

LEGISLATIVE BRIEF

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Health Plan Coverage for Same-sex Spouses

Due to recent changes in federal and state laws, employers may be considering their options and obligations for offering coverage to same-sex spouses under their group health plans. Some, but not all, employers will continue to have discretion regarding whether they offer health coverage to same-sex spouses. As an overview:

- Federal law does not require employers to offer health coverage to same-sex spouses, regardless of whether the health plan is self-funded or fully-insured.
- If an employer has a fully-insured health plan that provides coverage for spouses, state insurance law will likely require equal coverage for opposite-sex and same-sex spouses.
- Even if an employer is not required by state insurance law to offer coverage to same-sex spouses, workplace nondiscrimination laws may impact an employer's decision to offer same-sex spouse coverage.

SAME-SEX MARRIAGE LAWS

Federal Law

Until June 26, 2013, the federal Defense of Marriage Act (DOMA) banned federal recognition of same-sex marriage by solely defining "marriage" as the legal union between one man and one woman as husband and wife.

On June 26, 2013, the U.S. Supreme Court [struck down](#) a key part of DOMA by ruling that the law's definition of marriage violated the U.S. Constitution's guarantee of equal protection. As a result of the Supreme Court's ruling, legally married same-sex couples are entitled to the same benefits and protections under federal law as opposite-sex married couples.

Following the Supreme Court's decision, the Internal Revenue Service (IRS) and Department of Labor (DOL) adopted a "state of celebration" policy for determining when a same-sex marriage will be treated as valid for purposes of federal law. Under the state of celebration policy, same-sex couples who are legally married in states (including foreign jurisdictions) that recognize their marriages will be treated as married for federal purposes.

State Law

Until recently, laws on same-sex marriage varied from state to state. On June, 26, 2015, the U.S. Supreme Court ruled in [Obergefell v. Hodges](#) that the Constitution guarantees same-sex couples the right to marry. The Supreme Court held that every state must allow marriages between two people of the same sex and must also recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

By ruling that state laws prohibiting same-sex marriage are unconstitutional, the Supreme Court legalized same-sex marriage in all 50 states. Same-sex couples will be allowed to marry in any state, and will be entitled to all the rights, benefits and obligations given to opposite-sex spouses under both federal and state law.

Health Plan Coverage for Same-sex Spouses

Many federal laws have already been interpreted to include both same-sex and opposite-sex marriages due to the Supreme Court's decision on DOMA. The Supreme Court's ruling in *Obergefell* will expand these legal rights and protections to additional couples.

The Supreme Court's *Obergefell* decision does not require employers to provide health plan coverage for same-sex spouses. However, due to the Supreme Court's decision, more states will likely change their insurance laws to require that fully-insured health plans provide equal coverage to opposite-sex and same-sex spouses. Also, the Supreme Court's holding may strengthen claims of workplace discrimination based on sexual orientation or gender identity.

NONDISCRIMINATION LAWS

Federal law currently prohibits several types of workplace discrimination. Employers generally may not discriminate against workers on the basis of race, color, sex, religion, national origin, age or disability. There are currently no federal laws that specifically protect workers from discrimination based on sexual orientation or gender identity.

However, under the Obama Administration, there has been more support for employee protections against discrimination based on gender identity and sexual orientation. According to the [Equal Employment Opportunity Commission \(EEOC\)](#), lesbian, gay, bisexual and transgender (LGBT) individuals may bring valid sex discrimination in employment claims under existing federal law. Also, employers that differentiate between employees based on sexual orientation or gender identity may be at an increased risk for lawsuits due to the Supreme Court's ruling in favor of same-sex marriage.

In addition, a number of states have laws that prohibit workplace discrimination based on sexual orientation or sexual orientation and gender identity.

These states have employment laws that prohibit discrimination based on sexual orientation/gender identity:

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Utah
- Vermont
- Washington
- Wisconsin

Employers that are located in states that prohibit workplace discrimination based on sexual orientation or gender identity may violate state fair employment laws if they do not provide equal coverage for opposite-sex and same-sex spouses. For example, [guidance](#) from Washington State indicates that an employer who provides health benefits for its employees' spouses may not discriminate against employees with same-sex spouses by excluding those spouses from receiving health benefits. It is not clear to what extent, if any, ERISA preempts state fair employment laws as applied to group health plans.

HEALTH INSURANCE LAWS

Federal Law

On March 14, 2014, the Department of Health and Human Services (HHS) issued an [FAQ](#) on how the Affordable Care Act's guaranteed availability requirements affect health insurance coverage for same-sex spouses. The FAQ generally clarifies that the guaranteed availability mandate prohibits discrimination based on sexual orientation. The FAQ requires health insurance issuers offering non-grandfathered group or individual health insurance policies to **offer coverage** on the same terms and conditions to legally married same-sex spouses that is offered to opposite-sex spouses.

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4/14, EM 6/15

Health Plan Coverage for Same-sex Spouses

This guidance does not require employers with insured health plans to offer coverage to same-sex spouses. Instead, HHS' guidance requires issuers offering non-grandfathered coverage to give employers *the option* to cover same-sex spouses under their health plans. While HHS encouraged issuers to offer coverage for same-sex spouses in 2014, issuers are required to comply with this requirement for plan or policy years beginning on or after **Jan. 1, 2015**.

State Laws

In states that legalized same-sex marriage, state insurance laws generally require health insurance issuers to offer equal health plan coverage for same-sex and opposite-sex spouses. Now that the Supreme Court has legalized same-sex marriage throughout the U.S., insurance laws in every state may require equal health insurance coverage for same-sex and opposite-sex spouses.

Example: According to a Minnesota [insurance bulletin](#) issued on July 31, 2013, Minnesota's same-sex marriage law means that any health insurance policy issued in Minnesota that provides dependent coverage for spouses must make that insurance coverage available to all spouses regardless of their sex. Policies are not required to provide dependent benefits. However, if they do provide dependent benefits, issuers cannot define "spouse" in a way that would limit coverage to opposite-sex spouses. Policies that prohibit coverage after Aug. 1, 2013, for same-sex spouses violate Minnesota law.

Most self-insured plans are not subject to state insurance law. Thus, employers with self-insured plans are generally not subject to state insurance laws regarding equal coverage for same-sex spouses.

APPLICATION TO EMPLOYERS

Obligation to Offer Coverage

Some employers may continue to have discretion regarding whether they offer health coverage to same-sex spouses. Employers should review the definition of "spouse" under their group health plans to confirm that it is consistent with how they want to define plan eligibility.

State insurance laws will likely require equal coverage for opposite-sex and same-sex spouses for employers with fully-insured health plans that provide coverage for spouses. Even if an employer is not required by state insurance law to offer coverage to same-sex spouses (for example, because the employer has a self-funded plan), the employer may be at risk for discrimination lawsuits if coverage is offered only to opposite-sex spouses.

Employers with fully-insured health plans



- State insurance law may require equal coverage for same-sex and opposite-sex spouses.
- Due to the Supreme Court's *Obergefell* ruling, equal coverage may be required in all states.
- Even if applicable state insurance law does not require coverage for same-sex spouses, employers that do not offer equal benefits to same-sex spouses may be at risk for discrimination lawsuits.

Employers with self-funded health plans



- Self-funded plans are generally not subject to state insurance law.
- State insurance law will generally not require the plan to cover same-sex spouses.
- However, employers that do not offer equal benefits to same-sex spouses may be at risk for discrimination lawsuits.

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4/14, EM 6/15

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Tax Issues

Employers that offer health plan coverage for same-sex spouses should confirm that the administration of same-sex spouse benefits is consistent with federal and state tax law. For federal tax purposes, health plan coverage for a same-sex spouse is non-taxable to the employee and the employee can pay for the coverage on a pre-tax basis through an employer's cafeteria plan.

Also, due to the Supreme Court's ruling in *Obergefell*, health plan coverage for same-sex spouses is non-taxable at the state level. This change will allow for more consistent benefits administration in all states in which an employer operates.

Action Steps

If an employer decides to expand its health plan's eligibility rules to include same-sex spouses, it should consider taking the following steps:

- Communicate plan eligibility changes to employees through an updated summary plan description (SPD) or a summary of material modification (SMM);
- Update the plan's enrollment forms to include coverage for same-sex spouses; and
- Review the health plan's administration to confirm that employees are not being taxed on the value of the same-sex spouse coverage, either at the federal or state level.

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