning the amount to be included in the employee's wages have been inconsistent. The earliest letter ruling states:

> The amount of compensation includible in the employee's gross income will be the fair market value of such coverage determined, under the principles set forth in section 1.61-21(b)(2) of the regulations, on the basis of the amount that an individual would have to pay for the particular coverage in an arm's-length transaction (i.e., *at individual policy rates*).[36]

This conclusion presents difficulties beyond the additional tax burden. It

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[28] I.R.C. § 152 (1988 & Supp. V 1993); Treas. Reg. § 1.106-1 (1994) (dealing with contributions by employers to accident and health plans). *See also* I.R.C. § 105(b) (1988 & Supp. V 1993) (addressing amounts expended for medical care).

[29] *See* Priv. Ltr. Rul. 92-42-012 (July 20, 1992); Priv. Ltr. Rul. 92-31-062 (May 7, 1992); Priv. Ltr. Rul. 91-09-060 (Dec. 6, 1990); Priv. Ltr. Rul. 90-34-048 (May 29, 1990).

[30] I.R.C. § 152 (b)(5) (1988 & Supp. V 1993). *See* Private Letter Rulings cited *supra* note 29. The issue has not yet been discussed in a published court decision.

[31] I.R.C. § 152(b)(5) (1988 & Supp. V 1993).

[32] *See* Priv. Ltr. Rul. cited *supra* note 29.

[33] *See id.* In one instance, the subject city had adopted a "Domestic Partnership" statute that required an unmarried couple to execute an enforceable declaration of domestic partnership before the employee's cohabitant could be covered. Priv. Ltr. Rul. 92-31-062 (May 7, 1992). The additional formality did not change the result.

[34] *See* Priv. Ltr. Rul. cited *supra* note 29.

[35] *See id.*

[36] Priv. Ltr. Rul. 90-34-048 (May 29, 1990) (emphasis added).

requires the employer to determine what the domestic partner would have to pay for individual coverage, which requires an individual inquiry into that person's age, medical history, and present physical condition.

The I.R.S. has since reconsidered this problem. Later letters state:

> [T]he amount includible in the employee's gross income is *the fair market value of the group medical coverage*, notwithstanding that the fair market value of the group coverage may be substantially less or more than the fair market value of individual coverage or the subjective value of the coverage to the employee.[87]

The more recent I.R.S. position is obviously much less onerous, both for the employer because the amount can be determined by simple subtraction, and for the employee because group coverage is usually less expensive than individual coverage. However, the result remains unreasonable and probably represents a federally forced violation of state anti-discrimination laws.

### A. *The Limitation on "Dependent"*

The I.R.C. § 152(b)(5) limitation on the definition of "dependent," which is the basis for the I.R.S. distinction between married and unmarried couples, is a relic from pre-civil rights times. It provides, in part: "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."[88] In isolation, § 152(b)(5) seems innocuous because it merely denies "member of household" status to any individual with whom the taxpayer has a relationship that is proscribed by state law. However, it operates in conjunction with I.R.C. § 152(a)(9), which allows a taxpayer to claim as a "dependent" any person who lives with the taxpayer during the entire year *and is "a member of the taxpayer's household."*[89] The result is that if the relationship between the taxpayer and the person living in the taxpayer's home is "in violation of local law," the taxpayer cannot claim that person as a dependent for the § 151 exemption. Because the health insurance exclusion relies on the § 152(a) definitions, § 152(b)(9) causes unmarried employees imputed income.[40] Economic reality, the theoretical touchstone of the Internal Revenue Code, is irrelevant to § 152(b)(5)'s operation.

The first part of each "dependent" definition in § 152(a) is strictly economic in that the taxpayer must provide more than half of the dependent's

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[87] Priv. Ltr. Rul. 92-31-062 (May 7, 1992) (emphasis added). *See also* Priv. Ltr. Rul. 92-42-012 (July 20, 1992); Priv. Ltr. Rul. 91-09-060 (Dec. 6, 1990).

[88] I.R.C. § 152(b)(5) (1988 & Supp. V 1993).

[89] I.R.C. § 152(a)(9) (1988 & Supp. V 1993) (emphasis added). The standard support test must also be satisfied.

[40] Similarly, I.R.C. § 213 allows deduction of expenses for medical care of the taxpayer, his or her spouse, or a dependent "as defined in section 152". *See* Peacock v. Commissioner, 37 T.C.M. (CCH) 177, 183 (1978); Davis v. Commissioner, 23 T.C.M. (CCH) 1099, 1100 (1964).

support.[41] Before 1954, "dependent" was limited to the taxpayer's relatives by blood or marriage.[42] In the 1954 recodification, § 152(a)(9) added a new category of "dependent" based on physical living arrangements. Under that subsection, even if not related by blood or marriage, a "dependent" is: "[a]n individual . . . who, for the taxable year of the taxpayer, has as his [or her] principal place of abode the home of the taxpayer and is a member of the taxpayer's household."[43] Section 152(a)(9) neither has nor implies any requirement concerning the non-economic aspects of relationships. According to the sparse legislative history, Congress added § 152(a)(9) to allow a dependency exemption whenever the taxpayer actually supported a person who resided in her or his home.[44] One stated example was a foster child.[45] However, the examples in the legislative history were expressly and intentionally non-inclusive.[46]

At least one person took Congress at its word. In his 1954 personal tax return, Leon Turnipseed claimed Tina Johnson as a dependent, relying on § 152(a)(9).[47] The I.R.S. denied the claimed exemption despite the fact that Turnipseed clearly satisfied the statute's requirements.[48] On appeal, the Tax Court imposed a moral gloss on Congress' unambiguous language.[49] The Tax Court's emotive decision was prompted by the fact that Tina Johnson was Mrs. David Johnson, "living in sin" with another man, Turnipseed, and even bearing a child while so doing.[50] The Tax Court bluntly stated the decision's basis:

> The uncontroverted facts disclose that petitioner in the taxable year in question was living in adulterous cohabitation with Tina Johnson, the undivorced wife of David Johnson . . . . In our opinion, Congress never intended . . . [I.R.C. § 152(a)(9)] to be construed so literally as to permit a dependency exemption for an individual whom the taxpayer is maintaining in an illicit relationship in conscious violation of the criminal law of the jurisdiction of his abode.[51]
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> We are of the opinion that to so construe the statute would in effect ascribe to Congress an intent to countenance, if not aid and encourage, a

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[41] I.R.C. § 152(a) (1988 & Supp. V 1993).

[42] I.R.C. § 25(b)(3) (1939).

[43] I.R.C. § 152(a)(9) (1988 & Supp. V 1993).

[44] *See* S. REP. NO. 1622, 83d Cong., 2d Sess. 194 (1954).

[45] *See id.*

[46] *See id.* A similar example was incorporated into the Regulations. *See* Treas. Reg. § 1.152-1 (1995).

[47] Turnipseed v. Commissioner, 27 T.C. 758, 759 (1957).

[48] *Id.*

[49] *Id.* at 760-61.

[50] *Id.* at 760. It is not apparent from the opinion's stated facts that Turnipseed was the child's father.

[51] The facts stated in the opinion do not indicate that the taxpayer was actually aware of the relevant state statute or its potential application to his living arrangements.

> condition not only *universally regarded as against good public morals*, but also constituting a continuing, willful, open, and deliberate violation of the laws of the State of Alabama . . . . This we are unable to do.
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> In so interpreting . . . [§ 152(a)](9)] we do not intend to hold that its purpose is to be limited to cases falling within the example set forth in the Committee Report, but are here applying the well settled rule that statutes should receive a sensible construction, so as to effectuate the legislative intention and, if possible, avoid an absurd conclusion.[52]

The Tax Court obviously felt it was irrelevant that Ms. Johnson had been separated from, and not supported by, her legal "husband" for four years before she became a member of Turnipseed's household.[53]

The Tax Court's righteousness was apparently shared by others. Congress adopted a similar moralistic stance when it retroactively codified *Turnipseed*'s result by adding § 152(b)(5) in the Technical Amendments Act of 1958.[54]

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[52] *Id.* at 760-61 (emphasis added) (citing and footnoting Ala. Code tit. 14, § 16 (1940)). The Alabama statute provided:

> 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.* at 761, n.3. Apparently the Alabama legislature believed it was less offensive for a person to live with a variety of companions; fidelity between unmarried couples is directly discouraged.

The case authority cited in *Turnipseed* was Bassett v. Commissioner, 26 T.C. 619 (1956) (concerning the proper year for deduction of pre-paid medical expenses, and written by Judge LeMire [*Turnipseed*'s author]), Sorrells v. United States, 287 U.S. 435 (1932) (concerning the government's contention that entrapment was not a defense to a Prohibition violation, despite the egregious nature of the entrapment), and United States v. Kirby, 74 U.S. (7 Wall.) 482 (1868) (concerning a criminal charge of delaying the U.S. mail by arresting the mail carrier on a local murder warrant). There was no reference to decisions disallowing deduction of fines as business expenses only when allowing the deduction would "frustrate sharply defined national or state policy." *See, e.g.*, Lilly v. Commissioner, 343 U.S. 90, 96-97 (1952); Commissioner v. Heininger, 320 U.S. 467, 473-74 (1943). The Tax Court's failure to refer to those decisions, which are analogous, is probably because they would not support the conclusion the judges wished to reach. The Tax Court cited no authority concerning Congress' assumed intent not to allow a dependency exemption under the circumstances. Apparently the court felt that its own moral indignation was sufficient proof of congressional intent.

[53] *Turnipseed*, 27 T.C. at 759. In the first of those four years, Mr. Johnson contributed $52 to the support of his wife and his two children. Thereafter, he contributed nothing. *Id.*

[54] Pub. L. No. 85-866, § 4(c), 72 Stat. 1606, 1607 (1958) (codified at I.R.C.

Again, the legislative history is sparse. The supporting committee reports explained that the provision "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."[55] There was no attempt to provide a tax policy basis. The section is also somewhat irrational in that it does not prevent the taxpayer from claiming the cohabitant's children as dependents.[56]

In the years since its enactment, a number of taxpayers have contended that § 152(b)(5) did not preclude their claimed exemptions. However, the Tax Court and other courts, with one exception, have been remarkably consistent in deciding against the taxpayer. In various cases, courts have held:

- that the taxpayer was required to prove that it was not public knowledge that he and his cohabitant were not married;[57]
- that § 152(b)(5) was not an unconstitutional invasion of the taxpayer's right to privacy because any invasion resulted from state law, not federal law;[58]
- that the facts that state officials had not prosecuted, and the taxpayer's neighbors had accepted the couple as husband and wife, are irrelevant;[59]

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§ 152(a)(9) (1988)). The same provision inserted a parenthetical phrase in § 152(a)(9) to expressly indicate that it does not allow an additional exemption for the taxpayer's spouse, whose exemption is included in § 151. *See* I.R.C. § 152(a)(9) (1988).

[55] *See* H.R. REP. NO. 775, 85th Cong., 1st Sess. (1957), 1958-3 C.B. 811, 817-18; S. REP. NO. 1983, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 4791, 4804. The provision poses an interesting question for persons in states that do recognize common law marriage. Either directly or by implication, those states' laws validate the parties' relationship *ab initio*, once the requisite time has passed. After a common law marriage is established, can the spouses go back and amend their returns for prior years? Must they?

[56] *See* Martin v. Commissioner, 32 T.C.M. (CCH) 656, 657 (1973).

[57] Peacock v. Commissioner, 37 T.C.M. (CCH) 177, 182 (1978). In *Peacock*, the taxpayer and his claimed dependent appeared to comport themselves as husband and wife in all respects, including her use of his last name. An Arizona statute prohibited "open and notorious cohabitation or adultery." *Id.* T.C.M. at 182 (quoting ARIZ. REV. STAT. § 13-222 (renumbered as § 13-1409) (1989). To reach its result the Tax Court had to assume that unmarried cohabitation was "open and notorious" unless proven otherwise. Apparently there is no presumption of innocence in this type of case.

[58] Ensminger v. Commissioner, 610 F.2d 189 (4th Cir. 1979), *aff'g* 36 T.C.M. (CCH) 934 (1977) (involving a state statute requiring proof of sexual intercourse before the relationship was illegal). Because the court found the effect of § 152(b)(5) indirect, only a rational basis was required to uphold the section. A rational basis was found in Congress' presumed intent to conform federal with state law. *Id.* at 192.

[59] Eichbauer v. Commissioner, 30 T.C.M. (CCH) 581, 583 (1971). The Washington statute in that case made it a gross misdemeanor to "lewdly and viciously cohabit." *See id.* at 583 (quoting WASH. REV. CODE § 9.79.120 (1970) (repealed 1976)). The Tax Court relied on encyclopedia definitions to find that the taxpayer's relationship violated Washington law. *See id.* The admitted cohabitation was, in effect, assumed to be "lewd

and

- that a new state law enabling "common law" marriages to be legitimized did not overcome the existing state law criminalizing fornication.[60]

At least one court has applied § 152(b)(5) with an eye to contemporary society. In *In re Shackelford*,[61] the U.S. District Court for the Western District of Missouri considered the I.R.S.'s contention that the taxpayer had improperly claimed a dependency exemption.[62] On her 1976 return, Mary M. Shackelford claimed her three minor children and Mr. Francis Simons, who was unemployed, as dependents.[63] Both Ms. Shackelford and Mr. Simons were single and, as the court noted, "[t]heir bedside activities were completely private."[64] The I.R.S. denied the dependency exemption based on § 152(b)(5) and a Missouri statute that stated, in relevant part: "[e]very 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."[65] The district court held that "merely living together" does not violate that statute:

> [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 married to each other, to be publicly living together and cohabiting with each other", still be applicable today? I think not.[66]

Ms. Shackelford's claimed exemption was allowed. The district court's construction of the Missouri statute is not unreasonable.

State laws couched in value laden terms are susceptible to the *Shackelford* solution. For example, the Arizona statute involved in *Peacock* criminalizes "open and notorious cohabitation or adultery"[67] while the Washington statute

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and vicious." *Id.*

[60] Nicholas v. Commissioner, 62 T.C.M. (CCH) 467 (1991). The new statute required a court order finding that the parties had a contractual relationship, held themselves out as husband and wife, and undertook the relationship normally existing between husband and wife. UTAH CODE ANN. § 30-1-4.5 (1989). The taxpayer had not obtained a court order. Based on the Tax Court's analysis, a court order under the Utah statute would probably only be applied prospectively for federal tax purposes, even though the statute acts retrospectively. *Nicholas*, 62 T.C.M. at 468-69.

[61] 3 B.R. 42 (Bankr. W.D. Mo. 1980).

[62] *See id.* at 44.

[63] *Id.* at 43.

[64] *Id.* It was probably helpful that Ms. Shackelford and Mr. Simons had no children together, unlike many of the other taxpayers involved in § 152(b)(5) cases.

[65] *Id.* at 44 (quoting MO. ANN. STAT. § 563.150 (Vernon 1979)).

[66] *Id.*

[67] *See Peacock*, 37 T.C.M. at 182 (quoting ARIZ. REV. STAT. ANN. § 13-222 (since renumbered § 13-1409 (1989))).

involved in *Eichbauer* proscribes "lewdly and viciously cohabit[ing]."[68] Interpreting those statutes based on current community standards would place cohabiting couples in the same position vis-a-vis the I.R.S. as they are vis-a-vis their friends and neighbors and under enforced state laws. However, state statutes that do not include value laden terms are not amenable to the *Shackelford* solution. For example, the Utah law involved in *Nicholas* labels all sexual intercourse between persons not married to each other as "fornication"[69] and imposes criminal penalties; there is no requirement that "public decency" be "outraged." When there are no value laden terms, it is difficult to interpret the statute based on contemporary values.

When a state statute does contain value laden terms, there is no compelling reason why contemporary values should not be used. The courts have supplied the rationale that § 152(b)(5) was intended to conform the I.R.C. with state law. Based on the lack of prosecution, states are arguably interpreting their sex offense laws as not criminalizing consensual adult cohabitation. Applying contemporary standards to value laden sex offense statutes would conform to state law as interpreted by the state.

The alleged rationale for disallowing a dependency deduction for non-married cohabitants is that if Congress allowed such a deduction, Congress would appear to be condoning "immoral" activities condemned by the state. That rationale is extremely hollow when the state, through inaction, condones those activities. The end result is that the I.R.S. is placed in the position of acting as the morals squad for local police and prosecutors. At least in theory, the I.R.C. is morally neutral and is not a weapon for combating crimes unrelated to tax issues. While the response to illegal drug trafficking may politically justify disallowing business expense deductions for the expenses of illegal drug traffickers,[70] no similar public outcry exists concerning private consensual activities.[71] In contrast, there is at least some public support for, and there are some laws requiring, nondiscrimination concerning marital status.

## IV. CONCLUSION

Companies that provide health benefits to employees' domestic partners, for whatever reason, will not create equality between married and unmarried

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[68] *See Eichbauer*, 30 T.C.M. at 583 (quoting WASH. REV. CODE § 9.79.120 (1970) (repealed 1976)).

[69] *Nicholas*, 62 T.C.M. at 468 (construing UTAH CODE ANN. § 76-7-104 (1990)). It would be interesting to see how the I.R.S. would support its position if the cohabitants had no children. Unfortunately, placing the burden of proof on the taxpayer precludes the I.R.S. from having to prove its case.

[70] *See* I.R.C. § 280E (1988).

[71] Another factor that makes the I.R.S.'s "morals police" role rather anomalous, if not ludicrous, is the "marriage penalty" exacted when a couple does obtain state sanction. If cohabitants have children in their home and both work, their combined taxes are less if they are not married. This, therefore, encourages the situation discouraged by § 152(b)(5).

couples. One source of inequality is the amount and type of proof needed to qualify for benefits. Things that are assumed with respect to married couples must be proven by unmarried couples. It may be difficult to eliminate that inequality and still exclude benefits to employees' roommates.

The second source of inequality is the combination of I.R.C. § 152(b)(5) and states' morals laws. The I.R.C. forces unmarried employees to report the value of their companion's health coverage as income, thus causing higher taxes for the same real income. These benefits also increase the employer's costs. The value of the cohabitant's benefit is included in the tax base subject to social security, Medicare, unemployment and other taxes. In addition to these direct costs, there are the indirect costs of establishing unmarried employees' qualification for the benefits, increased record keeping, and so on.

It is unlikely that Congress will repeal § 152(b)(5). Voting for repeal of that provision may be interpreted by some voters as condoning "immoral" activities. However, there is another way to solve the problem, consistent with the presumed congressional purpose, without placing Senators and Representatives in the position of apparently condoning lifestyles some voters find repugnant. I.R.C. § 162(c) precludes deduction of illegal bribes as a business expense:

> No deduction shall be allowed . . . for any payment . . . made, directly or indirectly, to any person, if the payment constitutes an illegal bribe, illegal kickback, or other illegal payment . . . under any law of a State (*but only if such State law is generally enforced*), which subjects the payor to a criminal penalty or the loss of license or privilege to engage in a trade or business.[72]

By adding the emphasized parenthetical phrase in § 162(c) to § 152(b)(5), Congress would not be infringing on state policy. In fact, it would be more consistent with state policy than the current statute. At the same time, congresspersons could rightfully tell voters to express their moral arguments to local government, where they are more properly addressed.

Amending or repealing § 152(b)(5) would not fully resolve the problem. Given escalating health care costs, employers' concerns are understandable. Perhaps state laws relating to married couples justify a legal distinction between married and unmarried couples, but it is unlikely that actuarial statistics do.

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[72] I.R.C. §162(c)(2) (1988) (emphasis added).