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legislativeUPDATE

June 6, 2014

Same-Sex Spouse/Partner – Health Plan Coverage

Many U.S. employers offer health insurance coverage to their employees' domestic partners or same-sex spouses and there are no federal laws that either require or prohibit employers from offering this coverage. However, generally employers with fully-insured plans that offer spousal coverage in states that have legalized same-sex spouses may be required by state insurance law to offer coverage to same-sex spouses. Also, some states have enacted civil union and domestic partnership laws that affect benefits for civil unions or domestic partnerships, yet employee benefits for civil union/domestic partners generally do not receive the same favorable federal tax treatment as benefits for spouses.

This update provides an overview of the federal and state laws that affect domestic partner and same-sex spouse benefits and also outlines options, obligations, and action steps for employers to consider when providing same-sex spouse and domestic partner health benefits. See our prior [Conner Strong & Buckelew Legislative Update](#) for more information on prior guidance and links to our previous updates on same-sex spouse/partner issues.

Federal Law: Last year the Supreme Court's same-sex marriage decision struck down a key provision of the Defense of Marriage Act (DOMA) which stated that marriage must be between a man and a woman. The result is legally married same-sex couples are entitled to the same benefits and protections under federal law as opposite-sex married couples. The decision does not require employers to provide the same health benefits to opposite-sex and same-sex spouses. The DOMA ruling also does not force same-sex marriage on states that do not recognize same-sex marriage and does not require them to issue same-sex marriage licenses or recognize same-sex marriages performed elsewhere.

A "state of celebration" policy applies for determining when a same-sex marriage will be treated as valid for purposes of federal law. Under this 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.

For more information on federal law, see the IRS [FAQs for Individuals of the Same Sex Who Are Married Under State Law](#) focusing on individual tax return issues and also address some employee benefit topics related to same-sex spouses. See also the IRS issued [FAQs for Registered Domestic Partners and Individuals in Civil Unions](#) providing information to individuals of the same sex and opposite sex who are in registered domestic partnerships, civil unions or other similar formal relationships that are not marriages under state law. For convenience, these

individuals are referred to as “registered domestic partners” in the FAQs. As to welfare benefit issues affected by the guidance, plans sponsors should note that these “registered domestic partners” are not considered as married or spouses for federal tax purposes. Therefore, same-sex and opposite-sex domestic partners and partners in civil unions still do not have the same federal tax treatment as married (same- and opposite-sex) couples. Thus, any insured or self-insured employer-paid coverage provided to a registered domestic partner is excludable from an employee’s wages only if the domestic partner qualifies as a tax dependent under the Internal Revenue Code (this rule has not changed).

State Law: Currently, twenty states (California, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington) allow same sex marriage. Pennsylvania was added to the list May 20, 2014. This number may rise in the near future as several states' same-sex marriage bans are being challenged across the country. In states that have legalized same-sex marriage, employers with fully insured plans are required to offer equal health plan coverage to same-sex and opposite-sex spouses. But most self-insured plans are not subject to state insurance law. Thus, employers with self-insured plans, including those that are located in states that have legalized same-sex marriage, are generally not required to provide equal coverage to same-sex spouses.

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. The DOMA ruling also does not force same-sex marriage on the other states and does not require them to issue same-sex marriage licenses or recognize same-sex marriages performed elsewhere. In these states, the tax and imputed income rules for domestic partner/civil union couples remains the same (the DOMA rulings only apply to same-sex marriages, not domestic partner/civil union partnerships).

Employer Discretion: Employers will continue to have discretion regarding whether they offer health coverage to same-sex spouses and/or registered domestic partners. As an overview:

- Federal law does not require employers to offer health coverage to same-sex spouses/partners, 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/partnerships and has a fully insured plan that provides coverage for spouses/partners, state insurance law generally requires the employer to offer equal coverage to opposite-sex and same-sex spouses.
- A number of states (including Delaware, New Jersey and New York) have laws that prohibit workplace discrimination based on sexual orientation or gender identity and, therefore, 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.
- Effective for 2015, issuers of non-grandfathered insured health plans that provide coverage for spouses must give employers the option to cover same-sex spouses, even for policies issued in states that prohibit same-sex marriage.

Next Steps for Employers: 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.

- Employers with fully insured health plans should confirm that their eligibility rules for spouses comply with state insurance law, and if the employer 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.
- Self-funded plans are generally not subject to state insurance law, so 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.
- If an employer decides to expand its health plan's eligibility rules to include same-sex spouses/partners, it should consider taking the following steps:
 - Review the plan's enrollment process so that same-sex spouses/partners are properly identified (based on the state of celebration rule for same-sex spouses);
 - Communicate plan eligibility changes to employees and update enrollment forms as needed;
 - Work with tax advisors to confirm that the taxation of coverage is consistent with federal and state laws;
 - Review cafeteria plan terms (for pretax election changes and FSA eligibility) and confirm that an employee can pay for a same-sex spouse's health coverage on a pre-tax basis through the employer's cafeteria plan;
 - Confirm that same-sex spouses are subject to the DCAP exclusion limits for married couples (\$5,000 for married couples filing jointly and \$2,500 for married individuals filing separately);
 - Determine whether to permit an employee's same-sex spouse (or the spouse's dependents) to be reimbursed from FSAs for their expenses;
 - Confirm if cafeteria plan election change rules allow participants married to a same-sex spouse to change plan elections midyear—e.g., to add health coverage for a spouse—if specified events occur, and if the change is consistent with the event; and
 - Confirm that same-sex married couples are subject to the joint deduction limit for HSA contributions (if either spouse has family HDHP coverage), and the family contribution limit to HSA accounts applies to the total contributions the couples made to one or more such accounts, the same way it applies to opposite-sex married couples.

Amendments May Be Needed: All employers, even those who are not in states that recognize same-sex marriage, will need to take appropriate actions. For example, when considering administration and plan design changes, plan sponsors should review plan documents and open enrollment and other materials for definitions of “spouse” and determine whether amendments may be needed to take into account benefit and administration changes in response to the IRS guidance. Plans will need to decide if they want to keep or modify their eligibility rules for same-sex married couples, domestic partners, partners in civil unions, and their dependents. Contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 should you have any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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