

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. Many, 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 is located in a state that permits same-sex marriages and has a fully insured plan that provides coverage for spouses, state insurance law generally requires the employer to offer equal coverage to 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.

In addition, effective for 2015, health insurance issuers of non-grandfathered health plans that provide coverage for spouses are required to give employers the option of covering same-sex spouses, even for policies issued in states that prohibit same-sex marriage.

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. DOMA did not prohibit employers from providing health plan coverage for same-sex spouses, but it made the administration of these benefits complex. Under DOMA, for example, employees were required to pay additional federal income tax on the value of employer-sponsored health coverage for their same-sex spouse.

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.**

The Supreme Court's DOMA decision provides that the federal government may not discriminate against same-sex couples who are legally married. The decision does not require employers to provide the same benefits to opposite-sex and same-sex spouses.

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.

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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. This rule applies regardless of whether the couple lives or works in a jurisdiction that recognizes same-sex marriages.

State Law

A number of states have laws or constitutional amendments barring same-sex marriages. However, a **growing number of states have legalized same-sex marriage**. As of November 2014, the following states allow same-sex marriage:

STATE	EFFECTIVE DATE
Alaska	Oct. 17, 2014
Arizona	Oct. 17, 2014
California	June 28, 2013 (reinstated)
Colorado	Oct. 7, 2014
Connecticut	Nov. 12, 2008
District of Columbia	March 9, 2010
Delaware	July 1, 2013
Hawaii	Dec. 2, 2013
Idaho	Oct. 15, 2014
Illinois	June 1, 2014
Indiana	Oct. 6, 2014
Iowa	April 24, 2009
Kansas	Nov. 12, 2014
Maine	Dec. 29, 2012
Maryland	Jan. 1, 2013
Massachusetts	May 17, 2004
Minnesota	Aug. 1, 2013
Montana	Nov. 19, 2014
Nevada	Oct. 8, 2014
New Hampshire	Jan. 1, 2010
New Jersey	Oct. 21, 2013
New Mexico	Dec. 19, 2013
New York	July 24, 2011
North Carolina	Oct. 13, 2014
Oklahoma	Oct. 6, 2014

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Oregon	May 19, 2014
Pennsylvania	May 20, 2014
Rhode Island	Aug. 1, 2013
South Carolina	Nov. 20, 2014
Utah	Oct. 6, 2014
Vermont	Sept. 1, 2009
Virginia	Oct. 6, 2014
Washington	Dec. 6, 2012
West Virginia	Oct. 9, 2014
Wisconsin	Oct. 6, 2014
Wyoming	Oct. 21, 2014

Legal Challenges to State Laws

Following the Supreme Court's DOMA decision, a number of federal and state courts have ruled that state bans on same-sex marriage are unconstitutional. The decisions in Texas, Michigan, Arkansas, Florida, Missouri and Kentucky have been stayed, or put on hold, pending appeals. This means that same-sex marriages cannot currently take place in these states.

In June 2014, three federal appellate courts reviewed the constitutionality of state bans on same-sex marriages. The 10th Circuit Court of Appeals reviewed Utah's and Oklahoma's laws, the 4th Circuit Court of Appeals reviewed Virginia's law and the 7th Circuit Court of Appeals reviewed Indiana's and Wisconsin's laws. In all of these cases, the appellate courts ruled that the state laws prohibiting same-sex marriage are unconstitutional. These decisions were stayed pending further appeals.

On Oct. 6, 2014, the U.S. Supreme Court announced that it will not review the lower court decisions that had struck down state laws prohibiting same-sex marriage in Utah, Oklahoma, Virginia, Wisconsin and Indiana. Because the Supreme Court will not hear any appeals in these cases, the lower court rulings stand. This means that same-sex marriages are permitted in the affected states, effective immediately.

In October, 2014, federal appellate and district courts reviewed the constitutionality of state bans on same-sex marriage in six states. The 10th Circuit Court of Appeals lifted the stay of a ruling in Colorado, the 9th Circuit Court of Appeals overturned Nevada's and Idaho's bans, a federal judge ruled against Alaska's same-sex marriage ban and a U.S. District Court overturned the ban in Wyoming and Arizona. Same-sex marriage in these states is permitted.

On Nov. 6, 2014, the U.S. Court of Appeals for the 6th Circuit upheld bans on same-sex marriage in Kentucky, Michigan, Ohio and Tennessee. Because the 6th Circuit overturned the lower court decisions, laws against same-sex marriage in these states remain in effect. The 6th Circuit's decision conflicts with the decisions from the other appeals courts. This creates a split between the federal appeals courts. The challengers to the same-sex marriage laws can ask the full 6th Circuit to reconsider the case, or the challengers can proceed directly to the U.S. Supreme Court. The split between the appeals courts makes it likely that the Supreme Court justices would decide to resolve the same-sex marriage issue.

In November, 2014, U.S. District Courts in Kansas, Montana and South Carolina ruled that the state same-sex marriage ban is unconstitutional. This means that same-sex marriage is permitted in these states.

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State Insurance Laws

In states that have legalized same-sex marriage, employers with fully insured plans are generally required to offer equal health plan coverage to same-sex and opposite-sex spouses.

Most self-insured plans are not subject to state insurance law. Thus, employers with self-insured plans are generally not required to provide equal coverage to same-sex spouses, even employers that are located in states that have legalized same-sex marriage.

Example: 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.

NONDISCRIMINATION LAWS

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

On Nov. 7, 2013, the U.S. Senate passed the **Employee Non-Discrimination Act (ENDA)**, which would ban workplace discrimination against gay and transgender employees. Before becoming law, the bill must be approved by the House of Representatives. However, the ENDA faces strong opposition in the House, which may not permit a vote on it at all. As passed by the Senate, the ENDA would prohibit discrimination on the bases of sexual orientation and gender identity by private sector employers with **at least 15 employees**, and by local, state and federal government employers.

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

As of April 1, 2014, 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
- Vermont
- Washington
- Wisconsin

HEALTH INSURANCE ISSUER REQUIREMENTS

In February 2014, it was reported that some issuers in Pennsylvania and North Carolina were refusing to sell family coverage to married same-sex couples. 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

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policies to **offer coverage on the same terms and conditions to legally married same-sex spouses that is offered to opposite-sex spouses**. This requirement applies in all states, including states that prohibit same-sex marriage.

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. Thus, employers that have fully insured plans and are located in states that do not permit same-sex marriage are not required by state insurance law to provide equal coverage to same-sex spouses. However, they must be offered the option to provide this coverage by their health insurance issuers.

While HHS encourages issuers to offer coverage for same-sex spouses in 2014, issuers must fully comply with this requirement for plan or policy years beginning on or after **Jan. 1, 2015**.

APPLICATION TO EMPLOYERS

Obligation to Offer Coverage

Many employers will 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.

Also, employers with fully insured plans should confirm that their eligibility rules for spouses comply with state insurance law. If an employer with a fully insured plan is located in a state that has legalized same-sex marriage, the eligibility rules should provide equal coverage for opposite-sex and same-sex spouses.

Also, 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



- Review state insurance law to determine whether it requires equal coverage for same-sex and opposite-sex spouses.
- In states that have legalized same-sex marriage, equal coverage is likely required.
- Even if 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.
- Even if an employer is located in a state that has legalized same-sex marriage, 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.

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.

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Whether health plan coverage for same-sex spouses is taxable at the state level depends on state tax laws and state regulatory guidance. In states that do not permit same-sex marriages, the value of coverage for same-sex spouses may be taxable at the state level, even if the state otherwise follows the federal definition of income for tax purposes.

Several states that prohibit same-sex marriage do not have state income tax on wages, so health plan coverage for same-sex spouses is tax-free at the state level for employees in these states. These states include Alaska, Florida, Nevada, South Dakota, Tennessee, Texas and Wyoming.

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:

- If the plan is fully insured, confirm that the issuer is giving the option to cover same-sex spouses for plan years beginning before Jan. 1, 2015;
- Review the plan's enrollment process so that same-sex spouses are properly identified based on the state of celebration rule;
- 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
- Work with tax advisors to confirm that the taxation of same-sex spouse coverage is consistent with federal and state laws.

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