

Marriage for Same-Sex Couples: Considerations for Employers

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The legal definition of “spouse” as used in many employment and benefits contexts has changed considerably since 2004. Marriage is now available for same-sex couples in Connecticut, Iowa, Maine, Massachusetts, New Hampshire and Vermont, and is also recognized by New York and the District of Columbia.¹ As a result, employers across the country must reassess their employee benefits with respect to same-sex spouses.

This resource examines the interplay between inconsistent state and federal laws and an individual employer’s benefits and also suggests how employers can proactively address changing laws to ensure same-sex spouses are provided equal benefits, including eligibility, enrollment and tax treatment of benefits, where possible.

Ultimately, employers that prohibit discrimination based on sexual orientation and/or marital status can and should:

- Modify any definition of “spouse” in benefits programs throughout all U.S. operations to include same-sex spouses, rather than requiring employees with same-sex spouses to participate in a separate partner benefits program with separate requirements for eligibility;
- Maintain partner benefits programs in states that recognize same-sex spouses to accommodate employees who choose not to marry due to the inconsistencies among state laws and federal laws;
- Modify enrollment requirements to ensure that any necessary documentation asked of same-sex spouses does not exceed that of opposite-sex spouses: if a marriage license is not required to enroll an opposite-sex spouse, it should also not be required for a same-sex spouse; and
- Amend plan documents and other benefits communications to align with these changes.

Changing laws defining marriage will affect employers throughout the United States, including employers that:

- Have some or all operations in states that grant or recognize marriage licenses for same-sex spouses;
- Recruit employees from states that grant or recognize marriage licenses for same-sex spouses;
- Purchase insurance in states that grant or recognize same-sex spouses; or
- Have employees married to a same-sex spouse, irrespective of the employees’ states of residency or employment.

Employers’ Discretion in Determining Benefits Eligibility

Non-government employers can individually decide whether or not to provide health coverage to their employees, and can also decide whether or not to extend that coverage to different-sex spouses or partners of employees, same-sex spouses or partners of employees, children of employees and so on. **No federal or state law prohibits private employers from extending health insurance and most other spousal benefits to same-sex spouses.** Federal law does, however, determine the treatment of benefits with respect to federal employee income and employer payroll taxes, and state law often — but not always — follows federal law with respect to state income taxes.

Many major businesses offer benefits to same-sex partners of employees throughout the U.S., including a majority of Fortune 500 companies. A 2005 Hewitt Association study found that a majority of employers it surveyed offer benefits to unmarried partners; the majority of these (58 percent) offer benefits to both same-sex and different-sex unmarried partners. Of those that only offer benefits to same-sex partners, some have stated they do so only because such employees are “unable to marry.”

¹ California granted approximately 18,000 marriage licenses for same-sex couples in 2008, prior to the passage of Proposition 8. Marriage licenses will be granted to same-sex couples in Vermont beginning Sep. 1, 2009.

When employers first offered partner benefits in the 1990s, legal recognition for same-sex couples was limited to a few local jurisdictions. As a result, employers typically relied on a partnership affidavit with a series of requirements that employees and their unmarried partners were required to satisfy to qualify for benefits.

Given the expansion of legal recognition for same-sex couples over the last decade, many employers now allow employees the alternative of presenting a city, county or state registration of domestic partnership, a state-issued civil union or a state-issued marriage certificate to demonstrate eligibility for benefits. This generally reduces the employee's burden of documenting their relationship, and also reduces the employer's burden of administering their own system of relationship recognition. A 2005 Business & Legal Reports study found that the use of affidavits is in overall decline, but some employers continue to use them and each affidavit can vary.²

Employers with State-Regulated Insurance Plans

A business that purchases health insurance coverage from an insurance company is generally considered “fully-insured.” In order for health insurance to be sold to an employer, it generally must comply with the insurance regulations of the state where the product is based. Some states that recognize certain same-sex relationships also require health plans regulated by that state to extend coverage to those same-sex couples.

Connecticut, District of Columbia,³ Iowa,⁴ Maine, Massachusetts⁵, New Hampshire and Vermont.⁶ Employers with state-regulated, insured health plans are required to extend benefits to same-sex spouses of employees if they do so for different-sex spouses.

California. Despite the passage of the state's November 2008 constitutional amendment defining marriage as between a man and a woman, same-sex spouses will be treated the same as different-sex spouses for all state purposes. Employers should continue to recognize same-sex spouses for benefits plan enrollment and state tax purposes. Significantly, California's anti-discrimination statutes that apply to all employers explicitly prohibit employment discrimination based on an employee's sexual orientation and marital status. As such:

- State-regulated health plans must extend equivalent benefits to same-sex spouses of employees;⁷
- Health benefits for same-sex spouses are excludable from employees' income for state tax purposes⁸ and employees must file either a joint return or a married filing separate return for state tax purposes;⁹ and
- Family and medical leave and other state-defined spousal benefits are extended to employees and their same-sex spouses.¹⁰

The California Insurance Equality Act of 2004 (AB 2208) requires that health insurance plans in that state treat spouses and domestic partners equally – effectively mandating that employers providing spousal benefits must also provide partner benefits. Notably, this provision also precludes employers from asking for documentation for state-registered partners if not also asking for documentation for different-sex spouses. Neither California's domestic partner nor insurance equality laws have been addressed by the state's Supreme Court, legislature or voter initiative

² “Domestic Partner Benefits: Defining Domestic Partners and Dependents.” Available at: <http://www.hrc.org/issues/4826.htm>

³ Communication with District of Columbia's Department of Insurance, Securities and Banking, July 2009.

⁴ At the time of this writing, the Iowa Insurance Division had no indication that it would treat same-sex spouses differently than different-sex spouses for state-regulated health insurance purposes. Conversation between Iowa Insurance Division and author, Apr 13, 2009.

⁵ “Same-Sex Spousal Benefits in Massachusetts after *Goodridge*,” Gay & Lesbian Advocates and Defenders. Available at: <http://www.glad.org/rights/HealthBenefitsAfterGoodridge.html>

⁶ As of Sep 1, 2009, when the marriage legislation goes into effect. “An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage,” S. 115. <http://www.leg.state.vt.us/docs/2010/bills/Passed/S-115.pdf>

⁷ Communication from State of California Department of Insurance Legal Division to author, Jul 23, 2008.

⁸ Communication from State of California Employee Development Department to author, Jul 24, 2008. Also, refer to “EDD Information Sheet: Taxability of Employee Benefits,” available at: http://www.edd.ca.gov/pdf_pub_ctr/de231eb.pdf.

⁹ State of California Franchise Tax Board, “FTB Notice 2008-5: California Income Tax Treatment and Tax Return Filing Obligations of Same-Sex Married Couples,” Jun 20, 2008. Available at: http://www.ftb.ca.gov/law/notices/2008/2008_5.pdf

¹⁰ See note 6 above.

since the Court’s ruling. As such, state domestic partnerships will continue and employers with existing partner coverage should not consider ending such coverage.

New York. State officials have not provided specific guidance regarding how employers should treat same-sex spouses legally married outside New York State with respect to employment-based benefits since a New York Appellate court February 2008 ruling¹¹ and Gov. David A. Paterson’s subsequent May 2008 directive to all New York State agencies to recognize such marriages.¹² Several insurance companies in the state have already revised their policies to recognize marriage licenses for same-sex couples, including BlueCross BlueShield of Western New York and BlueCross BlueShield of Northeastern New York.¹³

Employers with Federally-Regulated Insurance Plans

Businesses that assume the full costs and risks of insuring their employees, rather than purchasing health insurance products, are considered to sponsor their own “self-insured” health plans, although these plans are typically still administered by a third-party insurance company.

Such plans are generally governed by the federal Employee Retirement Income Security Act, also known as ERISA, and not subject to state insurance laws or regulations. Furthermore, the federal Defense of Marriage Act, also known as DOMA, defines marriage as between one man and one woman, thus restricting the definition of “spouse” under federal law. **Nevertheless, self-insured employers can still extend most plan-based spousal benefits to same-sex spouses.**

Employers with State Contracts

California is the only U.S. state that has enacted a statewide equal benefits law that requires employers with state contracts of \$100,000 or more to provide equal benefits to same-sex partners of employees in California and any other employees who work on those contracts in other states.¹⁴

Taxation of Health Benefits

Due to federal tax law, health benefits provided to a non-dependent same-sex spouse or partner are considered taxable income to the employee for federal income tax purposes. However, seven of the states that legally recognize same-sex relationships also exempt health benefits from state income tax for participants of that state’s relationship structure: California, Connecticut, Iowa,¹⁵ Maine, Massachusetts, New Hampshire, Oregon, Vermont and the District of Columbia. Because of the differing tax treatment between federal law and these states’ laws, employers who provide non-dependent health coverage to employees in these states must perform two sets of calculations in determining an employee’s taxable income – one for federal tax purposes and one for state tax purposes.

- **Taxation of Partner Benefits**
<http://www.hrc.org/issues/4820.htm>

¹¹ Joseph A. Carello and Brian Kopp, “New York Employer Must Recognize Same-Sex Marriage Performed Outside of New York,” Nixon Peabody LLP, Feb 8, 2008. Available at: http://www.nixonpeabody.com/publications_detail3.asp?ID=2174

¹² “Protecting the Rights of Married Couples,” Governor David A. Paterson, May 30, 2008. Available at: <http://www.dailykos.com/storyonly/2008/5/30/13233/4971/725/525066>

¹³ Gene Warner, “Same-sex couple in Buffalo wins health care benefits fight,” The Buffalo News, July 29, 2008. Available at: <http://www.buffalonews.com/home/story/402176.html>

¹⁴ “Equal Benefits Ordinance: State of California,” Available at: <http://www.hrc.org/issues/6992.htm>

¹⁵ At the time of this writing, the Iowa Department of Revenue had not determined how it would treat same-sex spousal benefits; it is expected that they will treat them the same as different-sex spousal benefits as a result of the April 3, 2009 *Varnum* decision.

Weighing Partner vs. Spousal Benefits when Marriage Becomes Available

Employers should be mindful of the unique legal challenges that employees with same-sex partners can face when considering marriage, primarily due to a particular state's recognition — or active disregard — of their marriage and the challenges these disparities can present to employees in the long term.

Employers that nonetheless opt to end partner benefits in favor of same-sex spousal benefits should provide a reasonable grace period of one year to allow time for same-sex couples to weigh their individual legal concerns and obligations, and to also allow time for state officials to provide appropriate and sufficient guidance on the various legal issues affected by the change.

A multistate employer could conceivably require all of its U.S. employees in same-sex partnerships to obtain a marriage license from those states that provide them in order to receive benefits. But this could require traveling to another state and entering into a legal contract that might not be recognized in full or in part by the jurisdiction in which the employee resides or works.

- **Defining Domestic Partners and Dependents**
<http://www.hrc.org/issues/4826.htm>

Legal Rights and Protections for Same-Sex Couples: Uncertain Reciprocity Between States

While marriages between different-sex spouses performed in one U.S. state are generally recognized as valid by another, the majority of states as well as federal law define marriage as between one man and one woman — and some states, such as Wisconsin, could regard obtaining a marriage license in another state a criminal offense if the marriage would be illegal in the individual's state of residence.

States that recognize marriage for same-sex couples under state law: Five states—Massachusetts, Connecticut, Iowa, Vermont (effective Sep. 1, 2009), and Maine (effective Sep. 1, 2009, pending a possible referendum)—recognize marriage for same-sex couples under state law. California recognized marriage by same-sex couples between June and November of 2008, granting 18,000 marriages of same-sex couples that remain valid.

States that provide same-sex couples with access to benefits and responsibilities of marriage: Six states—California, New Hampshire, New Jersey, Oregon, Nevada (effective Oct. 1, 2009), and Washington (as of July 26, 2009, pending possible repeal effort)—plus Washington, D.C. provide same-sex couples with access to the state level benefits and responsibilities of marriage, through either civil unions or domestic partnerships.

States that provide same-sex couples with limited benefits and responsibilities: Hawaii provides same-sex couples with limited rights and benefits. New York recognizes marriages by same-sex couples validly entered into outside of New York. The New York legislature is considering marriage legislation that would permit same-sex couples to marry in those states, and the D.C. Council has passed legislation that would recognize marriages by same-sex couples legally entered into in other jurisdictions—that legislation is going through a Congressional review period.

Mobile Employees

Multistate employers, employers with a highly mobile workforce and employers that actively recruit employees from other states would benefit from maintaining both domestic partner and spousal benefits for same-sex couples in all states, rather than requiring employees in states with marriage for same-sex couples to get married. Employers often move employees in the course of normal business operations, particularly when restructuring or expanding operations. Requiring employees to legally re-establish their relationship based on their location of employment would be unreasonable.

Unintended Discrimination

Requiring employees to marry rather than provide partner benefits could potentially subject employees to discrimination in other aspects of their lives. As of July 2008, thirty states do not provide any legal protections from discrimination based on sexual orientation, including discrimination in housing and public accommodations.

Further Recommendations

To ensure that **spousal benefits** do not discriminate against same-sex spouses, employers should be mindful to:

- Treat the attainment of a valid marriage license as a qualifying event for purposes of the employer-sponsored plan, allowing the employee to enroll their spouse and their spouse's qualifying dependents outside of the open benefits enrollment period; and
- Treat, to the extent allowed for under state law, the imputed value of same-sex spousal benefits as exempt for the employee's state income taxes.

Given the rapid pace of change in state laws regarding same-sex relationships, as well as the conflicts between state and federal employment and benefit laws, employers can stay ahead of the curve by modifying their **partner benefits** programs to:

- Equalize requirements for documentation for benefits enrollment and auditing purposes – if employees are required to submit documentation to qualify for partner benefits, legal documentation such as a domestic partner registration, civil union or marriage license should be treated as sufficient;
- Minimize disparity between spousal and partner benefits, including documentation required for enrollment or audits; and
- Acknowledge the rights and benefits legally accorded to the legal structure as appropriate in that state.

The information in this document does not constitute legal advice. For assistance with legal questions specific to your situation, please consult an attorney.

For questions or comments about this document, e-mail workplace@hrc.org.

Additional Information

States that Recognize Same-Sex Relationships (14 states and Washington, DC)

As of April 9, 2009, fourteen states and the District of Columbia provide legal relationship recognition for same-sex partners and their dependents. These laws have varying impacts on employer-provided benefits and how they are treated for state tax purposes, as well as varying legal protections and obligations related to parenting, estate planning, hospital and visitation rights, etc. Nonetheless, ten of these states require same-sex partners be treated equally to different-sex spouses under that state's relationship structure.

- State issues marriage licenses to same-sex couples and recognizes marriages legally entered into in another jurisdiction (6 states): **Connecticut**†✓ (2008), **Iowa**✓ (2009), **Maine** (Sep. 1, 2009), **Massachusetts**✓ (2004), **New Hampshire** (Sep. 1, 2009), **Vermont**††✓ (Sep. 1, 2009) and formerly **California**‡ (Jun-Nov 2008)
- State recognizes marriages by same-sex couples legally entered into in another jurisdiction (1 state): **New York**✓ (2008)
- Statewide law provides the equivalent of state-level spousal rights to same-sex couples (6 states and DC): **California**‡✓ (domestic partnerships, 2007), **Connecticut**†✓ (civil unions, 2005), **District of Columbia** (domestic partnerships, 2002), **New Hampshire**✓ (civil unions, 2008), **New Jersey**✓ (civil unions, 2007), **Oregon***✓ (domestic partnerships, 2008) and **Vermont****✓ (civil unions, 2000)
- Statewide law provides some state-level spousal rights to same-sex couples (4 states): **Colorado*** (designated beneficiary, Jul. 1, 2009), **Hawaii**** (reciprocal beneficiaries, 1997), **Maine** (domestic partnerships, 2004) and **Washington**** (domestic partnerships, 2007)

† Connecticut's law restricting marriage was overturned October 2008 and marriage licenses available as of November 2008; civil unions also remain.

†† Vermont's law restricting marriage was overturned by legislation in April 2009; marriage licenses will be available beginning September 1.

‡ California voters approved a constitutional amendment restricting marriage to one man and one woman November 2008.

* Has a constitutional amendment restricting marriage to one man and one woman.

** Has a law restricting marriage to one man and one woman.

✓ State law or regulation mandates benefits equal to different-sex spouses under this relationship structure.

As of June 4, 2009, 40 states limit marriage for same-sex couples; 29 have constitutional amendments (including California, Colorado and Oregon) and 11 have laws (including Hawaii and Washington) that restrict marriage to one man and one woman.

- **State by State Same-Sex Relationship Recognition Laws**
http://www.hrc.org/issues/marriage/marriage_laws.asp
- **Relationship Recognition in the United States**
http://www.hrc.org/documents/relationship_recognition_laws_map.pdf
- **Statewide Marriage Prohibitions**
http://www.hrc.org/documents/marriage_prohibitions.pdf

Other Resources

The following resources discussed the implications of California marriage on employee benefit plans:

- California Same-Sex Marriage Ruling: Employee Benefit Plan Implications
http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/4aa34aeb-0b76-41da-bb59-12384e8c886a.cfm
- The Recent California Decision Overruling the Ban on Same-Sex Marriages and its Effect on Employee Benefit Plans
http://www.lw.com/upload/pubContent/pdf/pub2230_1.pdf
- California Supreme Court Opens the Door on Same-Sex Marriage, May 2008
<http://www.littler.com/collateral/19048.pdf>
- States' Recognition of Same-Sex Marriage is in Flux, November 2008
<http://moss07.shrm.org/LegalIssues/StateandLocalResources/Pages/States%E2%80%99RecognitionofSame-SexMarriageIsinFlux.aspx>

The following article examines compliance training with respect to marriage for same-sex couples:

- Same-Sex Marriage and Compliance Training – Yes, There's a Link
<http://www.elt-inc.com/blog/2008/06/samesex-marriage-and-complianc.html>