

# THE AMERICAN MILITARY PARTNER ASSOCIATION



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Connecting, supporting, honoring, and serving the partners and spouses of America's LGBT servicemembers and veterans - our nation's "silent heroes."

## DEFENSE OF MARRIAGE ACT HINDERS BENEFITS TO MILITARY FAMILIES – A SUMMARY FOR LAWMAKERS

AMERICAN MILITARY PARTNER ASSOCIATION

December 2012

## About

The American Military Partner Association ([www.MilitaryPartners.org](http://www.MilitaryPartners.org)) is the nation's premier support and resource network for the partners/spouses of LGBT servicemembers and veterans. Founded and led by the same-sex partners and spouses of servicemembers, AMPA was launched originally in 2009 as the "Campaign for Military Partners" sponsored by Servicemembers United. This first-of-its-kind initiative grew substantially over the course of the ensuing two years and graduated to become the American Military Partner Association on September 20, 2011 – the day that the "Don't Ask, Don't Tell" law was officially repealed.

## Summary of Benefits

The American Military Partner Association prepared a Benefits Guide to assist lesbian, gay, and bisexual (LGB) servicemembers and their families by discussing benefits available to current servicemembers and their families. Accompanying that Guide, the American Military Partner Association also prepared this Summary of Benefits to show lawmakers the inequalities LGB servicemembers and their families still face. LGB servicemembers and their families remain unable to receive all military benefits while serving together with their unit's heterosexual servicemembers and their opposite-sex spouses.

## Acknowledgments

Matthew Alex Ward prepared this Summary of Benefits on behalf of the American Military Partner Association. Information primarily comes from the Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell"<sup>1</sup> and research conducted for an article exploring this topic in greater detail which appears in the *N.Y.U. Review of Law & Social Change*.<sup>2</sup> Additionally, this Summary uses the abbreviation LGB; the T is excluded because the *Don't Ask, Don't Tell* repeal did not impact the status of transgendered individuals which military regulations bar from serving.<sup>3</sup>

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<sup>1</sup> U.S. DEPT OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" (Nov. 30, 2010) (hereinafter WORKING GROUP) available at [http://www.defense.gov/home/features/2010/0610\\_dadt/DADTRReport\\_FINAL\\_20101130%28secure-hires%29.pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTRReport_FINAL_20101130%28secure-hires%29.pdf).

<sup>2</sup> Matthew Alex Ward, *The Military Must Lead for Recognizing Same-Sex Marriages*, 37 NYU REV. L. & SOC. CHANGE \_\_\_\_ (forthcoming 2013).

<sup>3</sup> While discussions of homosexual rights often use the abbreviation LGBT the T is purposefully absent here because military medical regulations bar transgendered individuals from serving. See U.S. DEP'T OF ARMY, REG. 40-501, Standards of Medical Fitness ¶ 3-35 (4 Aug. 2011) (rendering the individual administratively unfit for military service).

## Introduction

The Don't Ask, Don't Tell (DADT) repeal emphasized that sexual orientation would be a nonissue in the military. The U.S. Army issued a statement accompanying the DADT Repeal explaining that Army regulations and policies will be applied "uniformly without regard to sexual orientation, which is a personal and private matter."<sup>4</sup> Additionally, the DAD Repeal recommended excluding sexual orientation as a class eligible for diversity programs (such as race, religion, etc...)<sup>5</sup>

Yet the Defense of Marriage Act (DOMA) defines marriages between opposite-sex partners,<sup>6</sup> thereby preventing the military from recognizing LGB military families. As such, while the military supports military families, sexual orientation is *not* a nonissue when it comes to the military's treatment of military families. Thus, because the military cannot recognize same-sex marriages, LGB military families do not receive the same financial and social support as other military families despite the military's claims to apply its policies "without regard to sexual orientation."<sup>7</sup> This tension between DADT's repeal and DOMA will remain until the Defense of Marriage Act is repealed. Only once governments recognizes same-sex marriages will the military be able to make sexual-orientation a nonissue and support the families of *all* servicemembers.

## Defense of Marriage Act

Both the federal and state governments both regulate marriage. The federal Defense of Marriage Act (DOMA) prohibits the federal government from recognizing same-sex marriages.<sup>8</sup> DOMA defines "the word 'marriage' [as] only a legal union between one man and one woman as husband and wife, and the word 'spouse' [as] only to a person of the opposite sex who is a husband or a wife."<sup>9</sup> Additionally, DOMA provides that there is no requirement for a state to recognize a same-sex marriage performed elsewhere.<sup>10</sup> In 2004, DOMA prevented same-sex spouses from receiving 1138 federal benefits contingent on marital status.<sup>11</sup> DOMA remains the law, although several law suits have challenged DOMA's constitutionality.<sup>12</sup>

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<sup>4</sup> RAYMOND F. CHANDLER III, RAYMOND T. ORDIERNO, & JOHN M. MCHUGH, DON'T ASK DON'T TELL REPEAL (Sept. 20, 2011) available at <http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2011/09/19/National-Politics/Graphics/DA-Tri-signed-dadt-repeal-cert.pdf>.

<sup>5</sup> WORKING GROUP, *supra* note 1, at 137; see U.S. ARMY, ARMY REG. 600-20, ARMY COMMAND POLICY at tbl. 6-1 (2011) (listing recognized "ethnic observances").

<sup>6</sup> 1 U.S.C. § 7 (2006).

<sup>7</sup> CHANDLER ET AL., *supra* note 4.

<sup>8</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>9</sup> 1 U.S.C. § 7 (2006). Other federal statutory definitions relevant to the military additionally define marriage as having an opposite sex spouse. *E.g.*, 38 U.S.C. § 101(3) (2006) (defining surviving as a "person of the opposite sex who was the spouse of a veteran at the time of the veteran's death..."); 38 C.F.R. § 3.50(a) (2011) ("Spouse" means a person of the opposite sex whose marriage to the veteran meets the requirements of § 3.1(j).").

<sup>10</sup> 28 U.S.C. § 1738C (2006).

<sup>11</sup> U.S. GOV. ACCT. OFFICE, GAO-04-353R DEFENSE OF MARRIAGE ACT (2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

<sup>12</sup> *E.g.*, Gill et al. v. Office of Pers. Mgmt., 699 F.Supp.2d 374, 376-77 (D. Mass. 2010).

Currently, ten states permit same-sex marriage (Connecticut, Washington D.C., Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington).<sup>13</sup> Seven states (California, Delaware, Hawai'i, Illinois, Nevada, New Jersey, and Oregon) allow civil unions or domestic partnerships which are equivalent to marriage.<sup>14</sup> Two states (New Mexico and Rhode Island) have no formal laws either recognizing or prohibiting same-sex marriage, although Rhode Island recognizes same-sex marriages performed elsewhere.<sup>15</sup> The remaining states do not recognize same-sex marriage.

## Benefits Overview

Although it is hard to believe in today's military, the military only reluctantly approved of its servicemembers marrying until recently.<sup>16</sup> Following the 1973 elimination of the draft<sup>17</sup> the military realized that maintaining an active duty force required providing for and accommodating the families of servicemembers.<sup>18</sup> This resulted in the quip that the military enlists servicemembers but reenlists families.<sup>19</sup> As a result, the military now provides a variety of benefits to servicemembers and their families. Indeed, the DADT Working Group recognized that "benefits cover many aspects of day-to-day life."<sup>20</sup>

Military benefits available are divided into three categories:

- 1) Benefits designated by servicemembers or "member-designated" benefits;
- 2) Benefits triggered by marriage; and
- 3) Benefits designated by military regulations.

## Benefits Designated by Servicemembers

The first category of military benefits is benefits designated by servicemembers or "member-designated" benefits. Servicemembers have discretion to name the beneficiary and may designate any individual, including same-sex partners, for the following benefits: beneficiary of insurance payments; receipt from some G.I. Bill benefits; beneficiary of Thrift-Savings plans, retirement annuities, or any unpaid pay or allowance; and hospital visitation. DOMA does not affect benefits designated by servicemembers.

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<sup>13</sup> *State By State: The Legal Battle Over Gay Marriage*, NPR, <http://www.npr.org/templates/story/story.php?storyId=112448663>; *Same Sex Marriage*, NAT'L CONF. OF STATE LEGIS., <http://www.ncsl.org/default.aspx?tabid=16430>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> BETTY L. ALT, FOLLOWING THE FLAG: MARRIAGE AND THE MODERN MILITARY 9-10, 20 (2006) ("The old adage 'if the military wanted you to have a wife, they'd have issued you one,' was not a joke. Wives and families were not welcomed; they were only tolerated.").

<sup>17</sup> Act of September 28, 1971, Pub. L. No. 92-129, 85 Stat. 348 (codified at 50 U.S.C. App. § 467(c)).

<sup>18</sup> ALT, *supra* note 16, at 20, 22 ("Without changes to support families, the all volunteer force might never have succeeded, so the military was forced to make improvements in family lifestyles.").

<sup>19</sup> *Id.* at 19; ELAINE GRAY DUMLER, ALREADY HOME 1 (2003) ("The military doesn't enlist only soldiers; they enlist families."); Marcy Karin, *Time Off for Military Families: An Emerging Case Study in a Time of War ... And the Tipping Point for Future Laws Supporting Work-Life Balance?*, 33 RUTGERS L. REV. 46, 47 (2009) (OIF "solidified the military's embrace of the concept of recruiting a soldier and retaining a family...").

<sup>20</sup> WORKING GROUP, *supra* note 1, at 146.

## Benefits Triggered by Marriage

The second category of military benefits is benefits triggered by marriage. As described above, the federal government does not recognize same-sex marriages. This prevents same-sex spouses of LGB servicemembers from receiving the following benefits: Basic Allowance for Housing (BAH) with the “With Dependents” Rate; Family Separation Allowance; military ID Cards;<sup>21</sup> Morale, Welfare, and Recreation Programs; relocation and transportation; employment and education for spouses; including the Military Spouse Career Advancement Accounts which provide up to \$2,000 a year to military spouses;<sup>22</sup> and family advocacy and spousal abuse services.<sup>23</sup>

## Benefits Designated by Military Regulations

The third category of military benefits is benefits designated by military regulations. Congress has not limited these benefits to preclude same-sex partners, but current regulations do not extend to same-sex partners.<sup>24</sup> These benefits include: military family housing; free legal services by military legal assistance officers; programs provided by family services; shopping at commissaries and exchanges; joint duty assignments; spousal privileges in court martial;<sup>25</sup> and relocation and command sponsored status. As a result, marital status remains the *de facto* determinant of whether servicemembers and their families are eligible for these benefits. Thus, like the category of benefits triggered by marriage, DOMA prohibits the military from providing these benefits to LGB military families.

The DADT Working Group recommended the Department of Defense review this category to determine what benefits could become member-designated benefits.<sup>26</sup> Nevertheless, the Working Group also recommended against redefining “dependent” to include committed same-sex partners of LGB servicemembers because this would be difficult to administer and doing so would create inequality between unmarried, committed same-sex couples and unmarried, committed opposite-sex couples.<sup>27</sup> This prevents same-sex couples from living together on-post, which impacts the careers of senior LGB servicemembers who are eligible for Key & Essential positions (such as senior command) which require servicemembers to live on post.<sup>28</sup>

The Working Group also recognized how DOMA will also affect same-sex spouses of LGB servicemembers. Some overseas duty locations allow servicemembers to bring their

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<sup>21</sup> U.S. AIR FORCE, U.S. AIR FORCE INSTRUCTION 36-3026 IP, VOL. 1, IDENTIFICATION CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR ELIGIBLE FAMILY MEMBERS, AND OTHER ELIGIBLE PERSONNEL ¶ 2.4.1 (2009).

<sup>22</sup> *Spouse Education and Career Opportunities*, MIL. ONE SOURCE, <http://www.militaryonesource.mil/> (click the “Career & Education” link).

<sup>23</sup> Some of the benefits triggered by marriage can also be triggered by dependent child(ren) or adults who are incapable of caring for themselves. That is, either married servicemembers or servicemembers with dependent child(ren) (or both), would be eligible. This includes the BAH With Dependents Rate and the Family Separation Allowance.

<sup>24</sup> WORKING GROUP, *supra* note 1, at 144-45.

<sup>25</sup> U.S. DEPT. OF DEF., MANUAL FOR COURTS-MARTIAL, UNIFORMED CODE OF MILITARY JUSTICE (2008 ed.); MIL. R. EVID. 504(a).

<sup>26</sup> WORKING GROUP, *supra* note 1, at 145.

<sup>27</sup> *Id.* at 145-46.

<sup>28</sup> U.S. ARMY, ARMY REG. 210-50, HOUSING MANAGEMENT ¶¶ 3-11a (1999).

dependents.<sup>29</sup> However, agreements between host nations and the United States were written to exclude same-sex partners from receiving the protections for civilians who accompany servicemembers.<sup>30</sup> Similarly, the military does not recognize same-sex marriage for consideration in assigning dual-career, same-sex military couples to the same area.<sup>31</sup>

## Additional Information

### States' Recognition

As previously noted, states vary their recognition of same-sex marriages. This affects the ability of servicemembers to marry or divorce depending on their state of domicile or the state where they are based. Currently, the military permits chaplains to authorize a same-sex ceremony on post if the base is in a state that recognizes same-sex marriages.<sup>32</sup>

### Uniform Code of Military Justice

The military's inability to recognize same-sex marriages means that the military cannot prosecute LGB servicemembers for certain charges under the Uniform Code of Military Justice (UCMJ), such as adultery and wrongful cohabitation, which include marriage as an element of the charge. The military's inability to charge LGB servicemembers for UCMJ violations that can be charged against heterosexual servicemembers shows how the military is unable to make sexual-orientation a nonissue.<sup>33</sup>

### Symbolism

The military distinguishes between boyfriends and girlfriends and spouses; spouses are "taken more seriously when [they're the] wife, compared to the girlfriend."<sup>34</sup> The inability to recognize same-sex marriages implies same-sex spouses are second-class, although they make the same sacrifices as opposite-sex spouses. Even using services available to all spouses, such as attending a unit's family readiness group meeting, shows the inequalities: opposite sex spouses can arrive

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<sup>29</sup> *Id.* at 147; Ed O'Keefe, *Celebration and Concern Mark the End of 'Don't Ask, Don't Tell'*, WASH. POST, Sept. 19, 2011, [http://www.washingtonpost.com/politics/celebration-and-concern-mark-the-end-of-dont-ask-dont-tell/2011/09/16/gIQAC0hffK\\_story.html](http://www.washingtonpost.com/politics/celebration-and-concern-mark-the-end-of-dont-ask-dont-tell/2011/09/16/gIQAC0hffK_story.html).

<sup>30</sup> WORKING GROUP, *supra* note 1, at 147.

<sup>31</sup> U.S. ARMY, ARMY REG. 614-100, OFFICER ASSIGNMENT POLICIES, DETAILS, AND TRANSFERS ¶ 1-6(d)(2) (2006) (noting the servicemembers' marital status is not a factor to consider except to "keep married Army couples together according to current policies."), ¶5-3 (describing policies for assignment of dual-military couples); U.S. ARMY, ARMY REG. 614-200, ENLISTED ASSIGNMENTS AND UTILIZATION MANAGEMENT ¶ 5-20 to ¶ 5-25 (2011) (describing the Married Army Couples Program).

<sup>32</sup> Memorandum from Undersecretary of Defense Clifford L. Stanley for Secretaries of the Military Departments (Sept. 30, 2011) available at <http://cmrlink.org/CMRDocuments/Johnson-Stanley0911.pdf>; Ed O'Keefe, *Gay Weddings May Be Performed by Military Chaplains, Pentagon Says*, WASH. POST, Sept. 30, 2011, [http://www.washingtonpost.com/politics/gay-weddings-may-be-performed-by-military-chaplains-pentagon-says/2011/09/30/gIQAgkJ8AL\\_story.html](http://www.washingtonpost.com/politics/gay-weddings-may-be-performed-by-military-chaplains-pentagon-says/2011/09/30/gIQAgkJ8AL_story.html); Andrew Tilghman, *Chaplains Can Preside Over Same-Sex Weddings*, ARMY TIMES, Sept. 30, 2011, <http://www.armytimes.com/news/2011/09/military-chaplains-same-sex-weddings-093011w/>.

<sup>33</sup> U.S. DEPT. OF DEF., MANUAL FOR COURTS-MARTIAL, UNIFORMED CODE OF MILITARY JUSTICE, art. 134-(Adultery)(c)(1) at IV-114 (2008 ed.).

<sup>34</sup> Catherine Welch *A New Husband Reflects on Returning to Afghanistan*, NPR, Jan. 14, 2011, <http://www.npr.org/2011/01/14/132930179/a-new-husband-reflects-on-returning-to-afghanistan>.

from their on-post house or easily get on base by showing their military ID card; these benefits are unavailable to same-sex spouses.

## Conclusion

The DADT repeal was suppose to make sexual orientation a nonissue in the military. Yet the military's use of marriage to trigger benefits and services, means that sexual orientation is *not* a nonissue when it comes to the military's treatment of military families. Thus, because DOMA prevents the military from recognizing same-sex marriages, LGB military families do not receive the same financial and social support as other military families. This will remain until lawmakers repeal the Defense of Marriage Act.

**For more information, contact us at:**

The American Military Partner Association

1725 I Street, NW, Suite 300

Washington, DC, 20006

[www.MilitaryPartners.org](http://www.MilitaryPartners.org)

[partners@militarypartners.org](mailto:partners@militarypartners.org)

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