

# Legislative Brief

## Health Plan Coverage - Same-sex Spouses

### Recent changes in federal and state laws

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:** The Federal Government may not discriminate against same-sex couples who are legally married. 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.
- **State laws:** Most state insurance laws do not require spousal coverage at all, opposite sex or same-sex. A fully insured plan that provides coverage for spouses, which is maintained by an employer that has employees in a state that recognizes same-sex marriage, is generally required to offer equal coverage to opposite-sex and same-sex spouses. Self-insured plans are generally not required to provide equal coverage to same-sex spouses.
- **Nondiscrimination laws:** Even if an employer is not required to offer coverage to same-sex spouses, workplace nondiscrimination laws may impact an employer's decision to offer same-sex spouse coverage.
- **Health Insurance Issuers:** Effective for 2015, the Affordable Care Act requires health insurance issuers of non-grandfathered health plans that provide coverage for spouses to give employers the option of covering same-sex spouses, even for policies issued in states that prohibit same-sex marriage. Offers of same-sex coverage before January 1, 2015 are encouraged but not required.

#### 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. 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.

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 all federal tax and ERISA Title I purposes (which includes COBRA, HIPAA and other group health mandates) regardless of state of residence.

**State Law**

The majority of states have laws or constitutional amendments barring same-sex marriages. However, a **growing number of states have legalized same-sex marriage**. As of April 1, 2014, the following states allow same-sex marriage:

State	Effective Date
California	June 28, 2013 (reinstated)
Connecticut	Oct. 1, 2010
District of Columbia	March 9, 2010
Delaware	July 1, 2013
Hawaii	Dec. 2, 2013
Illinois	June 1, 2014
Iowa	April 24, 2009
Maine	Dec. 29, 2012
Maryland	Jan. 1, 2013
Minnesota	Aug. 1, 2013
New Hampshire	Jan. 1, 2010
New Jersey	Oct. 21, 2013
New Mexico	Dec. 19, 2013
New York	July 24, 2011
Rhode Island	Aug. 1, 2013
Vermont	Sept. 1, 2009
Washington	Dec. 6, 2012

Following the Supreme Court's DOMA decision, a number of federal district courts ruled that state bans on same-sex marriage are unconstitutional, including courts in **Utah, Oklahoma, Virginia, Texas and Michigan**. These decisions have been stayed pending appeal. This means that same-sex marriages cannot currently take place in these states.

**NONDISCRIMINATION LAWS**

**Federal Law**

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.

**State laws**

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**

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**. 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.

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**.

**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. Additionally, the following should be considered when defining plan eligibility for fully-insured and self-funded plans:

***Employers with Fully Insured Health Plans***

- Review state insurance law to determine whether it requires equal coverage for same-sex and opposite-sex spouses (most state insurance laws do not require spousal coverage at all—opposite-sex or same-sex).
- In states that have legalized same-sex marriage, equal coverage to same-sex spouses 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.
- 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 that do not offer equal benefits to same-sex spouses may be at risk for discrimination lawsuits.

### **TAX LAWS**

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.

#### ***Federal 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.

#### ***State laws***

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. For example, as of April 1, 2014, regulators in at least four states—[Nebraska](#), [North Carolina](#), [Ohio](#) and [Wisconsin](#)—have issued guidance indicating that employers may not exclude the value of the health benefits provided to a same-sex spouse from an employee's income.

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 health insurance issuer is giving the option to cover same-sex spouses for plan or policy years beginning before January 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.

The health care reform law—the Affordable Care Act (ACA)—has many complex requirements for employers and health plans. Please contact Kapnick Insurance Group with any questions about how you can prepare for any of the health care reform requirements. This Kapnick Insurance Group Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal or tax advice. The information contained in this communication is intended to provide general information regarding health care reform and related topics, and is based on general information available at the time it was prepared. Readers should contact their tax and/or legal counsel for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.