

MEMORANDUM

April 14, 2016

TO: County Council

FROM: Robert H. Drummer, Senior Legislative Attorney 

SUBJECT: **Introduction:** Bill 17-16, Contracts and Procurement – Equal Benefits for Domestic Partner - Repeal

Bill 17-16, Contracts and Procurement – Equal Benefits for Domestic Partner - Repeal, sponsored by Lead Sponsor Councilmember Leventhal, is scheduled to be introduced on April 19, 2016. A public hearing is tentatively scheduled for May 3, 2016 at 1:30 p.m.

Background

Bill 17-16 would repeal the equal benefits law requiring a County contractor to provide same-sex domestic partner benefits to its employees. Bill 37-09, Contracts and Procurement – Equal Benefits, was enacted on February 2, 2010 and signed into law on February 16, 2010. Code §11B-33D(b) provides:

A contractor or subcontractor must provide the same benefits to an employee with a domestic partner as provided to an employee with a spouse. If a benefit cannot reasonably be provided to a domestic partner, the contractor or subcontractor must pay the employee the cash equivalent.

The legalization of same-sex marriage in Maryland created a new inequity for employers who provided domestic partner benefits to same-sex couples only. Governor O'Malley resolved this inequity by eliminating all domestic partner benefits for State employees soon after the State legalized same-sex marriages. Although Maryland began recognizing same-sex marriages in 2013, many States did not. Last year, the U.S. Supreme Court held that the right to marry is a fundamental right that must be provided to same-sex couples in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). Speaking for the Court, Justice Kennedy said:

These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not

be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry. 135 S.Ct. at 2604-2605.

The *Obergefell* case again changed the legal framework underlying the County's equal benefits law. The original purpose of the equal benefits law no longer applies because same-sex couples are guaranteed the right to marry in all States.

Many States have reacted to this change in law by eliminating all domestic partner benefits. See the *Stateline* article reviewing these reactions at ©8-13. In addition to the State of Maryland, the Montgomery County Board of Education eliminated all domestic partner benefits for its employees after same-sex marriage was legalized in Maryland. In contrast to this trend to eliminate domestic partner benefits, the Executive submitted a Bill to the Council, introduced as Bill 13-16 on April 12, that would provide opposite sex domestic partner benefits to employees represented by MCGEO and unrepresented employees. Bill 17-16 would follow the trend of eliminating domestic partner benefits by permitting a County contractor to decide whether or not to provide domestic partner benefits for their employees.

Lead Sponsor Councilmember Leventhal explained his reasons for introducing this Bill and related Bill 16-16 that would eliminate domestic partner benefits for County employees and retirees in an April 13 memorandum at ©7.

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Bill No. 17-16
Concerning: Contracts and
Procurement – Equal Benefits for
Domestic Partner - Repeal
Revised: April 13, 2016 Draft No. 1
Introduced: April 19, 2016
Expires: October 19, 2017
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

Lead Sponsor: Councilmember Leventhal

AN ACT to:

- (1) repeal the law requiring the County to provide domestic partner benefits for certain employees; and
- (2) generally amend the law regarding benefits for domestic partners.

By amending

Montgomery County Code
Chapter 33, Personnel and Human Resources
Sections 33-22

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Section 11B-33D is amended as follows:**

2 **11B-33D. [Equal Benefits] Reserved.**

3 [(a) *Definitions.* In this Section, the following words have the meanings
4 indicated:

5 *Benefit* means a plan, program, or policy provided or offered by a
6 contractor or subcontractor to some or all employees as part of the
7 employer's total compensation package. This may include:

- 8 (1) bereavement leave;
- 9 (2) family medical leave;
- 10 (3) sick leave;
- 11 (4) health benefits;
- 12 (5) dental benefits;
- 13 (6) disability insurance;
- 14 (7) life insurance; and
- 15 (8) retirement benefits.

16 *Cash equivalent* means the actual cost to the employer for insurance
17 benefits to the spouse of a married employee, which are not provided
18 to a domestic partner, if:

- 19 (1) the benefit would be provided to a domestic partner of an
20 employee if that person were a spouse of the employee; and
- 21 (2) the employer is unable to provide the benefit to a domestic
22 partner of an employee after making a reasonable effort to do so.

23 *Contract* means a contract for services subject to Section 11B-33A or a
24 contract for construction services subject to Section 11B-33C.

25 *Domestic partnership* means:

- 26 (1) a relationship between two individuals of the same sex that has
 27 been licensed as a civil union or marriage in a jurisdiction where
 28 such a civil union or marriage is permitted; or
 29 (2) an unlicensed relationship between two individuals of the same
 30 sex who:
 31 (A) share a close personal relationship and are responsible for
 32 each other's welfare;
 33 (B) have shared the same legal residence for at least 12
 34 months;
 35 (C) are at least 18 years old;
 36 (D) have voluntarily consented to the relationship, without
 37 fraud or duress;
 38 (E) are not married to, or in a domestic partnership with, any
 39 other person;
 40 (F) are not related by blood or affinity in a way that would
 41 disqualify them from marriage under State law if the
 42 employee and partner were opposite sexes;
 43 (G) are each legally competent to contract;
 44 (H) share financial and legal obligations; and
 45 (I) legally register the domestic partnership if a domestic
 46 partnership registration system exists in the jurisdiction
 47 where the employee resides.

48 *Employee* means a person who performs work on a contract in an
 49 employment relationship with the contractor or a subcontractor.]

- 50 [(b) *Equal benefits requirement.* A contractor or subcontractor must
 51 provide the same benefits to an employee with a domestic partner as
 52 provided to an employee with a spouse. If a benefit cannot reasonably

53 be provided to a domestic partner, the contractor or subcontractor must
54 pay the employee the cash equivalent.]

55 [(c) *Contract requirement.* Each contract covered by this Section must:

56 (1) require the contractor and all subcontractors to comply with this
57 Section; and

58 (2) specify that an aggrieved employee, as a third-party beneficiary,
59 may by civil action recover the cash equivalent of any benefit
60 denied in violation of this Section or other compensable
61 damages.]

62 [(d) *Enforcement.*

63 (1) The Director or a designee may perform random or regular audits
64 and investigate any complaint of a violation of this Section. If
65 the Director determines that this Section has been violated, the
66 Director must issue a written decision, including appropriate
67 sanctions, and may withhold from payment due the contractor,
68 pending a final decision, an amount sufficient to:

69 (i) pay each employee of the contractor or subcontractor the
70 cash equivalent of the benefits denied; and

71 (ii) satisfy a liability of a contractor for liquidated damages as
72 provided in this Section.

73 (2) A contractor or subcontractor must not discharge or otherwise
74 retaliate against an employee for asserting any right under this
75 Section or for filing a complaint of a violation.

76 (3) The sanctions of Section 11B-33(b) which apply to
77 noncompliance with nondiscrimination requirements apply with
78 equal force and scope to noncompliance with this Section.

79 (4) Each contract subject to this Section may specify the payment of
80 liquidated damages to the County by the contractor for any
81 noncompliance with this Section.

82 (5) Each contractor is jointly and severally liable for noncompliance
83 with this Section by a subcontractor.

84 (6) A contractor may appeal a written decision of the Director that
85 the contractor violated this Section to the Chief Administrative
86 Officer within 10 working days after receiving a copy of the
87 decision. The Chief Administrative Officer must designate a
88 hearing officer to conduct a hearing under Chapter 2A after
89 receiving a timely appeal. If the contractor does not appeal a
90 written decision within 10 working days after receipt, the
91 decision of the Director becomes final and binding.]

92 [(e) *Report.* The Chief Administrative Officer must report annually to the
93 Council and Executive on the operation of and compliance with this
94 Section.]

95 **Sec. 2. Transition.**

96 The amendments to Section 11B-33D made in Section 1 apply to any contract
97 awarded after the date this Act takes effect.

98

99 *Approved:*

100

101

Nancy Floreen, President, County Council

Date

102 *Approved:*

103

Isiah Leggett, County Executive

Date

LEGISLATIVE REQUEST REPORT

Bill 17-16

Contracts and Procurement – Equal Benefits for Domestic Partner - Repeal

DESCRIPTION: Bill 17-16 would repeal the requirement in the County Procurement Law that contractors and subcontractors provide same-sex domestic partner benefits to its employees.

PROBLEM: The US Supreme Court recently held that same sex marriage must be recognized in all 50 States.

GOALS AND OBJECTIVES: Permit County contractors and subcontractors to decide for themselves if they want to provide domestic partner benefits to their employees.

COORDINATION: Office of Procurement

FISCAL IMPACT: Office of Management and Budget

ECONOMIC IMPACT: Office of Finance

EVALUATION: N/A

EXPERIENCE ELSEWHERE: N/A

SOURCE OF INFORMATION: Robert H. Drummer, Senior Legislative Attorney

APPLICATION WITHIN MUNICIPALITIES: N/A

PENALTIES: N/A

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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

MEMORANDUM

April 13, 2016

GEORGE LEVENTHAL
COUNCILMEMBER
AT-LARGE

TO: Councilmembers

FROM: George L. Leventhal *GLL*

SUBJECT: Bills for introduction re: domestic partner benefits

Dear Colleagues,

I will be introducing the two attached bills and welcome your co-sponsorship.

At the request of the County Executive, legislation was introduced this week to extend domestic partner benefits to all county employees. I can't go along with this in 2016. The county has provided health benefits to members of the police union who register as non-married domestic partners (regardless of whether they are straight or gay or lesbian) since 2001, and to members of the firefighters' union since 2010. This bill would expand the benefit to members of MCGEO, the Montgomery County Government Employee Organization.

I strongly support marriage equality, and it makes perfect sense to me that when marriage became legal in Maryland for gays and lesbians, former Governor O'Malley eliminated domestic partner benefits for all state employees, and Montgomery County Public Schools eliminated them for MCPS employees. Mr. Leggett's bill, which I oppose, goes in the opposite direction, extending health benefits to non-married employees who live together at an estimated cost to taxpayers of \$4.8 million over the next six years.

Domestic partner benefits made sense when marriage was illegal for gays and lesbians, but they don't make sense today. We should recognize that times have changed and taxpayers should not have to continue paying the cost of an historic artifact. I am strongly committed to universal access to health care but this can be achieved through other means, including getting married!

The first of the two bills would repeal domestic partner benefits for county employees. The second bill would repeal the law requiring a county contractor to provide same-sex domestic partner benefits to its employees.

Please let me know if you have questions or would like to co-sponsor either or both bills.



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Stateline / After Same-Sex Marriage Ruling, States

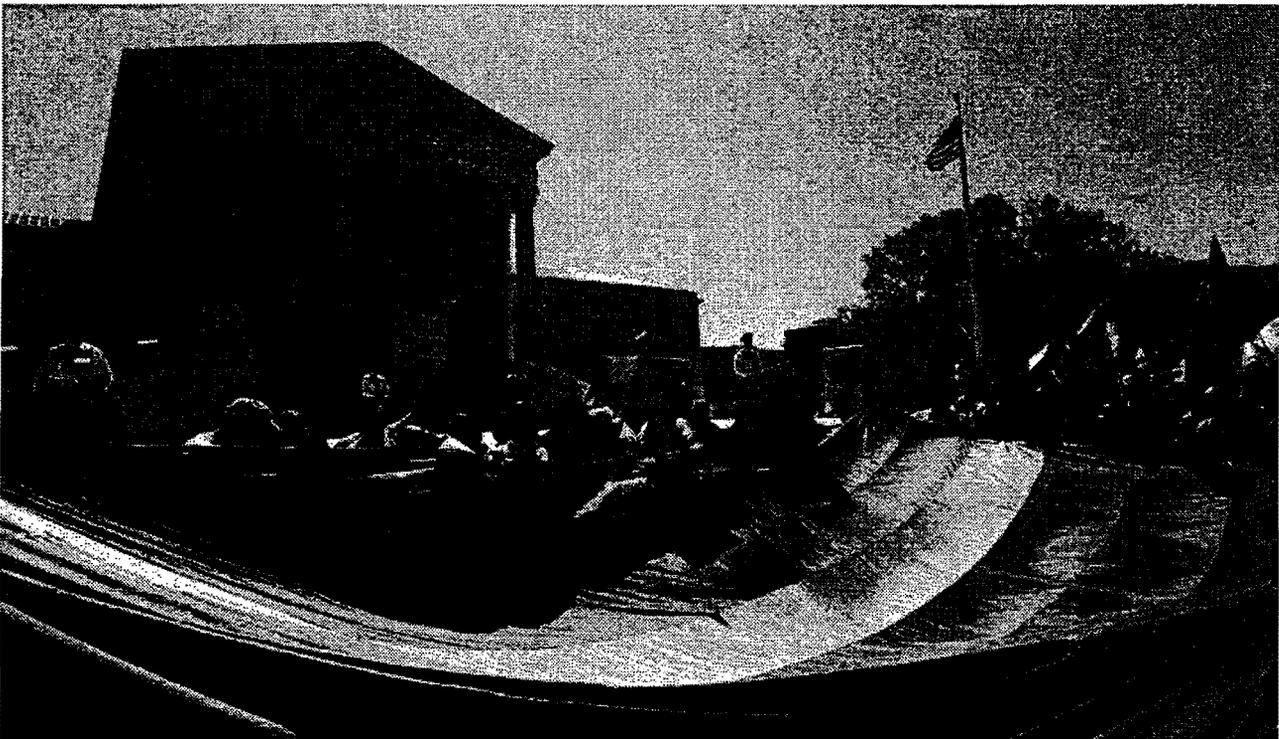
Reconsider Domestic Partner Benefits

STATELINE

After Same-Sex Marriage Ruling, States Reconsider Domestic Partner Benefits

September 11, 2015

By Rebecca Beitsch



The U.S. Supreme Court ruling legalizing same-sex marriage has some state and local governments reconsidering their domestic partner benefits.

Now that the U.S. Supreme Court has legalized same-sex marriage nationwide, some states that offer health and retirement benefits to their employees' domestic partners are considering changing those policies, in large part to save money or avoid discrimination lawsuits.

Before the ruling, 34 percent of state and local governments allowed unmarried same-sex couples to receive health care benefits, while 28 percent did so for domestic partners of the opposite sex, according to a study of public sector benefits by the Bureau of Labor Statistics.

Based on what happened in states that legalized gay marriage on their own, those numbers are about to dwindle.

Maryland ended domestic partner benefits for state employees, which it offered only to same-sex couples, just a few months after it legalized same-sex marriage in 2013. Arizona did the same after its legalization in 2014. Alaska still offers same-sex domestic partner benefits to the roughly 6,000 state employees it covers, but it is now reviewing that policy. The majority of Alaska state employees get their health insurance through state-funded union health trusts, and the state's largest union, the Alaska State Employees Association, ended same-sex domestic partner benefits for the more than 8,500 state and municipal employees it covers.

Connecticut and Delaware never offered domestic partner benefits to their workers, but they did allow those in civil unions to add their partners to their health and retirement plans. The two states scrapped those benefits once same-sex couples could marry.

Of the 13 states that prohibited same-sex marriage before the Supreme Court's June ruling (Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Tennessee and Texas), only Michigan offered anything similar to domestic partner benefits, as employees could add to their plan one adult they were not related to. Matthew Fedorchuk with the Michigan Civil Service Commission, which oversees state benefits, said the fate of those benefits could be hashed out in ongoing labor negotiations.

Government workers are likely to see more changes than those in the private sector.

Bruce Elliott, manager of compensation and benefits for the Society for Human Resource Management (SHRM), cited a survey of 153 companies by Mercer, a health care advocacy group, which found that although some companies had plans to get rid of their domestic partner benefits, many were not planning changes. Of the 19 percent that offered domestic partner benefits to same-sex couples, 23 percent said they would drop the option in the next year, while another 23 percent said they would do so over the next two or three years. The majority of companies offered domestic partner benefits to both homosexual and heterosexual couples, and 62 percent of those said they were not planning any changes.

Elliott said domestic partner benefits may be more vulnerable within state and local government, where competition over employees isn't as fierce as in the private sector and where leaders have been under pressure to keep finances in check since the recession.

A Question of Fairness

Cathryn Oakley, senior legislative counsel for the Human Rights Campaign, a gay rights advocacy group, said the group is encouraging public and private employers to keep offering domestic partner benefits. But she said employers that offer domestic partner

benefits exclusively to same-sex couples should extend them to heterosexual couples to avoid discrimination lawsuits.

That risk is part of the reason the capital city of Annapolis, Maryland, decided to end its domestic partner benefit program.

“We had added it because the law didn’t treat people equally,” Paul Rensted, former human resources manager for the city, said of the program, created in 2010. Now all city employees must be married to add an adult to their benefits package, and Rensted said couples were given six months’ notice, with four employees ultimately marrying.

Many in the gay rights community say keeping domestic partner benefits would continue to benefit some in the gay community as well as other non-traditional families. But straight couples would continue to be the biggest user of the benefits, they say.

“Millennials are waiting longer to get married, but that doesn’t mean they’re not living together—they’re not all living with mom and dad,” said SHRM’s Elliott.

Nancy Polikoff, a family law professor at American University Washington College of Law, said she likes “plus one” policies that allow employees to take care of their families, whether it be a spouse, a partner or an aging relative.

“The purpose of providing benefits is to help employees fund the financial and emotional obligations in their homes, and marriage is not always a part of that,” she said.

She pointed to Salt Lake City’s plan as a model. City employees can add any adult to their plan as long as they live together.

Jodi Langford, who oversees the benefits program for the city, said it has been used to cover parents, siblings and unmarried children older than 26 who would otherwise age out of their parents’ health insurance plans. Of the 60 people on the plan before same-

sex marriage was made legal, only about 10 have switched to spousal benefits.

"If we stop, we would have parents, siblings, boyfriends and girlfriends who would be without benefits," Langford said. While the program is secure for now, she said there's been some talk about reviewing it within the next year.

In Florida, public universities are planning to review their domestic partner benefits. Because only spouses are eligible for state-funded benefits, state universities had to come up with creative solutions to offer benefits to gay employees' domestic partners. It was an anonymous gift that covered the additional cost of adding an adult beneficiary to a health plan at Florida State University (FSU) starting in 2014, while the University of North Florida (UNF) began covering the additional cost to employees through its fundraising foundation in 2006.

Spokesmen for both universities said the programs played a role in attracting talent. UNF is winding down its program, which had only been offered to same-sex couples, said Vice President and Chief of Staff Tom Serwatka.

"When we went to this, we did so on the basis that heterosexual couples had a choice whether they wanted to marry and understood the full implication of that choice. Homosexual couples didn't have that choice." Now that they do, Serwatka said, it makes less sense for the university to raise private funds to pay for the benefits.

"The university wasn't trying to change the idea of marriage as the policy for the state, and state funding required marriage," he said.

FSU is reviewing its program, which only paid for health insurance for domestic partners who could not get insurance through their work, said spokesman Dennis Schnittker.

"The gift was made under the belief of the donor that the state would be funding the benefit in the near future," he said.

No Change?

In some states, however, domestic partner benefits are likely to continue.

California's domestic partner benefit statutes remain intact, and in Massachusetts the policy is part of a still-standing executive order. Maine and Vermont, which was the first state to offer domestic partner benefits, are not planning to change their programs.

"We wouldn't just get rid of it because same-sex marriage has come about," said Tom Cheney, deputy commissioner for Vermont's Department of Human Resources. "The state of Vermont has long seen the value in offering domestic partner benefits to couples of all types. It's a useful recruitment and retention tool for the state as an employer."

Elliott believes it's too early to know what most employers—both public and private—will do with domestic partner benefits.

"Once we get past this year into next year's open enrollment, we're going to see some real change. The tea leaves haven't dried yet," he said.

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