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# THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER- SPONSORED RETIREMENT PLANS

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*The Williams Institute, UCLA*

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# THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS

## *Executive Summary*

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Planning for retirement is a universal concern of American workers, regardless of their ages. But certain groups of workers must plan for the financial challenges of retirement in a context of unequal access to the institutions and public programs that help workers save for and manage that phase of their lives. Gay, lesbian, and bisexual employees (among other disadvantaged groups) face challenges that reflect employer practices and legal institutions that create a context of inequality. In particular, the lack of legal recognition for the same-sex partners of employees results in unequal treatment in employers' retirement plans.

This report analyzes the impact of unequal treatment of same-sex partners in the context of retirement plans and estimates the cost for employers of adopting a policy of equal treatment. The focus of this report is retirement income rather than health care provision for retirees and their families. Our goal is to address several key issues for same-sex couples as they plan for retirement. We find that same-sex couples face inequalities when it comes to their ability to accumulate wealth, plan for their futures, and pass on wealth.

**The characteristics of all same-sex couples provide a mixed picture for predicting their retirement savings and wealth. While some of the characteristics indicate that they would have less retirement savings and wealth than different-sex married couples, other indicate they would have more.** Current research suggests:

- Same-sex couples are less likely to own their homes than are different-sex married couples, and homes comprise the largest component of wealth for most Americans during retirement.
- Individuals in same-sex couples may have longer employment histories which would suggest greater retirement income. In particular women in same-sex couples have longer work histories than women in different-sex married couples.
- Individuals in same-sex couples have high levels of education. Because education is related to retirement savings and wealth, this would suggest that same-sex are more likely to save for retirement and have higher overall savings.

**Women in same-sex couples are disadvantaged in terms of employment that provides employer-sponsored pension plans.**

- Only 50% percent of female same-sex couples have at least one member eligible for an employer-sponsored retirement plan compared to 56% of different-sex married couples and 79% of male same-sex couples.
- Rates of participation in employer-sponsored plans also vary by couple type: only 46% of female same-sex couples have at least one member participating in an employer-sponsored plan compared to 52% of different-sex married couples and 69% of male same-sex couples.

**Female same-sex couples over 65 have almost 20% (\$12,000) less income than different-sex married couples.** The gender gap in wages and retirement savings compared to men means that female same-sex couples are severely disadvantaged when compared to different-sex couples and male same-sex couples. Using data from the Survey of Consumer Finance and the American Community

Survey, we find that female same-sex couples over 65 are disadvantaged in each of the three main sources of retirement income for most Americans – social security, retirement plans, and income from interest, rentals, and dividends.

- Female same-sex couples rely most heavily on social security income as a percent of their overall income. For couples in which both members are ages 65 and older, social security comprises 36% of female same-sex couples' income, 33% of different-sex married couples' income, and 31% of male same-sex couples' income.
- On average, female same-sex couples over 65 receive 15% less (\$2,800) in social security benefits than different-sex married couples.
- They are also 10% less likely than different-sex married couples over 65 to have any income from retirement plans or accounts. On average, their income from these sources is almost 27% less (\$3,575) than different sex-married couples over 65.
- They are 21% less likely to have any income from interest, rentals and dividends than different-sex married couples over 65.

**As a result, elderly female same-sex couples rely more on public benefit programs and continuing to work to maintain their household incomes.**

- Female same-sex couples over 65 are 70 to 80% more likely to have income from SSI and public assistance than different-sex married couples.
- Female same-sex couples also rely more heavily on wage income than do other couples.

**Male same-sex couples have higher income during retirement, but are less likely to have income from retirement plans and are more likely to have wage income and interest income.**

- Male same-sex couples with at least one member age 65 or older are 21% less likely to have retirement income than are different-sex married couples.
- Male same-sex couples are 60% more likely to have wage income than different-sex married couples.

**Same-sex couples are unable to access social security spousal and survivor benefits.** Because the federal government does not recognize same-sex relationships, same-sex couples are not eligible for spousal or survivor benefits from social security. Surviving same-sex partners who have lower benefits than their deceased same-sex partner lose out on more than \$5,700 each year in survivor benefits that different-sex married couples are able to access.

**Same-sex couples are treated differently than different-sex married couples in terms of employer-sponsored retirement plans.** Because the federal government does not recognize the same-sex partners of employees as spouses, employees with same-sex partners are treated like their single counterparts. For those employees with defined benefit plans, employees with same-sex partners do not have the option of selecting a Qualified Pre-Retirement Survivor Annuity (QPSA) or a Qualified Joint and Survivor Annuity (QJSA) to provide benefits to their partners in the case of their death.

**The costs to employers of treating same-sex couples equally in retirement plans are minimal.**

- For employers offering defined benefit plans, the costs of allowing employees with same-sex partners to opt for survivor benefits are small, primarily the administrative costs of amending plan and associated documents and of longer payout schedules.
- In the case of a defined contribution plan, the only costs associated with treating same-sex partners equally is the cost of amending the plan and any associated documents.

**The Pension Protection Act (PPA) has moved the treatment of same-sex couples closer to the treatment of married couples in the context of the taxation of retirement assets, but inequalities still exist.** The PPA permits withdrawals from retirement savings for hardships experienced by any designated beneficiary of certain kinds of retirement accounts, including a same-sex

partner. It also created a new mechanism for passing eligible retirement plan assets from individuals to nonspouses, including same-sex partners. However, same-sex partners are still disadvantaged:

- Spousal beneficiaries are permitted to wait until they reach age 70½ to begin making withdrawals from their deceased spouse's retirement account. Nonspousal beneficiaries, including same-sex partners, on the other hand, must begin taking withdrawals immediately upon the death of their partner.
- The PPA did not make hardship withdrawals for nonspousal beneficiaries mandatory, so some employers may not offer these to their employees.

The inequalities facing same-sex couples are substantial when it comes to their ability to accumulate wealth, plan for their futures, and pass on wealth. These inequalities are particularly significant for female same-sex couples. Existing inequalities in income as well as structural mechanisms that reinforce discrimination have long-term implications for same-sex couples and their families. Until state and federal laws, including the Defense of Marriage Act, change to protect same-sex couples from discrimination both in the workplace and in the tax system, couples may need to take extra caution when planning their financial futures.



# THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS

## *Introduction*

Planning for retirement is a universal concern of American workers, regardless of their ages. But certain groups of workers must plan for the financial challenges of retirement in a context of unequal access to the institutions and public programs that help workers save for and manage that phase of their lives. Gay, lesbian, and bisexual (GLB) employees (among other disadvantaged groups) face challenges that reflect employer practices and legal institutions that create a context of inequality. In particular, the lack of legal recognition for the same-sex partners of employees results in unequal treatment in employers' retirement plans.

This report analyzes the impact of unequal treatment of same-sex partners in the context of retirement plans and estimates the cost for employers of adopting a policy requiring equal treatment. The focus of this report is retirement income rather than health care provision for retirees and their families.<sup>1</sup> Our goal is to address several key issues for same-sex couples as they plan for retirement.

First, we draw on the 2005 and 2006 American Community Survey and the Survey of Consumer Finance to analyze the retirement income of same-sex couples. Specifically:

- What characteristics of same-sex couples put them at an advantage or disadvantage with respect to retirement income?
- What kind of retirement assets do same-sex couples hold pre-retirement?
- How much retirement income do same-sex couples earn?

Next we discuss the ways that employers typically treat employees with same-sex partners differently from heterosexual married employees:

- How are employees with same-sex partners treated differently by employer-sponsored retirement plans?
- What proportion of employees with same-sex partners face such unequal treatment?
- What would be the cost to employers of equal treatment for same-sex partners?

Beyond employer policies, we outline the ways in which same-sex couples are treated differently in tax law with respect to retirement assets, especially individual retirement accounts (IRAs) and 401(k) plans. Specifically, we focus on the ways that employees are limited in their ability to pass the wealth in these retirement assets to their same-sex partners and the impact that these inequalities have on couples' abilities to plan for the future.

Finally, we discuss strategies for same-sex couples to work around the inequalities that exist in federal law governing employer-sponsored retirement plans and other retirement assets.

### Key Findings

We find same-sex couples are disadvantaged in both retirement assets and savings and in their ability to plan for the future. Female same-sex couples have significantly lower retirement income when compared to different-sex married couples and male same-sex couples. They are much more likely to receive public assistance. Male same-sex couples are more likely to have wage income during retirement and rely more heavily on interest and dividend income than are different-sex married couples. Male same-sex

***Same-sex couples are disadvantaged in retirement assets, retirement savings, and the ability to pass on wealth.***

couples are 21% less likely than different-sex married couples to receive income from retirement plans.

Because federal law does not recognize same-sex partners as spouses, same-sex couples are treated differently than different-sex married couples when it comes to their ability to pass retirement wealth to their partners. As a result, same-sex couples are not ensured the same amount of financial protection as different-sex married couples, leaving same-sex couples with fewer options for retirement planning.

While the majority of these inequalities are a direct result of the Defense of Marriage Act and its provision that prohibits same-sex partners from being treated as spouses under federal law, some of the inequalities faced by same-sex couples may be mitigated both through financial planning and as a result of changes to individual employer retirement plans.

### A Note About Single GLB and Transgender Individuals

This report relies on data from the Survey of Consumer Finance and the American Community Survey. These surveys ask respondents to complete a household roster. In doing so, we are able to identify individuals who are living with an unmarried partner of the same-sex. Since most of the disadvantages outlined in this report relate to same-sex couples, these datasets are very helpful for understanding challenges faced by GLB couples.

Few surveys include questions about sexual orientation that would allow for analysis of a broader range of GLBT people, however. Of the surveys that include questions about sexual orientation, none include the specific financial data that this report analyzes. Therefore, this report and its conclusions pertain only to same-sex couples and individuals in same-sex couples. Furthermore, there are no nationally or locally representative data about transgender individuals. A recent literature review suggests that many transgender individuals have low income levels.<sup>2</sup> These findings suggest that transgender individuals may face substantial challenges during retirement.

## *The Retirement Savings and Income of Same-Sex Couples*

### **Characteristics of Same-Sex Couples That May Affect Retirement Incomes and Assets**

While much attention has been paid to whether Americans are saving enough for retirement, especially as the future of Social Security is questioned, most studies conclude that Americans are not planning adequately for retirement savings. For instance, one study examining behavior of respondents ages 51-56 found that 30% had not given any thought to retirement.<sup>3</sup> Recent data also suggests that there are large discrepancies in the amount Americans are saving for retirement compared with what they will need.<sup>4</sup> Studies of retirement savings and income have found several key indicators of level of savings: homeownership, labor force involvement, gender, educational attainment, race, and marital status. These indicators provide insight into the ways in which same-sex couples may be either advantaged or disadvantaged in terms of retirement income and assets.

*Same-sex couples have lower homeownership rates:* Same-sex couples are less likely to own their homes than their different-sex married counterparts.<sup>5</sup> In the 2005-2006 American Community Survey (ACS), 85.1% of female same-sex couples with at least one member age 65 or older owned their homes, compared to 89.3% of male same-sex couples, and 90.6% of different-sex married couples. Studies using the Health and Retirement Survey (HRS) found that home values constitute the single largest component of wealth for a majority of U.S. households; in the lower four quintiles of individuals over age 55, the value of their homes is greater than any other single component of wealth, including retirement savings.<sup>6</sup> One would thus expect that same-sex couples would have lower overall retirement wealth than their different-sex married counterparts.

*Women in same-sex couples have longer employment histories while men in same-sex couples earn less:* While men in same-sex and different-sex married couples do not have different full-time employment rates, women in same-sex couples are more likely than are

married women to work full-time.<sup>7</sup> We might expect that female same-sex couples would have higher retirement savings and income due to longer engagements in the workforce. However, there is a well-documented gay male “penalty” and lesbian “premium” in terms of earnings when compared to different sex-coupled men and women.<sup>8</sup> Men in same-sex couples earn less than do men in different-sex married couples, while women in same-sex couples earn more than women in different-sex married couples.<sup>9</sup> Both employer-sponsored retirement savings and Social Security benefits are tied to income as well as time at a company. If female same-sex couples work longer, one would expect same-sex couples to have higher retirement incomes, although men in same-sex couples’ lower earnings might reduce retirement income.

*Female same-sex couples are uniquely disadvantaged by the gender gap in wages and savings:* Women are particularly disadvantaged when it comes to current and projected retirement savings and income.<sup>10</sup> There is strong evidence that women generally save less for retirement than do men. In one study, unmarried men had 20% more retirement wealth than did unmarried women, and both groups had less than one-third of average married couples’ retirement wealth. A study using HRS data found that 85% of this retirement income gap for unmarried women, when compared to unmarried men, was due to labor force factors. Commonly cited reasons include women’s lower wages, fewer average years of work, shorter job tenure, and the lack of retirement benefits offered in female-dominated jobs.<sup>11</sup> As a result, women over the age of 65 are twice as likely to live in poverty as are similarly aged men, as are older lesbians.<sup>12</sup> The gender gap in wages and retirement savings means that female same-sex couples may be severely disadvantaged when compared to different-sex couples and male same-sex couples.

*Individuals in same-sex couples tend to have high levels of education:* Census 2000 and other datasets have revealed that same-sex couples have higher levels of education than do

different-sex couples.<sup>13</sup> The 2005-2006 ACS data mirrors this trend: 27.4% of married men age 65 or older have a college degree or higher compared to 37.8% of men in same-sex relationships age 65 or older. Seventeen percent of married women age 65 or older have a college degree or higher versus 25% of women in same-sex relationships. Several studies have linked an individual's educational attainment with retirement savings and wealth. One study conducted using the HRS data found a strong relationship between wealth and education: baby boomers with less than a high school diploma have a median net worth of \$22,000, while those with a high school degree have four times that, and boomers with a college degree or more have median net wealth approximately fourteen times that of boomers without a high school degree.<sup>14</sup> According to an April 2008 Wall Street Journal Online/Harris Interactive Personal Finance Poll, 65% of individuals with a college degree or higher had begun planning for retirement compared to just 37% of individuals with a high school degree or less.<sup>15</sup> Given that same-sex couples are more likely to have high education, we expect that same-sex couples are more likely to save for retirement and to have higher overall savings.

*Unmarried people have lower retirement savings than married couples:* The HRS data suggest that unmarried couples have less retirement savings than married couples.<sup>16</sup> Schmidt and Sevak found that married couples had twice the mean wealth of households headed by single females (2005). Analysis of the HRS data indicate that the average household income for the middle fifth of unmarried individuals between the ages of 65 and 74 was \$17,000, as compared to \$42,000 for married households in the same middle quintile.<sup>17</sup> An April 2008 Harris Poll found that only 39% of single women had an investment account for retirement, as compared to 60% of married women.<sup>18</sup> Another Harris Poll found that 47% of individuals identifying as gay, lesbian, bisexual, or transgender reported having an investment account specifically for retirement, as compared to 51% of individuals who identified as heterosexual.<sup>19</sup> It is not surprising that economic well-being during retirement is directly linked to marital status, since married couples have higher incomes before retirement, as well

as greater wealth in retirement.<sup>20</sup> Since same-sex couples are only allowed to marry in four states, they are by definition usually unmarried, although they might share characteristics of interdependence with married couples. Other studies have found that households with children have, on average, more wealth.<sup>21</sup> Given that same-sex couples are less likely to have children than are married couples, this may suggest lower wealth levels for same-sex couples.<sup>22</sup> Whether same-sex couples more closely resemble married or cohabiting different-sex couples is unclear as is the impact on retirement savings.

### **Types of Retirement Assets of Same-Sex Couples Before Retirement**

We use the Survey of Consumer Finance (SCF) to get a sense of what types of retirement savings and assets same-sex couples hold before reaching retirement age.<sup>23</sup> Sponsored by the Federal Reserve Board, the SCF collects data about Americans and their finances. The survey is conducted every three years. Households are selected randomly and participation is voluntary. While the survey does not include questions about sexual orientation, participants are asked to identify members of their household, including their spouse or partner. In our analysis, we focus on those households in which the respondent and his or her partner are of the same-sex, and we compare these "same-sex couples" to married respondents in which the respondent and spouse are of different sexes. Data from the 1992, 1995, 1998, 2001, and 2004 surveys were pooled in order to have enough observations to conduct statistical analyses.

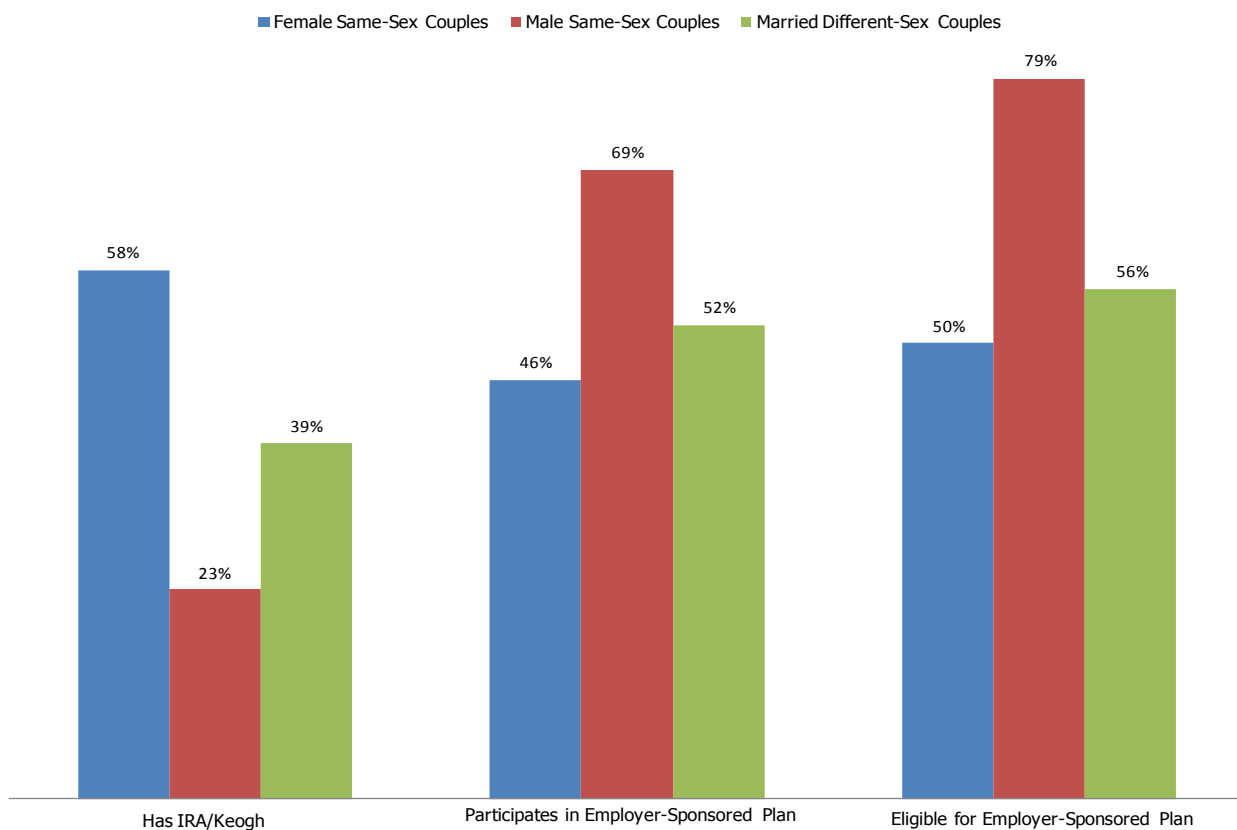
SCF data show that 52% of different-sex married couples have a retirement plan sponsored through an employer compared to 69% of male same-sex couples and only 46% of female same-sex couples. These differences are statistically significant. Similar, statistically significant patterns emerge in eligibility for employer-sponsored retirement plans: 56% of different-sex married households have at least one member eligible for such a plan, while 79% of male same-sex households and 50% of female same-sex households have at least one eligible member. This disparity in retirement

plan participation and eligibility is also a function of gender disparities in the types of employment for which plans are often offered.

IRAs may be seen as an alternative or substitute for employer-sponsored retirement plans. It is not surprising, then, since female same-sex couples are much less likely to be eligible or have an employer-sponsored retirement plan, they participate at higher rates in IRA and Keogh plans. SCF data shows that female same-sex couples are more likely to have IRA or Keogh plans than different-sex married or male same-sex couples. Fifty-eight percent of female same-sex couples surveyed have an IRA or Keogh plan, while only 39% of different-sex married couples and 23% of male same-sex couples have these types of plans. Female same-sex couples also have more money held in IRA or Keogh plans. Female same-sex couples have, on average, \$41,684 in combined IRA and Keogh plans, while male same-sex couples have \$14,916 and different-sex married couples have \$29,791.

The results from the SCF mirror general trends related to gender. Women are often disadvantaged in terms of retirement savings because they have been more likely to work for employers that do not offer retirement programs.<sup>24</sup> This may explain the lower participation and eligibility rates for lesbians. Given that both men in male same-sex couples are more likely to work than are both members of a different-sex married couple, it is not surprising that male same-sex couples appear to be advantaged in terms of retirement savings. The overall picture of same-sex couples and their financial assets is mixed. Female same-sex couples have greater wealth in IRA and Keogh plans, while male same-sex couples are eligible and participate in much greater numbers in employer-sponsored plans.

**Figure 1. Percent of Couples Participating in and Eligible for Retirement Assets**



### Analysis of Retirement Income Among Older Same-Sex Couples

The American Community Survey (ACS) allows us to measure retirement income for couples where one or both members are age 65 or older. The ACS is conducted by the U.S. Census Bureau on a yearly basis. The ACS asks respondents to complete a household roster, in which respondents must identify all individuals living in their home. In addition to spouse, respondents may select an “unmarried partner,” who is defined as someone with whom the respondent “shares living quarters and has a close personal relationship.” By identifying householders and partners of the same or different sex, we can compare same-sex couples to different-sex married couples. In this paper, we combine data from the 2005 and 2006 American Community Surveys. We estimate that there are 77,200 individuals in same-sex couples who are 65 or older: 38,800 men and 38,400 women.

Among households where at least one member is age 65 or older, the data presented in Table 1 show that male same-sex couples have significantly higher total incomes than different sex married couples and female same-sex couples.<sup>25</sup> Male same-sex couples have an

average total income of \$81,381 as compared to \$61,174 for different-sex married couples and \$53,255 for female same-sex couples.

As previous studies suggest, female same-sex couples face a significant disadvantage in overall income levels as well as all key forms of retirement income. Female same-sex couples have \$3,615 less in retirement income, \$4,051 less in interest and dividend income, \$5,412 less in social security income, and \$1,161 less in self-employment income than different-sex married couples.

Male couples have lower levels of social security income than married couples, as well as lower or comparable levels of income in most other categories. Male same-sex couples are 21% less likely to be receiving retirement income compared to different-sex married couples.

Both female and male same-sex couples have higher wage income than their different-sex married counterparts, which may mean that one or both partners work longer into older age, perhaps to compensate for less expected income from social security or other sources. In particular, male same-sex couples have more than two times the amount of wage or salary income than different-sex married couples,

**Table 1. Average Couple Income by Source, Households with at Least One Member Age 65 or Older**

Income Type	Female Same-Sex Couples (n=394)	Male Same-Sex Couples (n=421)	Different-Sex Married Couples (n=137,534)
Total Income	53,255*	81,381*	61,174
Retirement Income <sup>1</sup>	9,267*	10,905	12,882
Interest, Dividend, Rental Income	6,135*	12,739	10,186
Social Security Income	11,764*	14,116*	17,176
Wage or Salary Income	21,349*	34,798*	15,401
Supplemental Social Security Income	519*	337	279
Public Assistance Income	70	46	33
Self-Employment Income	1,880*	6,237	3,041
All Other Income <sup>2</sup>	2,272	2,203	2,175

\*Statistically significant at  $p < 0.05$  when compared to different-sex married couples

1 Retirement income includes income from retirement, survivor, or disability pensions.

2 Other income includes income from any other sources including Veterans' payments, unemployment compensation, child support or alimony.



**Table 2. Average Couple Income by Source, Households with Both Members Age 65 or Older**

Income Type	Female Same-Sex Couples (n=134)	Male Same-Sex Couples (n=130)	Different-Sex Married Couples (n=97,377)
Total Income	44,583*	65,912	56,578
Retirement Income <sup>1</sup>	9,778*	12,059	13,353
Interest, Dividend, Rental Income	8,450	17,881	10,993
Social Security Income	16,130*	20,489	18,909
Wage or Salary Income	7,496	9,302	8,518
Supplemental Social Security Income	382	310	271
Public Assistance Income	109	35	33
Self-Employment Income	634*	2649	2,196
All Other Income <sup>2</sup>	1,514	3,187	2,305

\*Statistically significant at  $p < 0.05$  when compared to different-sex married couples

1 Retirement income includes income from retirement, survivor, or disability pensions.

2 Other income includes income from any other sources including Veterans' payments, unemployment compensation, child support or alimony.

which accounts for most of higher total income seen for male couples. Male same-sex couples are 60% more likely to be receiving wage income than are different-sex married couples.

Higher wage income for female and male same-sex couples could also be explained by the wages of younger spouses who are still working. In couples with both members 65 or older, the differences between male same-sex couples and different-sex married couples in terms of income are less pronounced (Table 2). While male same-sex couples still have the largest total couple income, the differences between male same-sex couples and different-sex married couples are no longer statistically significant. Still, male same-sex couples are 16% less likely to have retirement income than are different-sex married couples.

The types of income that constitute total couple income for these older couples are also substantially different than for couples with one younger spouse or partner. Social Security income, interest, dividend, and rental income, and retirement income constitute the largest sources of income for all couples with both members are 65 or older. In contrast, wages

play a much larger role in overall income for couple with one younger partner, as indicated by a comparison with Table 1 above.

While the differences between male same-sex couples and different-sex married couples are no longer statistically significant for these older couples, female same-sex couples with both members age 65 or older continue to be disadvantaged. Female same-sex couples have lower overall couple income, as well as lower retirement income, lower social security income, and lower interest, dividend, and rental income, which are the three largest sources of income for older couples. For all of these but interest income, the differences between female same-sex couples and different-sex married couples are statistically significant. These differences likely reflect women's lower lifetime earnings, which would reduce retirement savings, other forms of wealth, and social security income. This gender effect would be more pronounced for a lesbian couple. Female same-sex couples are 10% less likely to have retirement income than are different-sex married couples and 21% less likely to have interest or dividend income, and they receive approximately 20% less in these types of income. Female same-sex couples,

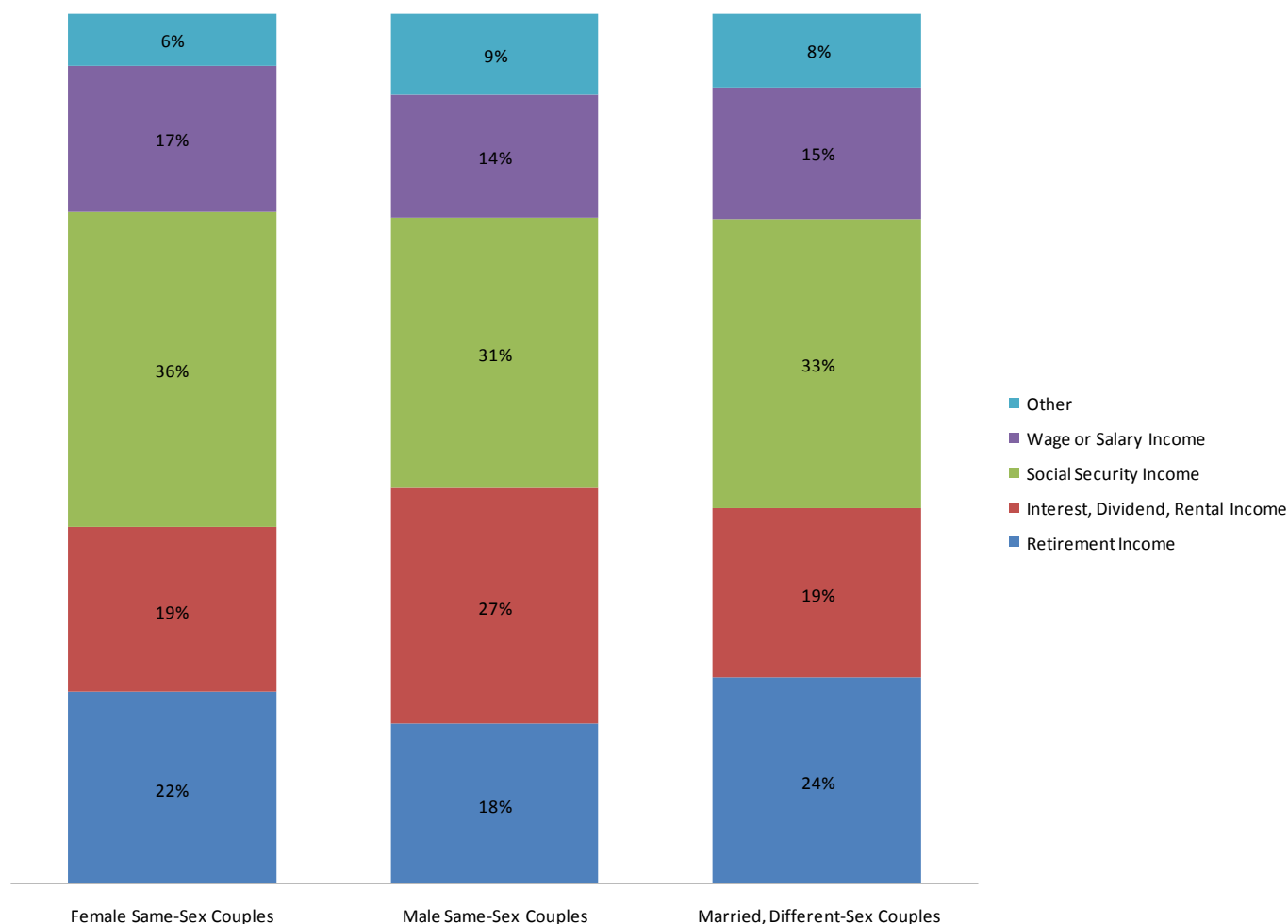
## SAME-SEX PARTNERS & EMPLOYER-SPONSORED RETIREMENT PLANS

instead, are much more likely to receiving public assistance in the form of supplemental social security income (72% more likely) or public assistance income (84% more likely).

Examining the composition of total income by couple type also shows significant differences (see Figure 2). Almost all individuals in older couples, regardless of couple type, receive social security payments, and those payments are the largest source of income for these couples. Social security comprises a larger share of total income for female same-sex couples (36%) than

it does for both male same-sex (31%) and different-sex married couples (33%). Female same-sex couples also rely more heavily on wage income than do other couples: seventeen percent of total income is wage income for same-sex couples compared to 14% for male same-sex couples and 15% for different-sex married couples. Interestingly, retirement income comprises a lower share of overall income for male same-sex couples (18%) than it does for either female same-sex couples (22%) or different-sex married couples (24%).

**Figure 2. Composition of Retirement Income, Households with Both Members Ages 65 or Older**





### Social Security Income

Under the current Social Security system, monthly payment levels are based upon years worked and accumulated wages over the course of one's lifetime. Married different-sex couples are entitled to two different types of social security benefits: spousal benefits and survivor benefits.

A spousal benefit allows a spouse with little or no social security earnings to receive a social security benefit up to one-half of their spouse's full benefit. For example, Jane is eligible for \$250 in social security benefits, and her husband's social security benefit is \$800. As a spouse, Jane is eligible for a spousal benefit of \$400. As a result, Jane will receive her \$250

***Surviving same-sex spouses are not eligible for more than \$5,700 each year in survivor benefits.***

based upon her own earnings, and an additional \$150 in spousal benefits to bring her total social security payment to a total of half of her husband's benefit, or \$400.

In the case of the death of one spouse, a survivor benefit allows the surviving spouse to continue receiving a monthly payment that reflects the higher of the pair's earnings. For example, for a different-sex married couple, the husband may receive \$12,073 each year while his wife may receive \$6,835 each year. When the wife passes away, the husband continues to receive his monthly payment of \$12,073. However, if the husband dies first, the wife would then begin receiving the higher of their payments, or \$12,073.

Because the federal government does not recognize same-sex relationships (whether married or not), same-sex couples do not benefit from this potential survivor benefit. Previous research suggests that individuals in same-sex couples are both more likely to work, so the potential gap between their monthly payments may not be as substantial as in different-sex married couples.<sup>26</sup> However, Census data suggest that same-sex couples are likely to lose out on the survivor benefit. A 2004 study estimated that the average loss of survivor benefits for surviving partners who have lesser incomes would be \$5,528 each year.<sup>27</sup>

Using more recent ACS data, we calculate the average difference in social security payments between the members of a couple. For couples in which both members are ages 65 or older, the difference in annual social security income between female same-sex couples is \$5,700 and \$5,767 for male same-sex couples. Because same-sex couples are not eligible for social security survivor benefits, if the partner receiving higher social security payments dies, the surviving same-sex partner will lose this amount in monthly benefits.

Lower incomes for women over the age of 65 in same-sex couples mirror the overall observation that women are disadvantaged in income and retirement savings. However, structural inequalities exist that magnify these disadvantages. The following sections turn to the structural ways in which same-sex couples are treated differently by their employers and the tax system in the context of retirement plans and savings.

### ***Employer-Sponsored Retirement Plans and Employees with Same-Sex Partners***

Based upon the Bureau of Labor Statistics' Employee Benefits Survey, the number of Americans participating in employer-sponsored retirement plans is increasing. In 2006, 60% of full-time workers participated in those plans, a 4 percentage point increase from 1999. Given that the majority of American full-time workers are now participating in employer-sponsored retirement plans, it is important to understand how same-sex couples may be treated unequally by their employers and the law as well as how much it would cost employers to ensure equal treatment.

While overall participation in employer-sponsored retirement plans is increasing, there is a marked trend toward participation in defined

***More than 621,000 individuals in same-sex couples participate in an employer-sponsored retirement plan.***

contribution plans, as opposed to defined benefit plans. In a defined contribution plan, the employee, and sometimes the employer, contribute to an individual employee's account. The level of payment is determined by the amount contributed and it

may vary based upon the ways that the funds are invested. Participation by full-time employees in defined contribution plans increased from 42% in 1999 to 51% in 2006. A defined benefit plan, on the other hand, promises beneficiaries a set level of benefits during retirement. The exact benefit is usually calculated using a formula taking into consideration factors such as salary and time of service. Participation in defined benefit plans dropped from 25% in 1999 to 23% in 2006.

To apply these recent participation rates to figures from the 2005 and 2006 American Community Survey, we first estimate that 67% of individuals in same-sex couples, more than 1,036,000 people, work 35 hours or more per week. If we assume that individuals in same-sex couples are spread evenly among the types of plans and that gays and lesbians participate

in employer-sponsored retirement plans at the same rates that individuals in different-sex couples do, we can estimate the number of people in same-sex couples participating in the defined benefit and defined contribution plans. Applying the BLS statistics about participation rates among full-time workers, we estimate that 60% of individuals in same-sex couples working 35 hours or more participate in an employer-sponsored retirement plan, or approximately 621,000 individuals in same-sex couples.

We estimate that there are approximately 238,200 individuals in same-sex couples who participate in defined benefit plans. These individuals might also participate in other types of employer-sponsored retirement plans. The number of Americans overall participating in defined benefit plans is decreasing as employers shift toward defined contribution plans.

The majority of Americans participating in employer-sponsored retirement plans are enrolled in a defined contribution plan, such as a 401(k) plan. Using BLS statistics showing that 51% of full-time employees participate in a defined contribution plan, we estimate that 528,200 individuals in same-sex couples participate in defined contribution plans. Some employers offer both a defined contribution and defined benefit plan, so these estimates may include some individuals who also participate in defined benefit plans.

### **Laws Regulating Employer-Sponsored Retirement Plans and Same-Sex Recognition**

Federal law influences the treatment of employees with same-sex partners. Same-sex couples are also affected by the Employee Retirement Income Security Act of 1974 (ERISA), which regulates welfare and pension plans provided by employers, including defined benefit plans (pensions), defined contribution plans (such as 401(k)), and welfare benefit plans (health, death, disability). ERISA was enacted as a way to protect employees from

mismanagement of their employer-provided pensions and to “promote the interests of employees and their beneficiaries in employee benefit plans.”<sup>28</sup>

ERISA does not provide a clear definition for the term “spouse.”<sup>29</sup> Prior to the passage of the Defense of Marriage Act (DOMA), the meaning of spouse was based upon state law.<sup>30</sup> However, DOMA explicitly defines spouse as only applying to different-sex married couples for purposes of interpreting federal law. Thus, while ERISA does not prohibit private employers from treating same-sex partners equally, DOMA does. DOMA ensures that even in a state where same-sex couples may legally marry, state law cannot require employers to recognize same-sex married couples for the purposes of benefits administered under ERISA.<sup>31</sup> In Massachusetts, where same-sex couples can legally marry, for example, only 35% of 147 private employers surveyed indicated that they planned to offer retirement benefits to same-sex spouses as of December 2004.<sup>32</sup>

The following analysis of employer-sponsored retirement plans assumes that same-sex partners will not be considered “spouses” due to the restrictions of DOMA. The final section of this analysis examines what the financial implications may be for employers if DOMA were repealed, which impacts federal tax law, and ERISA required that employers treat same-sex partners as they do different-sex spouses.

### Defined Benefit Plans

Details of defined benefit plans vary, but generally employers, and sometimes employees, contribute funds to a large pool. When an employee retires, a specific level of benefits are guaranteed based upon time at the company, salary, age, and other factors. Much like defined contribution plans, contributions made by employees are tax-deferred and contributions by employers are tax deductible to the firm. Employees pay taxes upon disbursement. Defined benefit plans may offer employees the option to receive a lump sum if, for example, they terminate employment before retirement. More often, a retired employee receives benefits spread over the course of his or her lifetime through what is called a single life annuity.

Married employees may opt to have benefits continue after their deaths for spouses through “survivor options” that reduce benefits during the retiree’s lifetime but continue past death through the survivor’s lifetime.

*Survivor Options:* If an employee has a spouse, benefits may continue to be paid to designated individuals after the employee’s death through “survivor options.” ERISA requires that employers offering defined benefit plans and money purchase plans provide employees with such survivor options. In many firms, employees with spouses have two options to ensure that payments continue after their deaths: a Qualified Pre-Retirement Survivor Annuity (QPSA) and a Qualified Joint and Survivor Annuity (QJSA). While specific plans may offer variations on the QPSA and QJSA, the benefits that surviving spouses receive are determined, in large part, by the timing of the employee’s death.

While these survivor options are just that, options, married employees are by default signed up for both a QPSA and a QJSA. For a married employee to opt out of these survivor benefits in favor of a single life annuity, ERISA requires that an employee have formal legal spousal consent. ERISA is highly protective of spouses in the context of defined benefit plans.<sup>33</sup> If an employee who opted for a QPSA dies before retirement, the spouse receives benefits as defined under the QPSA. A QPSA ensures that a surviving spouse has the option to receive a continuous stream of benefits based upon what the employee would have received if the employee had survived and retired. The level of benefits or the amount of money received on a monthly or yearly basis is usually calculated based upon the life expectancy of the surviving spouse.

When an employee opts for a QJSA, benefits that are paid upon retirement are reduced when compared to a single employee. As a result of this reduction, an employee’s spouse is guaranteed benefits after the employee’s death. Benefit payments are adjusted so that the total amount of payment for a single employee and an employee whose spouse will receive a survivor benefit are expected to be the same

given actuarial data. In essence, monthly payments from the defined benefit plan are reduced to take into consideration the need for the payments to be stretched over the lifetime of both the employee and any additional years that beneficiary may live after the death of the employee. Thus, when an employee who opted for a QJSA dies during retirement, the surviving spouse and any qualifying children continue to receive benefits as detailed in the QJSA.

Employees who opt out of survivor benefits are treated as unmarried employees. For these employees, benefits are paid through what is often called a single life annuity. Monthly benefit payments in a single life annuity are based upon the employee's life expectancy at the time of retirement. When an employee with no spouse or an employee who has elected a single life annuity dies, payments end. Some plans provide an option of a lump sum payout to any named beneficiary upon death of an employee who has opted for a single life annuity. The availability and amount of this lump sum may depend on time of death as well as the details of plan. The tax treatment of the lump sum also varies based upon whom the employee has named as the beneficiary (see discussion below).

Because DOMA does not recognize same-sex partners as spouses, unless an employer has specifically altered their defined benefit plan to include provisions for same-sex partners and employees are made aware of this option, employees cannot opt for a survivor benefit for their same-sex partners. Instead, employees with same-sex partners are treated like their single counterparts and receive a single life annuity that is based solely upon their own life expectancy, and upon death, there is no provision for a surviving same-sex partner. Under plans that provide for lump sum payouts, same-sex partners who are named as beneficiaries may receive the payout, but tax treatment of this payout differs from that of spouses (see discussion below).

**Annuities:** For employees with a same-sex partner, who do not have the option of selecting a QJSA that would include a same-sex partner, there is another option – although imperfect – to ensure that a surviving spouse receives

benefits after the employee's death. As mentioned above, under some defined benefit plans, there is an option for a lump sum payout either upon separation from the company or upon retirement. Additionally, unmarried employees and married employees, under some plans, can opt for a cash payout upon death to a designated beneficiary. Single employees and employees with same-sex partners who opt for lump sum payouts will receive the same amount that any other employee, married or not, would receive with the same amount of tenure at the company. Any beneficiary may be named, but the tax implications for naming a spouse versus a nonspousal beneficiary are substantial, and they will be discussed later in this report.

***Employees with same-sex partners are treated like their single counterparts and receive a single life annuity with no provision for a surviving same-sex partner.***

In the case of a lump sum payout, an individual can purchase an annuity on the private market that would guarantee a set level of payments over the length of both partners' lives. In 1983, the Supreme Court held that employers could not adjust monthly defined benefit payments based upon the differences in life expectancy of men and women,<sup>34</sup> although women live more than five years longer than men on average.<sup>35</sup> Prior to the Court's ruling, employers and insurance providers reduced women's monthly payments to take into consideration their longer life expectancies.

While employers who recognize same-sex partners cannot discriminate in benefits provided based upon sex, companies that sell annuities on the private market can use a sex-specific table to calculate annuity payments. As a result, a woman may in fact receive a reduced monthly benefit from a private sector annuity when compared with a payment from an employer-provided defined benefit plan. Female same-sex couples may, as a result of a combined longer life expectancy, receive an even lower monthly benefit payment or pay more for an annuity providing an equal payment on the open market. This also means that gay male couples who look to purchase annuities may receive a

higher monthly payment due to their lower combined life expectancy.

### Defined Contribution Plans

The majority of Americans participating in employer-sponsored retirement plans are enrolled in a defined contribution plan, such as a 401(k). In these plans, employees and sometimes employers contribute to an account on a tax-deferred basis. Upon retirement or by the age of 70 ½ years, the balance of the account may be withdrawn and taxed as ordinary income. Same-sex partners may be designated as the nonspousal beneficiary of these defined contribution plans, and upon death of the employee the funds may either be rolled over to an inherited IRA and distributed and taxed accordingly (see discussion below) or a lump sum distribution may be taken, depending on the options available in the plan.

### Impact of Equality on Employers

While employers are not required to provide retirement benefits to the same-sex partners of their employees so long as DOMA remains in place, employers can opt to provide employees with survivor options and the possibilities of hardship withdrawals. Because of a bill signed in late 2008, employers are required to make nonspousal rollovers available to beneficiaries. The impact on employers of recognizing same-sex partners and providing equal treatment in terms of retirement benefits varies depending on the type of plan, either defined benefit or defined contribution. However, in both cases, the potential financial impact is minimal.

*Equality in Defined Benefit Plans:* For defined benefits plans, employers may bear some small additional costs for recognizing same-sex couples, especially when employees choose survivor benefits for their same-sex partners. Existing plans would need to be rewritten or amended and forms would need to be revised to allow employees to include their same-sex partners in QPSA and QJSA forms. Some data suggests that a limited number of employers may already be providing survivor options to employees with same-sex partners.

The Human Rights Campaign's Corporate Equality Index surveyed employers with defined benefit (pension) plans and found that 43% of surveyed employers offer QJSAs for same-sex partners and 27% offered QPSAs.

Allowing employees to opt for QPSAs and QJSAs for their same-sex partners would lead to a slight increase in cost for employers. For employees who die before retirement, employers would be required to provide payments to same-sex partners under a QPSA. Those employers who currently allow for lump sum payouts to any beneficiary for employees who die before retirement would bear no increase in costs. The QPSA essentially spreads lump sum payments over the lifetime of the spouse. For employers that do not provide for a lump sum payment, if any employee dies before retirement, there would be an additional cost of allowing employees with same-sex partners to opt for QPSAs. For these employers, instead of absorbing the unpaid benefits into the broader pool, employers would be required to provide benefits for same-sex spouses.

***The potential financial impact to employers of recognizing same-sex partners and providing equal treatment in retirement benefits are minimal.***

Allowing employees with same-sex partners to opt for a QJSA would result in minimal costs to employers. Because the payments made to an employee under a single life annuity and the reduced payments made to an employee and spouse via a QJSA are designed to be the same over the lifetimes of the employee and spouse, employers should experience no significant increase in cost aside from the administrative cost of making payments over a longer period of time. However, in the case of female same-sex couples, it is possible that an employer may have slightly higher costs due to the slightly longer life expectancy of both the employee and her female spouse. However, these costs may be offset by the lower overall costs for male same-sex couples due to their lower overall life expectancies.

## SAME-SEX PARTNERS & EMPLOYER-SPONSORED RETIREMENT PLANS

*Equality in Defined Contribution Plans:* In the case of defined contribution plans, costs of treating same-sex partners equally are also minimal. Because the funds of a defined contribution plan are distributed upon death to a beneficiary regardless of who is designated as the beneficiary, there are no additional costs associated with recognizing same-sex partners as spouses for the purposes of a defined contribution plan. A simple amendment to the details of the plan document is necessary to allow for nonspousal rollovers, which would entitle the partner to special tax advantages, but upon death the funds would be allocated to a beneficiary in any case. Nonspousal rollovers result in no measurable, incremental cost to the employer. Employers might bear some small one-time administrative costs to amend existing plans. Employers and plan administrators often

favor disbursement upon death as opposed to keeping funds in a defined contribution plan due to the administrative costs associated with a long disbursement period. Nonspousal rollovers still allow employers to give lump sum disbursements to survivors, so the administrative costs of long disbursement periods are avoided. According to the HRC's 2009 Corporate Equality Index, of survey companies, 48% of firms that provide domestic partner benefits also had provisions allowing for nonspousal rollover.<sup>36</sup> Twenty-five percent of firms with domestic partner benefits allowed for hardship withdrawals. Only 24% of employers surveyed gave employees in same-sex couples the option of both nonspousal rollover and hardship withdrawals.



## ***Unequal Tax Treatment of Retirement Assets***

Equal treatment of same-sex partners requires equality in both employer practices and in public policies. Because the federal government does not recognize same-sex couples as married couples, even in states where legal marriage is an option, there are significant differences in the tax treatment of retirement assets for same-sex and different-sex couples. However, the Pension Protection Act of 2006 (PPA) substantially changed the way that gay and lesbian couples' retirement assets may be withdrawn and how such assets are passed on upon death, moving the treatment of same-sex couples closer to the treatment of married couples.<sup>37</sup> PPA now permits withdrawals from retirement savings for hardships experienced by any designated beneficiary of certain kinds of retirement accounts, including for nonspouses. PPA also created a new mechanism for passing eligible retirement plan assets<sup>38</sup> from individuals to nonspouses upon death: the nonspousal rollover.<sup>39</sup> This provision of PPA has important ramifications for gay and lesbian couples, different-sex unmarried couples, and single people, regardless of sexual orientation because of the ways retirement wealth is disbursed and taxed. This section explains how retirement wealth was taxed prior to the passage of PPA as well as the new tax treatment for such wealth under the PPA. It also examines the remaining ways in which gays and lesbians are disadvantaged in the passing on of retirement wealth under the existing system.

### **Defined Contribution Plans and Nonspousal Rollovers**

The passage of the Pension Protection Act did not alter the terms by which a spouse inherits retirement assets from his or her deceased spouse. Funds in an employee's retirement account may be rolled over to a spouse's IRA upon death. Spouses named as beneficiaries are permitted to roll plan assets into their own plans, annuities, or IRAs within sixty days of receipt of the inherited funds. Such inherited "rolled over" assets are treated as the spouse's for purposes of taxes and disbursements.<sup>40</sup> For example, spouses are not required to make any withdrawals until reaching the age of 70 ½ years, and taxes are assessed on the funds only

upon withdrawal. After rolling these assets into their own IRAs, surviving spouses also have the option of naming a new beneficiary of their IRA.

The Pension Protection Act substantially altered the tax treatment of inherited retirement accounts by nonspouses. Because domestic partnerships and civil unions are not recognized at a

federal level, for the purposes of tax treatment of retirement savings, same-sex partners fall into the category of nonspouses. Prior to the PPA's passage, the disbursement of the decedent's defined contribution retirement plan assets to a nonspousal beneficiary, such as partners and children, was treated as a lump sum withdrawal regardless of how they were used.<sup>41</sup> Assets from the decedent's qualified retirement account were required to be withdrawn by the end of the fifth year after the decedent's death. When such withdrawals were made, they were taxed as income at the beneficiary's marginal tax rate.

***There are significant differences in the tax treatment of retirement assets for same-sex and different-sex couples.***

Since the passage of the PPA, upon the death of the employee, the assets in a qualifying retirement plan may be rolled over directly into an inherited IRA or inherited individual retirement annuity.<sup>42</sup> The beneficiary is not given a lump sum check to deposit into a new account, but instead the funds must be rolled over from the employer-managed plan directly to the company or plan managing the inherited IRA.<sup>43</sup> There are no taxes paid on the funds at this time, much like during a spousal rollover.

Unlike the case with a spousal rollover, however, the new inherited IRA remains uniquely linked to the decedent in several ways. First, the naming of the IRA must reference both the decedent and the nonspousal beneficiary; for example, "IRA for Tom Smith as Beneficiary of John Smith." Second, the disbursement terms after the rollover remain tied to the decedent and depend in large part on when the decedent dies.

If the employee dies before the required minimum distribution period begins (70 ½ years of age), there are two distribution options for nonspousal beneficiaries: the “five year rule” and the “life expectancy rule.” Under the “five year rule,” the funds must be withdrawn in full within five years of the death of the employee. The beneficiary pays income taxes on the amount withdrawn, as with any retirement

***Funds may now be withdrawn from a retirement account in the case of a financial hardship suffered by either the employee or his or her same-sex partner.***

account. The “life expectancy rule” generally allows for a longer disbursement period, but is designed to be an exception to the “five year rule.” If the rollover occurs prior to the end of

the tax year following the death of the decedent, disbursements must be made at least annually starting the year following the employee’s death, with payments calculated using the nonspouse’s life expectancy. Generally, the details of the plan will explain which disbursement option is available. In cases where there is no specific method mentioned in the plan and there is a designated beneficiary, the default method is the life expectancy rule. Clearly this difference encourages rapid rollover of funds, as the potential deferral of tax payments may be substantially lengthened, particularly for younger beneficiaries.

Alternatively, if the employee dies after the required minimum distribution period has begun and had already started making minimum withdrawals as required by law, there are two options, again depending on the details of the employer’s plan. Just as before the creation of the nonspousal rollover, if the plan requires that funds be withdrawn in accordance with the “five year rule,” then funds must be fully withdrawn by the end of the fifth year after death. However, some plans allow for alternative disbursement schedules. For example, monthly or yearly withdrawals may be made based upon the longer of either the decedent’s life expectancy at age of death or the beneficiary’s life expectancy.

### **Defined Contribution Plans and Hardship Withdrawals**

Prior to the passage of the PPA, withdrawals from qualified retirement accounts prior to retirement were permitted only if the funds were to assist with a financial hardship suffered by either the employee or the employee’s spouse. Withdrawals were permitted for financial hardships, including medical, tuition, and funeral expenses. These early withdrawals were allowed only if the plan explicitly permitted them. As a further disincentive to withdraw funds early from a retirement account, the funds were taxed as ordinary income upon withdrawal. Most plans that permit early withdrawals also charge an administrative fee and may have rules regarding when one may begin contributing to the account after making an early withdrawal.

Under the PPA, employees whose plans allow hardship withdrawals may now withdraw funds for financial hardship suffered by either the employee or the primary beneficiary of the plan. Because anyone may be designated as a beneficiary, this new legislation means that funds may be withdrawn early in the case of a financial hardship suffered by either the employee or his or her same-sex partner. Withdrawn funds are still taxed as ordinary income and subject to any penalties outlined in the specific plan. Moreover, plans are not required to permit hardship withdrawals.

While it is not often advised that individuals withdraw funds from their retirement savings prior to retirement, this extension of the hardship withdrawal policy allows same-sex couples to access saved money in cases of emergency or unforeseen expenses. Recent data indicates that the number of hardship withdrawals has been steadily increasing over the past two years. For example, in December 2007, Vanguard reported a 22% increase in hardship withdrawals from the previous year, with the average withdrawal in 2007 being \$6,194.<sup>44</sup>



### **Continuing Inequalities for Same-Sex Couples in Retirement Assets**

The ability of nonspouses to rollover retirement funds allows for a longer disbursement period and hence deferred tax payments. These longer disbursement periods can allow for longer, compounded growth and appreciation of invested assets. This is an important change in the treatment of retirement funds and a step forward for gay and lesbian couples. However, this treatment does not entirely remove the inequalities that gay and lesbian couples experience in terms of retirement savings and the passing of those savings upon death. In several key ways, nonspousal rollovers are not identical to spousal rollovers, putting same-sex couples at a disadvantage with respect to their retirement savings.

First, because PPA did not mandate that employers offer nonspousal rollovers, it is plausible that few employers have included it in their retirement plans. According to the Human Rights Campaign, which conducts an annual survey of Fortune 1000 corporations and AmLaw 200 law firms, 47% of business surveyed offer rollover options to same-sex partners. Twenty-four percent reported that they provide the option for hardship withdrawals for same-sex couples. However, in late 2008, the Worker, Retiree, and Employer Recovery Act of 2008 was passed, which requires that employers make nonspousal rollovers available. Although rollovers are now mandatory, existing plans will still need to be amended. Nonspousal rollovers allow survivors to have more flexibility in choosing how to manage the lump sum payments.

Employers are now required to offer a nonspousal rollover option to beneficiaries. But this change in the law has not removed all disadvantages faced by same-sex couples in terms of employer-sponsored retirement plans. The term “nonspousal rollover” indicates a far greater level of equivalence with spousal rollovers than exists in practice. When an employee dies, her different-sex spouse, as recognized by the federal government, can roll the funds remaining in her retirement account into his own IRA, annuity, or retirement plan. These new assets are then treated as though

they have been the survivor’s all along. Nonspousal rollovers, on the other hand, must be deposited into a new rollover account on which the decedent’s name must remain. The processes through which funds are rolled over from the decedent’s account to the spouse or nonspousal beneficiary also differ. A federally recognized spouse receives a check for the amount in the retirement account and then has sixty days to deposit it into her own rollover IRA. In nonspousal rollovers, the funds are rolled over directly from one trustee to the new trustee. More advance planning by the nonspousal beneficiary may be needed to coordinate the rollover of funds as opposed to receiving a check and having sixty days with which to plan for deposit.

Perhaps the largest inequality in the existing nonspousal rollover treatment is the requirement for withdrawals.

Spousal beneficiaries are permitted to wait until they reach age 70½ years to begin making withdrawals from their rollover IRA account. Meanwhile, in the case of the nonspousal rollover, the disbursement schedule is more regimented.

***Being able to wait until withdrawals are needed means that different-sex spouses are advantaged in terms of retirement planning and the net total of savings.***

There are two possible disbursement schedules, which depend upon the language contained in the specific plan. In one case, all the funds in a plan must be withdrawn within five years of the employee’s death. The other disbursement schedule requires that incremental withdrawals begin immediately and occur annually either for the duration of the decedent’s life expectancy or for nonspouse’s life expectancy. The duration of payments is dictated by the specific language of the plan. This difference means that the same-sex partner of a deceased employee may have to begin receiving payments from the inherited IRA immediately upon the employee’s death, even if disbursements are not needed. One could imagine a 50 year old partner who is still working, receiving payments upon his or her same-sex spouse’s death, while a different-sex partner whose spouse also dies could wait until

## SAME-SEX PARTNERS & EMPLOYER-SPONSORED RETIREMENT PLANS

age 70½ to make withdrawals and reap the benefits of 20 additional years of tax deferred growth of their invested assets. They may also be in a lower tax bracket by the time they reach age 70½.

Being able to wait until withdrawals are needed, as well as having more time for funds to grow in an account, means that different-sex spouses are still advantaged in terms of retirement planning and ultimately the net total of savings. This difference in disbursement schedules is attributed to the fact that a spousal rollover essentially rolls over the funds into the survivor's account and treats it as the survivor's funds moving forward in time. The 70½ age requirement is associated with any standard IRA. Meanwhile, the "inherited IRA" with the nonspousal rollover is treated differently and provides fewer distribution options as it remains tied to the decedent.

Allowing employees to make hardship withdrawals from retirement accounts for circumstances involving nonspouses is an important step toward equality for same-sex

couples. While financial hardships affecting nonspouses are now considered reasonable for withdrawals, there are still limitations for same-sex couples. Plans are not required to permit hardship withdrawals for nonspousal beneficiaries. In some states, same-sex partners are not permitted to adopt their partners' children, which has implications for hardship withdrawals. In the case of withdrawals from a retirement account, financial hardships pertaining to the employee's children are considered permissible. If a same-sex employee could not be the legal parent of his or her partner's child, a withdrawal related to that child would not be allowed.

Legislation has been effective in addressing some of the inequalities facing same-sex couples in terms of employer-sponsored retirement plans. The Pension Protection Act and the 2008 clarifications give same-sex couples more options to plan for a secure retirement. Yet, same-sex couples still face some disadvantages and inequalities emanating from DOMA and the inability of the federal government to recognize same-sex partners as spouses.

### ***CONCLUSION***

The provisions in the Pension Protection Act that allow employers to amend their plans to give employees with same-sex partners more options in terms of retirement assets are a step toward greater equality for employees and their same-sex partners. The recently passed Worker, Retiree, and Employer Recovery Act of 2008 makes nonspousal rollovers mandatory.

Employees with same-sex couples should still engage in conversations with their employers and advocate for amendments to their retirement plans. Employees should inform their employers that rollovers and hardship withdrawals are now possible for nonspousal beneficiaries and that an amendment to include these in retirement plans would not lead to a cost increase for employers.

Employers will not be required to treat same-sex partners and spouses as they treat different-sex spouses until DOMA is repealed. However, recent testimony for the New Jersey Civil Union Review Commission indicates that when individual states make marriage available to same-sex couples, employers are much more likely to provide identical benefits to employees.<sup>45</sup>

The inequalities facing same-sex couples are substantial when it comes to their ability to accumulate wealth, plan for their futures, and pass on wealth. These inequalities are particularly poignant for female same-sex couples. Existing inequalities in income as well as structural mechanisms that reinforce discrimination have long-term implications for same-sex couples and their families. Until state and federal laws change to protect same-sex couples from discrimination both in the workplace and in the tax system, couples may need to take extra caution when planning their financial futures.

## ENDNOTES

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<sup>25</sup> Total income is a sum of the householder's and spouse's individual income sources over that last 12 months. Self-reported incomes are subject to the interpretation of the individual respondent, however, definitions are provided in the survey instrument.

<sup>26</sup> Romero et. al, 2007.

<sup>27</sup> Bennett, Lisa and Gary J. Gates. 2004. "The Cost of Marriage Inequality to Gay, Lesbian and Bisexual Seniors," Human Rights Campaign Foundation Report, January 21, [http://www.hrc.org/about\\_us/7055.htm](http://www.hrc.org/about_us/7055.htm)

<sup>28</sup> 29 U.S.C. §1001(b)-(c).

<sup>29</sup> 29 USCS § 1002.

<sup>30</sup> McClendon, Janice Kay. 2006. "A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples," N.M.L. Rev. 36:99.

<sup>31</sup> Haltzel, Laura and Patrick Purcell. 2008. "The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions," CRS Report for Congress, Jan. 3.

<sup>32</sup> Blanton, Kimberly. 2004. "Same-Sex Retirement Benefits Lag Only 35% of Mass. Firms Say They'll Extend Offerings," *The Boston Globe*, Sect: Business, Dec. 29.

<sup>33</sup> Schelbuerg, Neal S. and Carrie L. Mitnick. 2004. "Same-Sex Marriage: The Evolving Landscape for Employee Benefits," *Hofstra Lab. & Emp. L.J.* 22:65-80.

<sup>34</sup> *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, etc. v. Norris* (1983).

<sup>35</sup> Table 6. Expectation of life by age, race, and sex: United States, final 2004 and preliminary 2005. Centers for Disease Control and Prevention, National Center for Health Statistics.

<sup>36</sup> Estimates were calculated using data provided by the Human Rights Campaign from the 2009 Corporate Equality Index.

<sup>37</sup> Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) (hereafter "PPA").

<sup>38</sup> 402(c)(8)(B) defines eligible retirement plans as: an individual retirement account, an individual retirement annuity, a qualified trust, an annuity plan, an eligible deferred compensation plan, or an annuity contract.

<sup>39</sup> Fed. Tax Coordinator ¶ H-11438.1 (2d.)

<sup>40</sup> 402(c)(9)

<sup>41</sup> Fed. Tax Coordinator ¶ H-11437 (2d.)

<sup>42</sup> Fed. Tax Coordinator ¶ H-11438.1 (2d.)

<sup>43</sup> Fed. Tax Coordinator ¶ H-11438.1 (2d.)

<sup>44</sup> Nessmith, William E. and Stephen P. Utkus. 2008. "Research Note: Hardship Withdrawals and the Mortgage Crisis," *Vanguard*.

<sup>45</sup> Tom Barbera, Transcript 9/26/07, pg 37-40, *First Interim Report of the New Jersey Civil Union Review Commission*, [www.NJCivilRights.org/curc](http://www.NJCivilRights.org/curc)