

FACT SHEET

SUBJECT: Extension of Benefits to Same-Sex Domestic Partners

BACKGROUND INFORMATION:

I. On June 2, 2010, the White House issued a memorandum, subject as above. It directed Agencies to immediately extend a host of benefits to their employee's same-sex domestic partners and the children of those partners, as permitted by law. (There are a number of instances where benefits may not be conveyed to the same-sex domestic partners of employees and the children of those partners because of a statutory conflict with the Defense of marriage Act (DOMA).) To that end, in Section 1 of the memo the President ordered the following:

a. The Director of OPM to take the following actions:

1. Clarify that the children of employee's same-sex domestic partners fall within the definition of "Child" for purposes of Federal Child Care subsidies and where appropriate, child-care services.
2. Clarify that for purposes of Employee Assistance Programs (EAP), same-sex domestic partners and their children qualify as "family members".
3. Issue a proposed rule that would clarify that employee's same-sex domestic partners qualify as "family members" for purposes of non-competitive appointments made pursuant to EO 12721 of July 30, 1990. (EO has to do with overseas employees.)
4. Issue a proposed rule that would add the same-sex domestic partners of federal retirees to the list of individuals presumed to have an insurable interest in the employee pursuant to 5 U.S.C. 8339(k)(1), 8420. (survivor annuity)
5. Clarify that under appropriate circumstances, employee's same-sex domestic partners and their children qualify as dependents for purposes of evacuation payments made in accordance with 5 U.S.C. 5522-5523.
6. Amend its guidance on implementing President Clinton's April 11, 1997 memo on "Expanded Family and Medical Leave Policies" to specify that the 24 hours of unpaid leave made available to Federal employees in connection with (i) school and early childhood education activities; (ii) routine family medical purposes; and (iii) elderly relatives health or care needs, may be used to meet the needs of an employee's same-sex domestic partner, or the same-sex domestic partner, or partner's children.
7. Clarify that employee's same-sex domestic partners qualify as dependents for purposes of calculating the extra allowances payable under 5 U.S.C. 5942a to assist employees who are stationed on Johnson Island, subject to any limitations applicable to spouses.

b. The Administrator of GSA to take appropriate action to amend the definition of "immediate family" and "dependent" appearing in the Federal Travel regulations, 41 C.F.R. Ch 300-304, to include same-sex domestic partners and their children, so that employee's, their same-sex

domestic partners, and their children can obtain full benefits available under applicable law, including certain travel, relocation, and subsistence payments.

c. All agencies offering any of the benefits specified by OPM in implementing guidance under Section 3 of the President's memo, including credit union membership, access to fitness facilities, access to planning and counseling services, should take all appropriate actions to provide the same level of benefits that is provided to employee's spouses and their children to employee's same-sex domestic partners and their children.

- In Section 2, the President ordered that in the future when agencies provide new benefits to spouses of Federal employees and to their children, that we should to the extent permissible by law (Defense of Marriage Act/DOMA) also provide those benefits to same-sex domestic partners of our employees and their children. (This applies to both appropriated and non-appropriated fund employees.
- In Section 3, the Director of OPM is charged with monitoring compliance with the President's memo and may require Agency heads to provide reports on the status of compliance and prescribe the form and manner of reporting. OPM shall issue guidance to ensure consistent and appropriate implementation.
- Section 4 states that by April 1, 2011, and annually thereafter, the Director of OPM shall provide the President with a report on the progress of agencies in implementing this memorandum until such time as all recommendations have been appropriately implemented.
- Section 5 is the disclaimer/General Provisions section and states the following:

Except as expressly stated herein, nothing in this memorandum shall be construed to impair or otherwise affect the authority granted by law or Executive Order to an agency or the head thereof; or the functions of the Director of the Office of Management and Budget related to budgetary, administrative, or legislative proposals.

This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

II. Concurrent to the issuance of the White House memorandum, the Director of the Office of Personnel Management issued an implementing memorandum to Heads of Executive Departments and Agencies. The OPM guidance frames the guidance on the subject as being in the interest "to attain greater equality for the Federal workforce and to assist the Federal

Government in competing with the private sector for the best and brightest employees.” The OPM memo contained the following guidance:

a. Section I of the OPM memo provides a definition of “Domestic Partner” thusly, “For purposes of ensuring consistent implementation of the President’s memorandum, a “domestic partner” is a person in a domestic partnership with an employee or annuitant of the same sex. (Though Federal law does not currently recognize same-sex marriages, individuals in same-sex marriages recognized by a State or the District of Columbia are eligible to qualify for the benefits covered by the President’s Memorandum if they meet the definition of “domestic partner” herein.) The term “domestic partnership” is defined as a committed relationship between two adults, of the same sex, in which the partners-

- (1) are each other’s sole domestic partner and intend to remain so indefinitely;
- (2) maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (3) are at least 18 years of age and mentally competent to consent to contract;
- (4) share responsibility for a significant measure of each other’s financial obligations;
- (5) are not married or joined in civil union to anyone else;
- (6) are not domestic partners with anyone else;
- (7) are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which they reside;
- (8) are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, shall be determined by the agency; and
- (9) are willing to promptly disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.

Agencies may choose to secure documentation (such as a sworn affidavit) to establish the existence of a domestic partnership but they are not required to do so. (*More on this later.*) In determining whether to require documentation, agencies must consider whether a similar requirement is imposed upon opposite-sex spouses, consistent with the President’s intention that same-sex domestic partners be treated in the same manner as opposite-sex spouses for purposes of these benefits, to the extent permitted by law.

b. Section II of the OPM memo provides guidance on the types of benefits that while not available Government-wide, could/should, to the extent consistent with law, be made available to same-sex domestic partners (In consultation with the Department of Justice, OPM has concluded that there is no statutory bar that would preclude agencies from extending these benefits to their employee's same-sex domestic partners. Changes in agency regulations, policies, contracts, negotiated agreements, or other documents, however, may be necessary to implement the President's direction.) to the same extent that such benefits are available to spouses (and their children):

- credit union membership;
- access to fitness facilities;
- hardship transfers to maintain or improve the health of a domestic partner to the same extent provided to opposite-sex spouses;
- planning and counseling services (including briefings on employee pay and allowances, career counseling, retirement counseling, financial counseling, resource and referral services, planning sessions for permanent change of duty station, deployment support, parenting support groups, and elder care support groups);
- family assistance services (including adoption counseling, parenting counseling, childcare, elder care, financial planning, and home improvements);
- family and morale/wellness/recreation (MWR) events (including barbeques, golf outings, or award ceremonies);
- access to medical treatment;
- access to lodging or allowances;
- joint consideration of transfers; and
- accidental death and dismemberment insurance.

c. Section III of the OPM memo covers guidance for benefits offered by non-Title 5 agencies and therefore does not impact DLA.

d. Section IV of the OPM memo covers guidance on the continuing obligation to provide new benefits

e. Section V of the OPM memo covers agency reporting requirements. In this section, the Director, OPM instructs agencies to include information on the results of their implementation efforts in their Human Capital Management Reports. Each agency is instructed to identify any benefits it has already extended to cover same-sex domestic partners and/or their children;

identify each benefit that is to be extended; provide an update on the extended benefit; and include a projected date by which the benefit will be extended. This reporting obligation shall continue until such time as it reports that all benefits covered in its reports that are capable of being extended have in fact been extended to cover their employees' same-sex domestic partners and their children, as applicable.

III. On June 1, 2010, in the Federal Register (Vol. 75, No. 104) OPM issued a final regulation to expand the eligibility to apply for coverage under the Federal Long Term Care Insurance Program (FLTCIP) by adding a new 875.213 to Subpart B of Part 875.. Under this regulation, the definition of "qualified relative" is expanded to cover the same-sex domestic partners of Federal and U.S. Postal Service employees and annuitants. The definitions used for "domestic partner" and "domestic partnership" are the same as those contained in the OPM guidance memo. It should be noted that while the OPM guidance memo stated that it would be left to agency discretion whether to require documentation to establish the existence of a "domestic partnership", in 875.213 OPM requires applicants for coverage under FLTCIP "to provide documentation to demonstrate that you meet the requirements..." of a domestic partnership. (The related OPM Benefits Administration Letter, #10-901, dated June 1, 2010, provides a Declaration of Domestic Partnership form that is to be completed, signed, and becomes a part of the permanent record in the employee's OPF.) Effective date for this change is July 1, 2010.

IV. On June 14, 2010, in the Federal Register (Vol. 75, No. 113) OPM issued final regulations to modify definitions to family member and immediate relative in 5 CFR Part 630 and to add other defined terms, for purposes of use of sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer. Specifically, OPM has made the definitions of family member and immediate relative more explicit to include more examples of the types of relationships that are covered under the phrase "any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship." The examples include stepparents and stepchildren, grandparents, grandchildren, and same-sex and opposite-sex domestic partners. OPM's final regulations also define the terms committed relationship, domestic partner, parent, and son or daughter as they pertain to the affected sections of Part 630. The new definitions do not apply to the Family and Medical Leave Act (FMLA) and its associated regulations because the FMLA statute and regulations specify individuals for whose care an employee may take FMLA leave.

V. On June 22, 2010, The Department of Labor, Wage and Hour Division issued a News Release (Release Number: 10-0877-NAT) to clarify certain familial relationships as they apply to the Family and Medical Leave Act (FMLA). Specifically, it "clarified the definition of "son or daughter" under the FMLA to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship." The deputy administrator of the Wage and Hour Division clarified that "these rights extend to the various parenting relationships that exist in today's world." Examples in the news release

included the following, “As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same-sex partner will be able to exercise the right to FMLA leave to be with that child.” The deputy administrator went on to say, “This is a critical step in ensuring that children have the support and care that they need from the persons who have assumed that responsibility. Nothing in the statute or regulations suggests that we should restrict the rights of various individuals who take on that very important role.” The release goes on to state, “the administrator interpretation provides guidance to employers in applying the FMLA’s provisions in the workplace and ensures that employees are aware of their rights. Under the Act, covered employers must grant eligible employees up to 12 workweeks of unpaid leave during any 12 month period for the birth and care of a newborn child; to adopt or assume care for a foster child; to care for an immediate family member (spouse, child, or parent) with a serious health condition; or to take medical leave due to a serious health condition.” We expect additional clarifications from the Department of Labor and/or OPM at some time in the immediate future.

VI. On March 3, 2011, the Federal Travel Regulations (FTR) and Joint Travel Regulations (JTR) were revised to enable payment of certain allowances and expenses to same-sex domestic partners of employees by adding terms and definitions, based on the published OPM guidance of June 2, 2010, for “Domestic Partner.” The JTR change included a revised definition of “Immediate Family” to include “Domestic Partner” and children, dependent parents, and dependent brothers and sisters of the domestic partners as named members of the employee’s household. Due to current statutory restrictions (e.g., DOMA), the changes do not apply to house hunting trip expense reimbursement, the relocation income tax allowance, the income tax reimbursement allowance, or non-federal source travel.

VII. On December 28, 2011, the Department provided JTR revision information adding “domestic partner” to the definition of “Extended Family” for instances requiring Emergency Travel and Transportation of an employee due to illness or injury or a personnel emergency situation while the employee is on TDY. This allows Components to include members of an employee’s extended family and family of employee’s spouse/domestic partner for compassionate reasons, and when warranted by circumstances of an emergency situation.

VIII. Effective January 5, 2012, the Department extended the family member employment preference for civilian employee family members in foreign areas, to same sex domestic partners of civilian employees and their children.

IX. Effective January 6, 2012, the Department expanded some placement opportunities through the Priority Placement Program (PPP) where the PPP procedures are linked to the JTR definition of domestic partner. They stipulate that the partner must be eligible to travel on their

sponsor's orders to qualify for PPP registration as is required for other family members reflected as dependents.

X. Effective July 20, 2012, with a Final Rule published in Federal Register Volume 77, Number 140, enables employees to elect a same sex domestic partner as a person having a presumed insurable interest in the continued life of a retiring federal civilian employee.