Federal Employee Benefits and Same-Sex Partnerships

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Summary

The federal government provides a variety of benefits to its 8 million employees and annuitants. Among these benefits are health insurance; enhanced dental and vision benefits; survivor benefits; retirement and disability benefits; family, medical, and emergency leave; and reimbursement of relocation costs. Pursuant to Title 5 U.S.C. Chapters 89, 89A, 89B and other statutes, millions of federal employees may extend these benefits to their spouses and children. An estimated 34,000 federal employees are in same-sex relationships, including state-recognized marriages, civil unions, or domestic partnerships.

The Defense of Marriage Act (DOMA) prohibits federal recognition of these unions for purposes of federal enactments. Some federal employees and Members of Congress have argued that the same-sex partners of federal employees should have access to those benefits afforded married, opposite-sex couples.

To this end, companion bills that would extend certain benefits to the same-sex partners of federal employees have been introduced in the 111th Congress. On May 20, 2009, Senators Joseph Lieberman and Susan Collins introduced S. 1102. That same day, Representative Tammy Baldwin introduced H.R. 2517. S. 1102 was referred to the Senate Committee on Homeland Security and Governmental Affairs, and ordered to be reported favorably on December 16, 2009. H.R. 2517 was referred to three different committees: the House Oversight and Government Reform Committee, the House Administration Committee, and the House Judiciary Committee. On July 30, 2009, the House Oversight and Government Reform Committee's Subcommittee on Federal Workforce, Post Office, and the District of Columbia reported the bill, as amended, to the full committee. On November 18, 2009, the House Oversight and Government Reform Committee ordered the bill to be reported, as amended.

The executive branch has also taken action on the issue of extending benefits to same-sex spouses of federal employees. On June 17, 2009, President Barack Obama issued a memorandum directing executive agencies to extend benefits to the domestic partners of federal employees within the authority of existing law. On July 10, 2009, Office of Personnel Management (OPM) Director John Berry issued a memorandum directing executive-branch agencies to review all benefits offered to employees who are married to someone of the opposite gender. The agencies were directed to determine whether the benefits they listed were or could be extended to the same-sex domestic partners of federal employees. The agency reports were due on September 15, 2009.

On December 17, 2009, the Congressional Budget Office (CBO) released its cost estimate of H.R. 2517, stating that enacting the legislation "would increase direct spending by $596 million through 2019" and discretionary spending would increase $302 million over the same period of time.

This report examines the current policies on the application of benefits to same-sex partners, analyzes the bills currently pending in the 111th Congress, and reviews the policy debate on extending benefits to same-sex partners. This report is about federal benefits for same-sex partners and not about same-sex relationships in general. It will be updated as events warrant.

Contents

Tables

Contacts

Introduction

The federal government provides a variety of benefits to its 8 million employees and annuitants.[1] Among these benefits are health insurance; enhanced dental and vision benefits; retirement and disability benefits and plans; survivor benefits; family, medical, and emergency leave; and reimbursement of relocation costs. Pursuant to Title 5 U.S.C. Chapters 89, 89A, 89B, and other statutes, federal employees who are married to opposite-sex partners may extend these benefits to their spouses and/or children.

An estimated 34,000 federal employees are in same-sex relationships, including state-recognized marriages, civil unions or domestic partnerships.[2] The Defense of Marriage Act (DOMA) limits the recognition of these relationships for purposes of some federal benefits. [3] Specifically, DOMA states

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.[4]

While DOMA does limit recognition of some benefits to same-sex partners, some agencies permit employees in same-sex relationships to extend certain health and other federal benefits to same-sex domestic partners; others do not.[5]

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[1] This number includes employees and annuitants of the U.S. Postal Service. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *FEHBP's Prescription Drug Benefits*, 111th Cong., 1st sess., June 24, 2009, http://www.opm.gov/News_Events/congress/testimony/111thCongress/06_24_2009.asp.

[2] U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, Testimony of M.V. Lee Badgett, *H.R. 2517, The "Domestic Partnership and Benefits and Obligation Act of 2009,"* H.R. 2517, 111th Cong., 1st sess., July 8, 2009, http://federalworkforce.oversight.house.gov/documents/20090708125728.pdf. Five states currently allow same-sex couples to marry. These states are Connecticut, Iowa, Massachusetts, New Hampshire (as of January 1, 2010), and Vermont. Legislation that would make same-sex marriage legal in the District of Columbia was approved by the District of Columbia City Council and signed by Mayor Adrian M. Fenty on December 18, 2009. This act was transmitted to Congress in early January, 2010. Pursuant to provisions of the District of Columbia Home Rule Act, unless federal legislation is enacted preventing the D.C. law from going into force, its provisions will take effect upon the expiration of a 30-calendar day period (not counting Saturdays, Sundays, legal holidays, and days on which neither chamber is in session due to a recess or adjournments of more than three days) beginning on the day the act was transmitted to the Speaker of the House and the President of the Senate or upon the date prescribed by the act, whichever is later. Some states, districts, and territories sanction same-sex partnerships or civil unions, giving the couple involved rights that are similar to those given to a married opposite-sex couple. These partnerships are not generally recognized by the federal government.

[3] For more information on DOMA and its effects on same-sex marriages, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

[4] 1 U.S.C. §7.

[5] For example, on June 18, 2009, one day after President Barack Obama released his memorandum seeking to extend benefits to same-sex partners, Secretary of State Hillary Clinton directed her agency to extend a variety of relocation, medical, and other benefits to the partners of employees in same-sex, committed relationships.

Companion bills that would extend a variety of benefits to the same-sex partners of federal employees have been introduced in the 111th Congress. On May 20, 2009, Senators Joseph Lieberman and Susan Collins introduced S. 1102. On the same day, Representative Tammy Baldwin introduced H.R. 2517. The initially identical bills are entitled the Domestic Partnership Benefits and Obligations Act of 2009. S. 1102 was referred to the Senate Committee on Homeland Security and Governmental Affairs, which ordered the bill to be favorably reported on December 16, 2009. H.R. 2517 was referred to three different committees: the House Oversight and Government Reform Committee, the House Administration Committee, and the House Judiciary Committee. On July 30, 2009, the House Oversight and Government Reform Committee's Subcommittee on Federal Workforce, Post Office, and the District of Columbia reported the bill to the full committee. On November 18, 2009, the full House Oversight and Government Reform ordered the bill to be reported, as amended.

Pursuant to the legislation, federal employees seeking to extend federal benefits to their same-sex partners would be required to "file an affidavit of eligibility for benefits and obligations with the Office of Personnel Management" (OPM) to qualify as recipients of the benefits. In the affidavit, the employee must verify several criteria, including a requirement that the same-sex partners have an intent to remain together "indefinitely."[6] The legislation also would extend certain benefits to the children of a same-sex partner. The bills would define "domestic partner" as "an adult unmarried person living with another adult unmarried person of the same sex in a committed, intimate relationship." It would appear that this definition could exclude same-sex couples legally married under state law from qualifying for the benefits that the bill would extend.

On June 17, 2009, President Barack Obama issued a memorandum directing executive agencies to extend benefits to federal employees in same-sex domestic partnerships or same-sex marriages[7] within the authority of existing law.[8] On July 10, 2009, OPM Director John Berry issued a memorandum directing all executive-branch agencies to review and report on the benefits offered to opposite-sex partners of federal employees.[9] Agency reports were due on September 15, 2009. OPM is now to review these reports and determine how to further pursue extension of benefits to the same-sex partners of federal employees.

[6] The seven criteria are described later in this report.

[7] Although there is a legal distinction between same-sex partners and same-sex marriages, this report refers to both institutions as same-sex partnerships. In this report, the term "same-sex partnership" includes a legal marriage with a federal employee, same-sex partners who chose not to get married, and partners who have been unable to get married for any reason. According to a telephone conversation with an OPM official on November 18, 2009, federal employees who are in opposite-sex common-law marriages do qualify for federal benefits. Common law marriages, which are recognized in nine states and the District of Columbia, are defined differently in each state. Generally, however, such a marriage requires a couple to live together for an unspecified, but considerable length of time, and to generally understand themselves to operate as a married couple, despite not having a traditional marriage ceremony.

[8] U.S. President (Obama), "Memorandum for the Heads of Executive Departments and Agencies, Subject: Federal Benefits and Non-discrimination," June 17, 2009, http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-on-Federal-Benefits-and-Non-Discrimination-6-17-09/. Among the benefits that could be extended are relocation and travel expenses for same-sex domestic partners. Some departments and agencies, including the State Department, already extend such benefits.

[9] John Berry, *Memorandum for Heads of Executive Departments and Agencies*, Office of Personnel Management, Subject: Federal Benefits for Same-Sex Domestic Partners, July 10, 2009, http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=2384.

A 2008 study estimated the cost of extending same-sex partner benefits to federal employees at $41 million in the first year and $675 million over 10 years.[10] On December 17, 2009, CBO released its cost estimate of H.R. 2517, and stated that enacting the legislation "would increase direct spending by $596 million through 2019" and discretionary spending by $302 million over the same period of time.[11]

This report is about federal benefits for same-sex partners and not about same-sex relationships in general.

DOMA and the Extension of Federal Benefits

The federal government provides health and other benefits to roughly 8 million federal employees and annuitants.[12] Among these benefits are health insurance; enhanced dental and vision benefits; retirement and disability benefits and plans; survivor benefits; family, medical, and emergency leave; and reimbursement of relocation costs. Various federal laws and regulations determine who is eligible to receive these benefits. A federal employee who is married to someone of the opposite gender can, pursuant to federal law, extend many of his or her benefits to his or her spouse.

The Defense of Marriage Act (DOMA)[13] affects the application of some benefits to the partners of federal employees.[14] DOMA defines "marriage" explicitly as "only a legal union between one man and one woman as husband and wife."[15] DOMA defines "spouse" as "a person of the opposite sex who is a husband or a wife."[16] Pursuant to 1 U.S.C. §7, these definitions are to be used when "determining the meaning of any Act of Congress."[17] As such, DOMA has played a critical role in determining whether the same-sex partners of federal employees are eligible for certain federal benefits.[18]

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[10] Naomi Goldberg, Christopher Ramos, and M.V. Lee Badgett, *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners*, The Williams Institute, September 2008, p. 1.

[11] Congressional Budget Office, *H.R. 2517 Domestic Partnership Benefits and Obligations Act of 2009*, December 17, 2009, p. 1, http://www.cbo.gov/ftpdocs/108xx/doc10866/hr2517.pdf.

[12] This number includes employees and annuitants of the U.S. Postal Service. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *FEHBP's Prescription Drug Benefits*, 111th Cong., 1st sess., June 24, 2009, http://www.opm.gov/News_Events/congress/testimony/111thCongress/06_24_2009.asp.

[13] P.L. 104-199; 1 U.S.C. §7.

[14] The partner of a federal employee of the opposite gender would also not be eligible for the benefits. This report, however, focuses on eligibility of same-sex domestic partners.

[15] 1 U.S.C. §7.

[16] Ibid.

[17] For more information on DOMA, see CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

[18] Two federal judges on the 9th Circuit Court of Appeals, acting in their capacities as hearing officers for circuit employee disputes, concluded that the denial of health benefits to a same-sex spouse violated the 9th Circuit's Employment Dispute Resolution Plan. One order declared DOMA unconstitutional while the other avoided the constitutionality issue and concluded that ambiguous language in the federal health benefits act allowed the benefits. The precedential value of these decisions is unclear as the judges acted in their capacities as administrative officials and not Article III judges.

Companion bills introduced in the 111th Congress (S. 1102 and H.R. 2517)[19] would allow various federal benefits to be extended to the same-sex partners of qualifying federal employees. Reviewed below are some federal benefits that have been mentioned in both the pending legislation and executive-branch memoranda. Whether the same-sex domestic partners of federal employees and annuitants qualify for such benefits under existing federal laws and regulations is discussed.

Health Benefits

The Federal Employees Health Benefits Program (FEHBP) (5 U.S.C. §8909; 5 C.F.R. §890) offers health benefits to qualifying federal employees and encompasses nearly 300 different health care plans. As with health care plans in the private sector, FEHBP provides benefits to enrollees for costs associated with a health checkup, an injury, or an illness. Health care costs are shared between the federal government and the enrollee. According to a 2008 study, the federal government pays, on average, 71% of a health plan's premium, and 29% of the premium's cost is paid by the employee.[20]

Pursuant to the *Code of Federal Regulations*, certain family members of a federal employee are eligible to enroll in FEHBP.[21] Among those eligible are an employee's spouse and/or child under age 22.[22]

The OPM website that explains eligibility requirements for FEHBP enrollees includes the following excerpt on same-sex domestic partner benefits:

> Same sex partners are not eligible family members. The law defines family members as a spouse and an unmarried dependent child under age 22. P.L. 104-199, Defense of Marriage Act, states, "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[23]

Neither same-sex domestic partners of federal employees—nor the partner's children,[24] therefore, are eligible to enroll in FEHBP.

[19] References to the bills are to the versions that were introduced unless otherwise noted.

[20] Naomi Goldberg, Christopher Ramos, and M.V. Lee Badgett, *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners*, The Williams Institute, September 2008, p. 4. The health care benefit costs for the U.S. Postal Service's (USPS's) 765,000 employees is borne by USPS and the employees. Pursuant to bargaining contracts, USPS pays, on average, 84% of its employees' health care benefit premiums, and employees pay 16%.

[21] 5 C.F.R. §890.302.

[22] Ibid. A federal employee's child includes a "legitimate child," "an adopted child," or a "stepchild, foster child, or recognized natural child who lives with the enrollee in a regular parent-child relationship."

[23] U.S. Office of Personnel Management, "Federal Employees Health Benefits Program Handbook," http://www.opm.gov/insure/health/reference/handbook/fehb28.asp.

[24] If a federal employee legally adopted the child of his or her same-sex partner, the child would be eligible to receive federal benefits. 5 C.F.R. §890.302.

Dental and Vision Benefits

Federal employees may choose to enroll in the Federal Dental and Vision Program (FEDVIP; P.L. 108-496; 5 U.S.C. Chapter 89A and 5 U.S.C. Chapter 89B), which provides vision and dental benefits in addition to the limited coverage provided by FEHBP. Unlike FEHBP, however, the enrollee pays all benefit premium costs and the federal government does not contribute to the benefit's premiums.

Like federal health benefits, federal employees may extend FEDVIP benefits to family members. Eligibility rules are identical to FEHBP's regulations.[25]

Both the Enhanced Dental Benefits program (5 U.S.C. §8951) and the Enhanced Vision Benefits program (5 U.S.C. §8981) are not extended to the same-sex partners of federal employees who are eligible for the benefit. OPM states on its website that "[t]he rules for family members' eligibility are the same as they are for the" FEHBP for both the dental and the vision programs.[26]

Federal Employment Compensation Act Benefits

A federal employee is eligible for up to $100,000 in compensation if he or she is disabled while performing his or her job, pursuant to the Federal Employment Compensation Act (FECA; 5 U.S.C. Chapter 81). If an employee is killed while performing his or her job, 5 U.S.C. §8102a requires that payment go to the deceased employee's spouse or children. The federal employee may also designate his or her parents or siblings as the compensation recipient.[27] The same-sex partner of a federal employee is not listed in statute among the eligible recipients of such compensation. Section (g)(1)(F) of both H.R. 2517 and S. 1102 would extend this benefit to the same-sex partners of federal employees.

Federal Employee Pensions and Survivor Benefits

Federal employees with permanent appointments are eligible for retirement and disability benefits under either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS).[28] All federal employees initially hired into permanent federal employment on or after January 1, 1984, are covered by FERS. Employees hired before January 1, 1984, are covered by CSRS unless they chose to switch to FERS during open seasons held in 1987 and 1998. Both FERS and CSRS provide survivor benefits for the spouse and dependent children of a deceased federal employee or retiree.[29]

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[25] U.S. Office of Personnel Management, "Federal Employees Dental and Vision Insurance Program (FEDVIP)," http://www.opm.gov/insure/archive/dentalvision/.

[26] U.S. Office of Personnel Management, "Dental: Introduction," http://www.opm.gov/insure/dental/index.asp; and U.S. office of Personnel Management, "Vision: Introduction" http://www.opm.gov/insure/vision/index.asp.

[27] 5 U.S.C. § 8102a(d)(1).

[28] For more information on CSRS or FERS, see CRS Report 98-810, *Federal Employees' Retirement System: Benefits and Financing*, by Patrick Purcell.

[29] See CRS Report RS21029, *Survivor Benefits for Families of Civilian Federal Employees and Retirees*, by Patrick Purcell.

Both CSRS and FERS are subject to the statutory interpretation required by DOMA in determining eligibility for survivor or dependant benefits under CSRS or FERS. As noted earlier, "the word 'spouse' in DOMA refers only to a person of the opposite sex who is a husband or a wife."[30]

An employee or former employee can designate anyone as a beneficiary or beneficiaries who will receive his or her Thrift Savings Plan (TSP) account balance in the event of the participant's death. TSP is a defined contribution (DC) retirement plan similar to the 401(k) plans provided by many employers in the private sector.[31] Designation of a beneficiary must be done by filing Form TSP-3 with the Federal Retirement Thrift Investment Board. The Thrift Board is not authorized to recognize wills or other estate planning documents. A participant married to a partner of the opposite sex is not required to designate his or her spouse as the beneficiary of the TSP account, nor is the spouse's consent required to designate someone other than the spouse as the beneficiary of the TSP account.[32]

Although a federal employee cannot name a same-sex domestic partner as his or her surviving beneficiary under either FERS or CSRS, an employee who is applying for a non-disability retirement can elect an Insurable Interest Annuity (IIA). Only one person may be named as the beneficiary of the IIA, and the election must be made at the time of retirement. The person named as the beneficiary must be someone who is financially dependent on the employee, and the employee must establish, through one or more affidavits from other people, the reasons why the beneficiary might reasonably expect to suffer loss of financial support as a result of the employee's death. The cost of an IIA can range from a 10% reduction in the employee's retirement annuity if the beneficiary is 10 years younger than the employee to a 40% reduction if the beneficiary is 30 or more years younger.[33]

Family and Medical Leave Act

Pursuant to the Family and Medical Leave Act (FMLA; P.L. 103-3; 5 U.S.C. Chapter 63), certain federal employees are entitled to use up to 12 weeks of unpaid leave during any 12-month period for any of the following reasons:

- the birth of a child of the employee and follow-up care related to that birth;
- the adoption of a child by the employee or placement of a foster child with the employee;
- to care for an employee's ailing spouse, child, or parent; or
- an illness or condition of the employee that renders him or her unable to work.

[30] 1 U.S.C. § 7.

[31] "401(k)" refers to the section of the Internal Revenue Code that authorizes deferral of income taxes until the time of withdrawal for contributions to certain kinds of savings plans and for the interest and dividends on those contributions.

[32] 5 CFR §1651.4. See also CRS Report RS22856, *Retirement and Survivor Annuities for Former Spouses of Federal Employees*, by Patrick Purcell.

[33] For more information see CRS Report RS21897, *The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions*, by Patrick Purcell.

The 12 weeks of leave may be used intermittently throughout the year, when the employee meets statutory and regulatory requirements of FMLA.[34]

FMLA regulations (5 C.F.R. §630.1201) define "spouse" explicitly as "an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized." A federal employee, therefore, may not use FMLA to care for an ailing same-sex domestic partner. A federal employee also may not use FMLA to care for the ailing child of a same-sex domestic partner, unless the employee has legally adopted the child.

Federal Long Term Care

Federal employees may also apply for the Federal Long Term Care Insurance Program (FLTCIP; P.L. 106-265; 5 U.S.C. §9001), which provides medical services for enrollees who suffer a chronic medical condition and are unable to care for themselves. Employees may voluntarily opt into FLTCIP, and the entire premium is covered by the enrollee. Pursuant to 5 U.S.C. §9001, qualifying federal employees; members of the uniformed services; federal annuitants; current spouses of federal employees, service members, or annuitants; adult children of federal employees, service members, or annuitants; and parents, parents-in-law, and stepparents of federal employees, service members, or annuitants are eligible to enroll in FLTCIP. In addition, federal law states that OPM may prescribe regulations that permit an "individual having such other relationship" to a federal employee, service member, or annuitant to enroll in FLTCIP.[35]

Current regulations do not, however, extend FLTCIP benefits to the same-sex partners of federal employees. On September 14, 2009, OPM issued a proposed regulation in the *Federal Register* that would expand the definition of "qualified relative" to include "the same-sex domestic partners of eligible Federal and U.S. Postal Service employees and annuitants."[36] OPM accepted comments on the proposed regulation until November 13, 2009. As of this writing, no further action has been taken on the proposed regulation.

[34] Pursuant to FMLA, federal employees are required to give employers at least 30 days' notice prior to taking leave when the need for leave is foreseeable (5 U.S.C. §6382(e)).

[35] 5 U.S.C. §9001(5)(D).

[36] U.S. Office of Personnel Management, "Federal Long Term Care Insurance Program: Eligibility Changes," 74 *Federal Register* 46937, September 14, 2009. According to the proposed rule, "domestic partner" is defined as follows:

> "domestic partner'' is a person in a domestic partnership with an employee or annuitant of the same sex. The term "domestic partnership'' is defined as a committed relationship between two adults, of the same sex, in which the partners—are each other's sole domestic partner and intend to remain so indefinitely; have a common residence, and intend to continue the arrangement indefinitely; are at least 18 years of age and mentally competent to consent to contract; share responsibility for a significant measure of each other's financial obligations; are not married to anyone else; are not a domestic partner of anyone else; are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the state in which they reside; will certify they understand that willful falsification of the documentation described in paragraph (a) of this section may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification and may constitute a criminal violation under 18 U.S.C. § 1001.

Life Insurance

Pursuant to 5 U.S.C. Chapter 87, most federal employees, including part-time employees, are automatically enrolled in the Federal Employees' Group Life Insurance (FEGLI) program, which is administered by Metropolitan Life Insurance Company.[37] Federal employees pay two-thirds of their life-insurance premium, and the federal government pays the remaining third.[38] A federal employee may designate anyone, including a same-sex partner, as their life insurance beneficiary by filing an SF 2823 form.[39] If an employee married to an opposite-sex partner does not designate a beneficiary, his or her spouse would receive the federal benefit, pursuant to federal law (5 U.S.C. §8705(a)).

The definition of "family member" in 5 U.S.C. §8701, the section of the U.S. Code related to life insurance benefits, includes the phrase "spouse of the individual." The term "spouse" does not explicitly state that a same-sex partner would be excluded from the benefit. Title 5 U.S.C. §8705, however, delineates the order of preference in which life insurance benefits would be distributed in the event of a federal employee's death. Pursuant to the law, the benefit would first be distributed to any person or entity that was selected by the employee using the SF 2823 form. If no form were completed, the benefit would then go to "the widow or widower of the employee."[40] It would appear that DOMA would preclude same-sex domestic partners from qualifying as a widow or widower.

111th Congress Legislation

On May 20, 2009, companion bills that would extend various health benefits to same-sex domestic partners of qualifying federal employees were introduced in the Senate and in the House of Representatives. Senators Joseph Lieberman and Susan Collins jointly introduced the Domestic Partnership Benefits and Obligations Act of 2009 (S. 1102); Representative Tammy Baldwin introduced an identical bill in the House (H.R. 2517). Pursuant to the pending legislation, six months after the bill is enacted, the domestic same-sex partner of a federal employee "shall be entitled to benefits available to, and shall be subject to obligations imposed upon, a married employee and the spouse of the employee."[41] Among these benefits are

- health insurance and enhanced dental and vision benefits (5 U.S.C. §89, 89A, 89B);
- retirement and disability benefits and plans (5 U.S.C. Chapters 83, 84; 22 U.S.C. §4101 et seq.; 50 U.S.C. Chapter 38);

[37] A qualifying federal employee may be exempted from the life insurance program if he or she provides required written notice of the desired exemption (5 U.S.C. §8702). Qualifying federal employees may choose to enroll in additional life insurance coverage.

[38] The U.S. Postal Service pays 100% of the life insurance premium.

[39] For more information about the SF 2823, see U.S. Office of Personnel Management, "Life: Designation of Beneficiary," http://www.opm.gov/insure/life/fegli/sf2823.asp.

[40] 5 U.S.C. §8705(a).

[41] S. 1102, Sec. 2. Information provided in this section is taken from S. 1102, as introduced. The analysis, however, also applies to H.R. 2517, as introduced, as the bills are identical.

- family, medical, and emergency leave (5 U.S.C. Chapter 63 – subchapters II, IV, and V; 29 U.S.C. § 2601 et seq.; 2 U.S.C. §1312; 3 U.S.C. §412);
- federal group life insurance (5 U.S.C. Chapter 87);
- long-term care insurance (5 U.S.C. Chapter 90);
- compensation for work injuries (5 U.S.C. Chapter 81);
- benefits for disability, death, or captivity (5 U.S.C. §§5569 and 5570; 22 U.S.C. §3973; 42 U.S.C. 3796 et seq.);
- travel, transportation, and related payments and benefits (5 U.S.C. Chapter 57; 22 U.S.C. § 4981 et seq.; 10 U.S.C. §1599(b); and
- any other benefit similar to a benefit described above.

Each qualifying federal employee who seeks to enroll his or her same-sex domestic partner in a federal benefit program would be required, pursuant to the bills, to file an affidavit of eligibility with OPM [42] "identifying" his or her domestic partner and "certifying" that he or she meets several other criteria. The bill defines a domestic partner as "an adult unmarried person living with another adult unmarried person of the same sex in a committed, intimate relationship." In the affidavit, the employee and the same-sex domestic partner must verify that they

- are one another's "sole domestic partner and intend to remain so indefinitely";
- "have a common residence and intend to continue the arrangement";
- are at least 18 years old and are "mentally competent to consent to contract";
- "share responsibility for a significant measure of each other's common welfare and financial obligations";
- "are not married to or domestic partners with anyone else";
- "are same sex domestic partners, and not related in a way that, if the [two] were of opposite sex, would prohibit legal marriage in the state in which they reside"; and
- "understand that willful falsification of information within the affidavit may lead to disciplinary action," including both civil and criminal penalties (S. 1102, Sec. 2).

The legislation also requires a federal employee to file a statement of dissolution within 30 days of the death of his or her same-sex partner or the dissolution of the relationship.[43] The bill states that if the employee's same-sex relationship ends for any reason other than death, the partner would "be entitled to benefits available to, and shall be subject to obligations imposed upon, a former spouse." Similarly, if the federal employee were to die, the same-sex partner would

[42] Section 2(e) of the legislation requires OPM to use the information provided by an employee only for the purposes of determining eligibility.

[43] Defining the term "dissolution" may prove difficult. In an opposite-sex marriage, the dissolution of the relationship is determined by law. As many same sex partnerships are recognized in limited circumstances or not at all, the dissolution of such unions may vary based on jurisdiction. Moreover, the dissolution of partnerships entered into other jurisdictions may prove problematic. Determining when a same-sex relationship is officially dissolved is beyond the scope of this report.

receive benefits identical to those that would be given to a widow or widower (S. 1102, Sec. 2(c)).

Natural or adopted step children of a federal employee's domestic partner would be "deemed a stepchild of the employee," pursuant to the bill.

Congressional Action

H.R. 2517

On May 20, 2009, H.R. 2517 was concurrently referred to the Committee on House Administration, the Committee on the Judiciary, and the Committee on Oversight and Government Reform. The Committee on Oversight and Government Reform referred the bill to its subcommittee on the Federal Workforce, Post Office, and the District of Columbia.

On July 8, 2009, OPM Director Berry testified before the House Committee on Oversight and Government Reform, Subcommittee on the Federal Workforce, Postal Service, and the District of Columbia.[44] In his statement, Mr. Berry said that neither same-sex nor opposite-sex domestic partners are eligible for federal benefits, but added that opposite-sex domestic partners have the option to get married and qualify for benefits. Even in the few states where same-sex marriage is recognized, Mr. Berry said, such unions are not recognized under federal law because of DOMA. He continued:

> This policy is unjust and it directly undermines the federal government's ability to recruit and retain the nation's best workers. Historically, the federal government has in may ways been a progressive employer, but we're behind the private sector and 19 states, including Alaska and Arizona, on this one.

In his testimony, Mr. Berry estimated that providing health insurance and survivor benefits to the same-sex domestic partners of both current federal employees and federal annuitants would cost the federal government $56 million in 2010. He expressed a view that,

> This marginal increased cost—which equates to about 2-tenths of a percent of the entire cost to the Federal Government of Federal employee health insurance—would be funded by the additional Government contribution payments for self and family health insurance plans. This includes $19 million in savings because retirees who elect survivor benefits for their domestic partners will experience a reduction in their annuity payments.[45]

Mr. Berry added that extending life, dental, and vision benefits to the same-sex partners of federal employees would not increase federal outlays because the costs "would be borne entirely by the gay and lesbian employees who enroll their partners in those benefit plans." He recommended to the committee that the bill be amended to extend federal benefits to the same-sex domestic

[44] U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *The Domestic Partnership Benefits and Obligations Act of 2009*, hearing on H.R. 2517, 111th Cong., 1st sess., July 8, 2009, http://www.opm.gov/News_Events/congress/testimony/111thCongress/07_08_2009.asp.

[45] Ibid. H.R. 2517 and S. 1102 currently would not extend benefits to the same-sex partners of federal annuitants. In his testimony, however, Mr. Berry recommended that the committee amend the existing bill language to include federal annuitants.

partners of federal annuitants, and suggested that the committee clarify the tax status of the federal benefits.

On July 30, 2009, the subcommittee conducted a markup on the bill. During the markup, Representatives opposed to the bill said extending benefits to same-sex domestic partners was in direct violation of DOMA.[46] Other Members questioned whether same-sex couples should have to be together for a specific length of time before they could be eligible to apply for benefits.[47] The legislation currently does not require a same-sex couple to be together for a specific length of time prior to becoming eligible for federal benefits.[48] Federal employees who are married to someone of the opposite gender generally can apply for benefits immediately upon their marriage.

At the same markup, proponents of the legislation said the bill would ensure "equal pay for equal work" among federal employees.[49] Proponents also stated that the federal government needed to compete with the private sector for the most effective and efficient employees. According to proponents, not providing benefits to employees' same-sex partners could place the federal government at a competitive disadvantage.[50]

During the markup session, the subcommittee adopted an amendment making technical changes to the bill that were recommended by OPM. On July 30, 2009, the subcommittee voted to report the bill favorably to the full committee.

At the full committee's markup session on November 18, 2009, similar arguments were made on both sides of the debate. Proponents said the bill would make the federal government a "model employer" and "foster a more inclusive workplace so we can attract the best and brightest to federal government."[51]

Opponents stated that enacting the bill would be fiscally irresponsible, and would prompt a hike in health care premium costs for all federal employees.[52] Furthermore, opponents called the bill "reckless deficit spending" at a time of high unemployment rates and financial difficulty for many Americans.[53]

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[46] U.S. Congress, House Committee on Oversight and Government Management, Subcommittee on the Federal Workforce, Post Office, and District of Columbia, *Markup of H.R. 2517 "The Domestic Partners Benefits and Obligations Act of 2009"* H.R. 2517, 111th Cong., 1st sess., July 30, 2009, statement of Representative Mark Souter,http://republicans.oversight.house.gov/index.php?option=com_content&view=article&id=276:7-30-09-markup-of-hr-2517-qthe-domestic-partners-benefits-and-obligations-act-of-2009q&catid=13&Itemid=&layout=default&date=2009-11-01.

[47] Ibid., statement of Representative Dan Burton.

[48] There are exceptions to this immediate application. The Civil Service Retirement System (CSRS), for example, requires a federal employee to be married to his or her spouse for at least nine months before the spouse would be eligible to receive survivor benefits. See U.S. Office of Personnel Management, "Retirement Information and Services," http://www.opm.gov/retire/pre/death/index.asp.

[49] Ibid., Representative Stephen A Lynch.

[50] Ibid.

[51] U.S. Congress, House Committee on Oversight and Government Management, *Markup of H.R. 2517 "The Domestic Partners Benefits and Obligations Act of 2009"* H.R. 2517, 111th Cong., 1st sess., November 18, 2009, statement of Representative Eudolphus Towns, http://www.youtube.com/watch?v=RWCbE1J5us4. (3 minute mark).

[52] Ibid., statement of Representative Darrell Issa.

[53] Ibid.

At the markup, the committee adopted two amendments. One amendment clarified the process by which federal employees would apply and qualify for same-sex domestic partner benefits. A second amendment would require the Government Accountability Office (GAO) to conduct a study to determine whether the insurance premiums for all federal employees would increase as a result of the bill. In addition, the amendment would require GAO to study the bill's effects on recruitment and retention rates in the federal workforce. The committee voted to report the bill favorably the same day.

The House Judiciary Committee referred the bill to its Subcommittee on Constitution, Civil Rights, and Civil Liberties. No further action has been taken on the bill.

S. 1102

On May 20, 2009, S. 1102 was referred to the Senate Committee on Homeland Security and Governmental Affairs. On October 15, 2009, the committee conducted a hearing on the legislation. In his opening statement, Chairman Joseph Lieberman, sponsor of the legislation, said the bill would prove to be an asset to a federal government facing a large wave of retirements:

> Senator Collins and I introduced this bill because we believe it is the fair and right thing to do, and also because it makes practical sense for the federal government as an employer. As we approach a generational change in the federal workforce that will see the retirement of approximately one-third of all federal employees, it seems to us to be just plain sensible to do all we can to attract and retain the "best and the brightest" to serve in the years ahead. This legislation would help accomplish that.[54]

Senator Collins, co-sponsor of the bill, said the legislation would help the federal government hire the most effective federal workers:

> When it comes to employment, the federal government must compete with the private sector in attracting the most qualified, skilled, and dedicated employees. Today, health, medical, and other benefits are a major component of any competitive employment package.[55]

On December 16, 2009, the committee voted to report the bill favorably, but with amendments that are reportedly similar to those included in the House bill.[56] At the meeting where the vote took place, Senator Collins reportedly expressed concerns that OPM has not yet revealed how it would cover any increased costs associated with enacting the bill,[57] but she, nonetheless, voted to favorably report the bill.

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[54] U.S. Congress, Senate Committee on Homeland Security and Governmental Affairs, *S. 1102*, The "Domestic Partnership and Benefits and Obligation Act of 2009," S. 1102, 111th Cong., 1st sess., October 15, 2009, http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=d5347e63-e680-4ebf-8b9d-5eb5f8cd5e79.

[55] Ibid.

[56] Leah Nylen, "Senate Committee Approves Domestic Partners Bill," *CQ.com*, December 16, 2009, http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/committees/111/committees111-2009121600268787.html@committees&metapub=CQ-COMMITTEEMARKUPS&searchIndex=0&seqNum=1.

[57] Joe Davidson, "Same-sex Benefits Advance, Quietly," *The Washington Post*, December 17, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/16/AR2009121604178_pf.html.

Executive Branch Action

Although many federal benefits cannot be extended to the same-sex partners of federal employees under current law, certain agencies have extended other benefits. Certain agencies, for example, reportedly permit a federal employee in a same-sex relationship to use sick leave to care for an ailing partner.[58]

In addition, on June 17, 2009, one day after President Obama released his memorandum on same-sex benefits, Secretary of State Hillary Clinton directed her agency to extend a variety of relocation, medical, and other benefits to the partners of employees in same-sex, committed relationships. Certain federal benefits that are not explicitly prohibited by law may be extended to such individuals at the discretion of the Department of Justice and each individual department or agency head.

On June 17, 2009, President Barack Obama released a memorandum requesting that the Secretary of State and the Director of OPM, in consultation with the Department of Justice, "extend the benefits they have respectively identified to qualified same-sex domestic partners of Federal employees where doing so can be achieved and is consistent with Federal law."[59] The memorandum also directed all executive departments and agencies to review and evaluate their existing employee benefits to determine "which may legally be extended to same-sex partners."[60]

President Obama offered several reasons for releasing this memorandum. In his public statement accompanying the memorandum's release, he said that his Administration "was not authorized by existing Federal law to provide same-sex couples with the full range of benefits enjoyed by heterosexual married couples." He also said that extending benefits to same-sex partners was "the right thing to do."[61] The President said many private companies already offer such benefits to same-sex domestic partners, which "helps them compete for and retain the brightest and most talented employees. The Federal Government is at a disadvantage on that score right now, and change is long overdue."[62]

The memorandum required each executive department and agency to provide to the Director of OPM a report that included "a review of the benefits provided by their respective departments and agencies" in order "to determine what authority they have to extend such benefits to same-sex domestic partners of Federal employees." Agencies were given 90 days to complete their reviews. In addition, the memorandum instructed OPM to issue guidance regarding compliance with anti-discrimination policies in the hiring of federal employees (5 U.S.C. § 2302(b)(10)). The

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[58] "Obama OKs Some Benefits for Employees' Same-sex Partners," *CNN.com*, June 17, 2009, http://www.cnn.com/2009/POLITICS/06/16/obama.same.sex.benefits/index.html.

[59] President Barack Obama, *Memorandum for the Heads of Executive Departments and Agencies*, The White House: Office of the Press Secretary, Subject: Federal Benefits and Non-Discrimination, June 17, 2009, http://www.whitehouse.gov/assets/documents/2009fedbenefits_mem_rel.pdf.

[60] The White House: Office of the Press Secretary, "Statement by the President on the Presidential Memorandum on Federal Benefits and Non-Discrimination, and Support of the Lieberman-Baldwin Benefits Legislation," press release, June 17, 2009, http://www.whitehouse.gov/the_press_office/Statement-by-the-President-on-the-Presidential-Memorandum-on-Federal-Benefits-and-Non-Discrimination-and-Support-of-the-Lieberman-Baldwin-Benefits-Legislation/.

[61] Ibid.

[62] Ibid.

memorandum was explicit in stating that all extensions of benefits and protections be "consistent with Federal law." No extension of benefits, therefore, could violate the Defense of Marriage Act or any other law prohibiting the extension of benefits to same-sex domestic partners. The agency reports were due on September 15, 2009. OPM is to review these reports and determine how to further pursue extension of benefits to the same-sex partners of federal employees.

Cost Estimates

Office of Personnel Management

As noted earlier in this report, OPM estimates that extending health insurance and survivor benefits to the same-sex domestic partners of current federal employees as well as annuitants will cost $56 million in 2010.

The Williams Institute

The Williams Institute—an independent and non-partisan think tank at the University of California, Los Angeles School of Law that researches sexual orientation laws and public policy—released a study in September 2008, that estimated H.R. 2517 and S. 1102 would cost the federal government $41 million in its first year and $675.1 million over 10 years.[63] The study estimated that 30,185 same-sex domestic partners of federal employees and their children would be eligible for benefits. Of the more than 30,000 people who would be eligible, the study estimated that 14,436 employees with same-sex partners would move from not being enrolled or single enrollment to family enrollment.[64] Family enrollment would render the child of a same-sex partner eligible for certain benefits. According to the institute's study, this extension of benefits could increase federal discretionary spending by $51.7 million in the first year and $666 million over 10 years.[65]

This cost estimate does not include USPS employees. About 28% of the civilian federal workforce is employed by the Postal Service, which pays for employee benefits using revenue earned. USPS pays a greater share of the health care premium for its employees than the rest of the federal government pays for non-postal federal civilian employees. In 2008, for example, the government's share of a non-postal employee's health care costs was $4,600, if that employee enrolled in family coverage. The federal government's share for the same family coverage plan for a USPS employee was $5,244 in 2008. According to the institute, extending federal benefits to

[63] Naomi G. Goldberg, Christopher Ramos, and M.V. Lee Badgett, *The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners*, The Williams Institute, Executive Summary, September 2008, https://www.policyarchive.org/bitstream/handle/10207/10871/S2521FiscalAnalysis_WilliamsInst.pdf?sequence=1.

[64] This estimate, according to the congressional testimony from one of its authors, takes into account that some federal employees in same-sex partner relationships are sometimes the partner of another federal employee. Also, other federal employees may have a same-sex partner who chooses to enroll in a health care plan provided by their state, local government, or tribal employer, or a private employer. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *Domestic Partnership Benefits and Obligations Act of 2009*, hearing on H.R. 2517, 111th Cong., 1st sess., July 8, 2009 (Washington: GPO, 2009), http://republicans.oversight.house.gov/images/stories/Hearings/pdfs/20090708Badgett.pdf.

[65] The measures are estimated to increase federal tax revenue in the first year by $10.7 million and $118.4 million over ten years, thereby reducing the first-year costs for the extension to $41 million and ten10-year costs to $675.1 million.

the same-sex partners of USPS employees could cost the Postal Service $259.2 million over 10 years.

More specifically, the institute report estimated that extending federal healthcare benefits to the same-sex domestic partners of federal employees and their children could increase spending by $43.5 million in the first year and $575.7 million over 10 years. [66] Extending survivor benefits to the same-sex domestic partners of federal employees was expected to save the federal government $108 million over 10 years.[67] The extension of disability benefits to employees in same-sex partnerships was estimated to increase federal spending by $10.2 million over 10 years, and the costs associated with work-related travel and mandatory relocation were estimated to increase by $80.2 million over 10 years.

Similar to Mr. Berry's viewpoint, the institute report found that the extension of dental and vision insurance to the same-sex domestic partners of federal employees would not increase government outlays because federal employees are responsible for the total cost of the premiums for those benefits. Similarly, extending life insurance benefits is not expected to increase federal costs.

The report stated that extending the Family and Medical Leave Act to include employees in same-sex partnerships would not directly increase personnel costs of the federal government but "there may be other peripheral costs associated with an employee's leave, such as accommodation of an employee's absence either through increasing the workloads of other employees, hiring temporary workers, or reduced productivity."[68]

M.V. Lee Badgett, a professor of economics at the University of Massachusetts Amherst who is also the research director of the institute, said in her testimony before the House Committee on Oversight and Government Reform that extending benefits to same-sex domestic partners may also reduce federal costs in employee turnover because gay or lesbian employees would be less likely to leave a federal position in favor of a job that did not offer such benefits.[69]

Table 1 below shows the institute's projected costs if a variety of federal benefits were extended to federal employees involved in same-sex domestic partnerships.

[66] Extending survivor benefits to same-sex partners of federal employees is anticipated to result in a short-term reduction in annuity payments prompted by the spousal reduction applied to pay for survivor benefits.

[67] Ibid., 2.

[68] Ibid, p. 8.

[69] U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *Domestic Partnership Benefits and Obligations Act of 2009*, hearing on H.R. 2517, 111th Cong., 1st sess., July 8, 2009 (Washington: GPO, 2009), http://republicans.oversight.house.gov/images/stories/Hearings/pdfs/20090708Badgett.pdf.

Table 1. Estimated Costs to the Federal Government if Benefits Were Extended to Same-Sex Domestic Partners

in millions of dollars

	Year 1	2	3	4	5	6	7	8	9	10	Total Cost (Over 10 Years)
Direct Spending											
Retiree Health Benefits	0	3.9	8.1	12.8	18.1	24.2	30.7	37.9	45.5	53.9	235.1
Reduction in Annuity Payments to Retirees and Survivors	0	-2.2	-4.4	-6.7	-9.1	-11.8	-14.4	-17.1	-19.8	-22.6	-108.1
Total, Direct Spending	0	1.7	3.7	6.1	8.9	12.4	16.3	20.8	25.7	31.4	127.0
Discretionary Spending											
Health Insurance	43.5	46.1	48.9	51.9	55.1	58.5	62.0	65.8	69.8	74.1	575.7
Dental & Vision Benefits	0	0	0	0	0	0	0	0	0	0	0
Family Medical Leave Provisions	0	0	0	0	0	0	0	0	0	0	0
Federal Group Life Insurance	0	0	0	0	0	0	0	0	0	0	0
Long Term Care	0	0	0	0	0	0	0	0	0	0	0
FECA Disability	0.9	0.9	1.0	1.0	1.0	1.0	1.1	1.1	1.1	1.1	10.2
FECA Death	*	*	*	*	*	*	*	*	*	*	.36
Travel, Transportation	7.3	7.4	7.6	7.8	7.9	8.1	8.3	8.5	8.6	8.8	80.2
Total, Discretionary Spending	51.7	54.5	57.5	60.7	64.1	67.6	71.4	75.4	79.6	84.1	666.5
Postal Service Costs (Off-Budget)											
Health Insurance	16.9	17.9	19.0	20.2	21.4	22.7	24.1	25.6	27.2	28.8	223.9
Dental & Vision Benefits	0	0	0	0	0	0	0	0	0	0	0
Family Medical Leave Provisions	0	0	0	0	0	0	0	0	0	0	0
Federal Group Life Insurance	0	0	0	0	0	0	0	0	0	0	0
Long Term Care	0	0	0	0	0	0	0	0	0	0	0
FECA Disability	0.36	0.37	0.37	0.38	0.39	0.40	0.41	0.42	0.43	0.44	4.0
FECA Death	*	*	*	*	*	*	*	*	*	*	.14

	Year 1	2	3	4	5	6	7	8	9	10	Total Cost (Over 10 Years)
Travel, Transportation	2.8	2.9	3.0	3.0	3.1	3.2	3.2	3.3	3.4	3.4	31.2
Total, Postal Service	20.1	21.2	22.4	23.6	24.9	26.3	27.8	29.3	31.0	32.7	259.2
Tax Revenue											
Tax Revenue from "Imputed Income" Taxation	-10.7	-11.0	-11.2	-11.4	-11.7	-11.9	-12.2	-12.5	-12.8	-13.0	-118.4
Total, Tax Revenue	-10.7	-11.0	-11.2	-11.4	-11.7	-11.9	-12.2	-12.5	-12.8	-13.0	-118.4
Total Federal Budget Cost	**41.0**	**45.3**	**50.0**	**55.4**	**61.3**	**68.1**	**75.5**	**83.7**	**92.6**	**102.4**	**675.1**

Source: The Williams Institute, "The Fiscal Impact of Extending Federal Benefits to Same-Sex Domestic Partners: Executive Summary," September 2008, p 13, http://www.law.ucla.edu/williamsinstitute/publications/S2521FiscalAnalysis_WilliamsInst.pdf.

The Congressional Budget Office

On December 17, 2009, CBO released its cost estimate for H.R. 2517, stating that enacting the legislation "would increase direct spending by $596 million through 2019" and discretionary spending would increase $302 million over the same period of time.[70] CBO estimated that the legislation would have no direct effect on federal revenues. The estimate assumes that if the bill were enacted, from 2011 to 2019, approximately 5,200 non-postal annuitants per year would switch from an individual insurance plan to a family plan, raising direct spending by $348 million over that time.[71] During that same time, CBO estimates that discretionary spending would increase by $266 million because 4,000 non-postal employees per year would switch from individual to family plans. Federal Employment Compensation Act benefits are estimated to increase direct spending by $35 million over the 2010-2019 period, as 1,000 employees per year are estimated to sign up for the benefit. CBO estimates that 1,500 employees per year through 2019 would sign up for survivor annuities in either the Federal Employees' Retirement System or the Civil Service Retirement System. In addition, CBO estimates that roughly 2,000 annuitants would sign up for the survivor annuities. The result would be that the employees would receive smaller retirement annuities, "thereby lowering direct spending."[72] The reduction in direct spending, however, would be offset by payouts to the surviving partners of annuitants. In the short term, CBO estimates that the extension of survivor annuities will decrease direct spending by $27 million. **Table 2** shows the CBO estimates.

Table 2. CBO's Estimated Changes in Federal Outlays if H.R. 2517 or S. 1102 Were Enacted

	Estimated Additional Employee Enrollment	Cost in 2011 (first full year of enactment)	Cost from 2010 to 2019
Federal Employees Health Benefit Program			
Non-Postal Employees (discretionary spending)	4,000, per year	$17 million	$266 million[a]
Non-Postal Annuitants (direct spending)	5,200 per year	$18 million	$348 million[a]
Federal Employment Compensation (direct spending)	1,000, per year	$3 million	$35 million
Survivor Annuities (direct spending)	1,500, per year	($11 million)	($27 million)
Travel and Relocation Costs (discretionary spending)	N/A	$1 million	$6 million

Source: U.S. Congressional Budget Office, *H.R. 2517 Domestic Partnership Benefits and Obligations Act of 2009*, December 17, 2009, http://www.cbo.gov/ftpdocs/108xx/doc10866/hr2517.pdf.

[70] Congressional Budget Office, *H.R. 2517 Domestic Partnership Benefits and Obligations Act of 2009*, December 17, 2009, p. 1, http://www.cbo.gov/ftpdocs/108xx/doc10866/hr2517.pdf.

[71] CBO also estimates that about 2,000 USPS employees would move from individual to family health benefits if H.R. 2517 were enacted. USPS spending is categorized as off-budget because the entity is largely self-funded through the sale of stamps and other postal items. The enactment of H.R. 2517 would increase off-budget costs by $242 million through 2019, according to the CBO estimate. Congressional Budget Office, *H.R. 2517 Domestic Partnership Benefits and Obligations Act of 2009*, p. 3.

[72] Ibid., p. 4.

Notes: All per year estimates are for the years 2010 to 2019. This table does not include off-budget costs associated with the U.S. Postal Service, which uses revenue from the sale of postal stamps and other services to pay for its employee benefits.

a. Costs for FEHBP were estimated from 2011 through 2019.

Analysis

As discussed above, Congress is currently debating legislation that would extend certain benefits to the same-sex partners of federal employees. The Obama Administration has pledged its support for extending such benefits, within existing laws. OPM has testified in support of the pending legislation. At the same time, OPM reportedly decided not to extend benefits to the same-sex spouses of two federal employees in the judicial branch despite federal court orders to do so. The agency reportedly stated that extending such benefits would be a violation of existing federal law (DOMA).[73] The companion bills do not directly address DOMA; instead they modify other parts of the U.S. Code to explicitly include same-sex partners in the statutory language that extends certain benefits.

Congress may act to prohibit same-sex partners of federal employees from receiving federal benefits. Prohibiting the extension of certain federal benefits would reinforce current statutes, which state that same-sex partners do not qualify as spouses and, therefore, should not receive certain federal benefits. Such action could also save an estimated $596 million in direct spending through 2019—the estimated cost of extending such benefits.[74]

According to Dr. M.V. Lee Badgett, the research director of The Williams Institute, 20 states and the District of Columbia offer a variety of benefits to the same-sex partners of their employees.[75] In testimony before the House Committee on Oversight and Government Reform, she said that "[m]ore than 250 cities, counties, and other local government entities cover domestic partners of other public employees" and "[i]n the private sector, almost two-thirds of the Fortune 1000, and 83% of Fortune 100 companies also provide these benefits."[76] If Congress acts not to extend federal benefits to the same-sex partners of employees, however, it may be more difficult to recruit high-performing employees who are in or who may enter into same-sex relationships. Such employees may instead choose to work for state, local, or tribal governments or private companies that provide benefits to same-sex domestic partners.

On the other hand, Congress may consider that competing for the most effective and efficient workforce requires it to offer benefits similar to those available in other levels of government and the private sector.[77] To compete with local and state governments as well as private companies, Congress may decide to pass H.R. 2517 or S. 1102.

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[73] Joe Davidson, "OPM Defies Order on Same-sex Benefits," *Washington Post*.

[74] The Williams Institute study, p. 1.

[75] These states are Alaska, Arizona, California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Montana, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *Domestic Partnership Benefits and Obligations Act of 2009*, hearing on H.R. 2517, 111th Cong., 1st sess., July 8, 2009 (Washington: GPO, 2009), http://republicans.oversight.house.gov/images/stories/Hearings/pdfs/20090708Badgett.pdf.

[76] Ibid, p. 1.

[77] As noted earlier in this report, in congressional testimony Ms. Badgett said more than 250 cities, counties, and other (continued...)

Specific Issues

Application to Every State

If Congress acts to extend these benefits, it may additionally consider whether the legislation's existing language would prohibit same-sex couples who are legally married, according to state law, from receiving the benefits.[78] As the legislation is currently written, the term "domestic partner" is defined as "an adult unmarried person living with another adult unmarried person of the same sex in a committed, intimate relationship." Such language could prohibit married same-sex couples from being included in the extension of federal benefits provided for in the bills.

Congress may also act to continue the existing definition of domestic partner, but redefine the bill's application to states where same-sex marriage is not recognized. For example, Congress could require same-sex partners residing in states that allow same-sex marriage to be married in order to qualify for federal benefits. As noted earlier, same-sex marriage is legal in Connecticut, Iowa, Massachusetts, New Hampshire, and Vermont.[79] Unmarried same-sex partners who reside in these states have the option to get married. By requiring partners in these states to get married prior to being eligible for benefits, Congress could then rely on state laws to determine the creation and dissolution of the union—adopting a legal construct similar to the one currently used for opposite-sex marriages. Congress may determine that providing same-sex partner benefits to unmarried same-sex partners in these states is unnecessary because the couple could get married and, therefore, qualify for benefits as married spouses. The federal government currently does not provide federal benefits to the opposite-sex partners of federal employees who are not married.

Extending Benefits Beyond Same-Sex Partners

Some federal employees may not be married to their domestic partners, whether that partner is of the same gender or a different gender. As noted above, the domestic partners of these employees are not eligible to receive many federal benefits because they do not qualify as a "spouse," pursuant to federal law. Congress may consider extending benefits to the domestic partner of any federal employee, regardless of that partner's gender. Such action may attract additional highly qualified candidates to public service. Such action also would permit an employee to qualify for federal benefits without having to identify the gender of his or her domestic-partner. Some employees may be hesitant to identify the gender of their domestic partner, even if the affidavit is confidential. The extension of benefits to such partners regardless of gender, however, could increase the costs of the FEHBP.

(...continued)

local governments provide same-sex domestic partners with benefits. In the private sector, almost two-thirds of the Fortune 1000, and 83% of Fortune 100 companies provide such benefits. U.S. Congress, House Committee on Oversight and Government Reform, Subcommittee on Federal Workforce, Post Office, and the District of Columbia, *Domestic Partnership Benefits and Obligations Act of 2009*, hearing on H.R. 2517, 111th Cong., 1st sess., July 8, 2009 (Washington: GPO, 2009), http://republicans.oversight.house.gov/images/stories/Hearings/pdfs/20090708Badgett.pdf.

[78] Applying a law to only certain states, however, may be unconstitutional, as it could be considered an unequal application of the law.

[79] On December 15, 2009, Washington, DC's City Council passed legislation that would legalize gay marriage. Congress has 30 legislative days to veto the legislation. If Congress does not issue a veto, the legislation would then become law.

OPM Technical Amendments

In his testimony on July 8, 2009, before the House Committee on Oversight and Government Reform, OPM Director Berry endorsed H.R. 2517, but said there were several technical changes that could be made to the bills prior to their enactment. These included reconsidering whether OPM should be tasked with maintaining and ratifying employee's affidavits, ensuring that same-sex domestic partners would receive the same benefits and have the same requirements placed on them as a spouse of the opposite sex, and clarifying the tax status of these newly extended benefits.[80]

OPM as Clearinghouse

The bills would require an employee seeking to enroll their same-sex partner in a federal benefit program to first "file an affidavit of eligibility for benefits and obligations with the Office of Personnel Management." Mr. Berry, in his testimony, said that OPM officials "do not think it is practicable for OPM to play this role." He explained:

> Each Federal agency carries out human resources management functions, including benefits enrollment and payroll deductions, for its own employees. Requiring affidavits to be filed with OPM would be at odds with current provisions of law and regulation governing Federal employee benefits, which recognize that OPM is not a central clearinghouse for all Federal employees.[81]

Congress may choose to pass legislation that would make OPM the central clearinghouse for the affidavits required to qualify for same-sex partner benefits. Designating OPM as the only agency with the authority to maintain those records could increase employee privacy, making it less likely that federal employees' private information is made public. Giving each individual agency the authority to maintain the affidavits could make the documents more susceptible to information leaks, as each agency could have a different system of recordkeeping. In addition, giving individual agencies the authority to file the affidavits makes it more likely that federal employees applying for the benefits may know the person with whom they must file the record, making the process less anonymous. Some federal employees may be less likely to enroll in the program if they must identify themselves as gay or lesbian in front of a co-worker. On the other hand, Congress may determine that OPM's mission does not include this type of government-wide recordkeeping role related to federal benefits. Giving individual agencies the authority to certify employee affidavits would not task OPM with a responsibility it may not have the capacity to undertake.

Making Benefits and Obligations Identical

OPM Director Berry also expressed concerns that the bills do not include prescriptive language that would ensure the same treatment of a former spouse as a former domestic partner. According to Mr. Berry,

> The bill provides that, if a domestic partnership dissolves except by death, the former domestic partner will have the same rights and obligations as a former spouse. By law, a

[80] Ibid., p. 3.

[81] Ibid.

> former spouse is eligible to enroll in the Federal Employees Health Benefits (FEHB) Program if he or she meets certain eligibility criteria. The former spouse must be entitled to a portion of an annuity and must not have remarried before the age of 55.
>
> Under H.R. 2517, there is no language allowing [OPM] to enforce a similar obligation for the former domestic partner under the same circumstances. Entitlements and obligations for former spouses under the involuntary division of property are attributed to court orders with respect to divorce, annulment, and legal separation. In the absence of domestic relations law for domestic partnerships in many States, we believe that we would need more prescriptive language in the bill to avoid potential legal hurdles that could occur.[82]

Congress may act to clarify whether eligibility criteria identical to that for former opposite-sex spouses of federal workers can be extended to the former domestic partners of federal workers. It is unclear how the federal government would enforce a law that prohibited a former same-sex partner of a federal employee from receiving federal benefits if they entered into a new domestic partnership before the age of 55.[83] Because same-sex domestic partners in many states cannot get married or remarried, the federal government may have to consider different benefit eligibility criteria for the same-sex former partners of federal employees.

Tax Status of Benefits

Currently, an opposite-sex spouse who receives federal benefits does not have to pay taxes on his or her benefits. Neither H.R. 2517 nor S. 1102 states whether the same-sex domestic partners of federal employees who choose various benefits would have to pay taxes on those benefits. Congress may act to clarify whether identical tax requirements should be applied to the federal benefits provided to same-sex partners as are applied to the benefits extended to opposite-sex spouses.

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[82] Ibid.

[83] As noted earlier in this report, defining the "dissolution" of a same-sex relationship presents a variety of difficulties, including determining when a partnership has ended.