

COMPLIANCE OVERVIEW

Provided by Brown & Brown Benefit Advisors

Health Plan Coverage for Same-sex Spouses

Due to 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. Depending on whether a group health plan is fully insured or self-funded, employers that provide health coverage for employees' opposite-sex spouses may be required to extend coverage to same-sex spouses.

Federal law does not require employers to offer health coverage to same-sex spouses. However, 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. Also, 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.

LINKS AND RESOURCE

- Supreme Court [decision](#) from June 2015 that invalidated state bans on same-sex marriage
- EEOC [guidance](#) on enforcement protections for LGBT workers
- [IRS Notice 2015-86](#) -- IRS guidance on application of the Supreme Court's same-sex marriage decision to employee benefit plans

HIGHLIGHTS

SAME-SEX MARRIAGE LAWS

- Same-sex spouses have the same rights and protections under federal law as opposite-sex spouses.
- In June 2015, the U.S. Supreme Court ruled that state bans on same-sex marriage are unconstitutional.
- Due to this ruling, same-sex marriage is legal in every state.

FAIR EMPLOYMENT LAWS

- According to the EEOC, Title VII's prohibition on sex discrimination forbids employment discrimination based on gender identity or sexual orientation.
- A number of states have laws that prohibit workplace discrimination based on sexual orientation and gender identity.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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

On June, 26, 2015, the U.S. Supreme Court ruled that the Constitution guarantees same-sex couples the right to marry. The Supreme Court held in [Obergefell v. Hodges](#) 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 are now allowed to marry in any state, and are entitled to all the rights, benefits and obligations given to opposite-sex spouses under both federal and state law.

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, state insurance law will likely 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.

In addition, a number of states have laws that prohibit workplace discrimination based on 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. 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. 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.

State Laws

Because same-sex marriage has been legalized throughout the United States, state insurance laws may require equal health insurance coverage for 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 subject to state insurance laws regarding equal coverage for same-sex spouses.

APPLICATION TO EMPLOYERS

Obligation to Offer Coverage

In general, employers with self-insured plans have discretion regarding whether they offer health coverage to same-sex spouses, although they may be at risk for discrimination lawsuits if they only offer coverage to opposite-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.

| | |
|---|--|
| <p>Employers With Fully Insured Health Plans</p> | <ul style="list-style-type: none"> • State insurance law may require equal coverage for same-sex and opposite-sex spouses. • 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. |
| <p>Employers With Self-funded Health Plans</p> | <ul style="list-style-type: none"> • Because 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. |

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.

Cafeteria Plan Elections

[IRS Notice 2015-86](#) addresses issues relating to same-sex marriage and employee benefit plans, including Code Section 125 plans (or cafeteria plans). According to this guidance, a cafeteria plan that allows participants to make a change in election due to a significant improvement in coverage may permit a participant to revoke an existing election and submit a new election if same-sex spouses first become eligible for coverage under the terms of the plan during the period of coverage.

This new election may be an election by a participant to add coverage for a same-sex spouse to a benefit option in which the participant is already enrolled, or an election by a participant who had not previously elected coverage to add coverage for the participant and a same-sex spouse.

Action Steps

Health plan coverage for same-sex spouses is an evolving area of the law. Some lawsuits have already been filed regarding the failure to extend health coverage to same-sex spouses, and more lawsuits are expected to be filed. Due to the legal risks involved, employers that provide health coverage to employees' opposite-sex spouses should be cautious about excluding same-sex spouses from coverage. 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;
- If the eligibility rules change during a plan year, consider whether the cafeteria plan's mid-year election change rules will permit employees to change their elections; 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.