

Update

July 23, 2008



How do health and welfare plans handle same-sex marriages?

First Massachusetts and now California have legalized same-sex marriages, and other states may recognize the legal status of these unions. Yet federal and many state laws do not recognize same-sex marriages, creating unique issues for health and welfare plans offering spousal benefits. This *Update* reviews same-sex marriage issues that private-sector employers sponsoring health and welfare plans should keep in mind.

Where are same-sex marriages legal?

In the US, same-sex couples can legally marry in two states: California and Massachusetts. While Massachusetts doesn't permit nonresidents to marry unless their home state will recognize the marriage, California allows same-sex couples to marry regardless of where they live. Outside the US, a growing number of countries have legalized same-sex marriages, including Belgium, Canada, the Netherlands, Norway (effective 2009), South Africa and Spain.

Some jurisdictions that do not license same-sex marriages still extend marital or similar legal rights to couples lawfully wedded in other states or countries. [New York](#) and [Rhode Island](#), for example, will recognize same-sex marriages legally entered elsewhere (although a recent court [decision](#) has raised questions about Rhode Island's position). [New Jersey](#) will give same-sex spouses the same rights as civil union partners under state law. Two other jurisdictions that do not legally limit marriage to opposite-sex couples – the District of Columbia and New Mexico – have yet to say what legal status they will give same-sex spouses.

Where do same-sex marriages have no legal status?

Federal and many state laws limit marriage and its associated legal rights to opposite-sex couples. Under the federal Defense of Marriage Act (DOMA), “marriage” is a union between one man and one woman, and “spouse” means an opposite-sex husband or wife. These definitions apply for all federal purposes, including the tax and ERISA requirements for benefit plans.

Plan document pointers for self-insured plans

In deciding whether to offer same-sex spousal coverage and revising plan documents to clarify eligibility, keep these points in mind:

Account for jurisdictional differences when defining who is eligible for what types of coverage. For example, a plan could extend benefits to anyone recognized as a spouse where the marriage was performed or limit spousal benefits to marriages recognized by the jurisdiction where the employee currently lives or works.

Consider business needs when deciding whether to offer benefits to same-sex spouses. For example, a firm with California government contracts may want to extend same-sex spousal benefits to employees working on those contracts.

Don't promise all spousal benefits on equal terms when extending benefits to same-sex spouses. Because of DOMA, federal tax and benefit laws often preclude identical treatment of same- and opposite-sex spouses.

Coordinate with stop-loss insurance carriers to ensure stop-loss coverage matches any revisions to a benefit plan's eligibility terms. Otherwise, the employer could end up paying large claims that it expected stop-loss insurance to cover.

Most states – except the ones noted above – have enacted DOMA-like laws, and several states' constitutions prohibit same-sex marriage. These states neither permit same-sex couples to marry nor recognize same-sex marriages legally entered elsewhere. State courts, however, can overturn state laws restricting same-sex marriage – as happened this spring in California.

How are health and welfare plans affected by same-sex marriages?

Same-sex marriages create a variety of benefits issues, some of which depend on a plan's insured or self-insured status. But all employers – whether insured or self-insured – must comply with applicable state law for certain benefits:

- **Leave rights.** Because of DOMA, employees cannot use leave under the federal Family and Medical Leave Act (FMLA) to care for a seriously ill same-sex spouse. But FMLA doesn't pre-empt more generous state laws, so employers must offer state-mandated leave benefits to same- and opposite-sex spouses residing in [California](#) and [Massachusetts](#). Any state-mandated leave to care for a same-sex spouse cannot reduce an employee's 12-week FMLA allotment – unlike leave taken to care for an opposite-sex spouse.
- **Non-ERISA benefits.** Various employer-provided benefits aren't governed by the Employee Retirement Income Security Act (ERISA), such as club memberships, family discounts, and similar spousal or family perks. In California and Massachusetts, employers must offer these benefits to both same- and opposite-sex spouses and their families. Similar requirements may apply in states that recognize same-sex marriages performed elsewhere.

Issues for self-insured plans. Because ERISA generally pre-empts state laws regulating self-insured employee benefit plans, employers with such plans can choose whether to offer benefits to same-sex couples, regardless of state law. However, plan documents and summary plan descriptions should clearly define terms like “spouse” and “marriage” to include or exclude same-sex couples (see sidebar for related points to consider).

Issues for employers with insured plans. Employers with insured benefits through an HMO or group insurance policy must extend spousal benefits as required by state law. Deciding which state's laws apply to a policy can be tricky (see sidebar on page 3 for details).

How can health and welfare plans reconcile federal and state laws?

Must we offer benefits to same-sex spouses and their children?

For insured benefit plans and benefit programs not governed by ERISA – such as leave programs – employers must follow relevant state law. For self-insured ERISA health and welfare plans, employers may set their own eligibility standards, but plan documents should clearly define these terms.

Do we need to tax same-sex spouse benefits? Unless a same-sex spouse qualifies as an employee's federal tax dependent, the employee must pay federal taxes on employer-provided benefits for a same-sex spouse. State law governs state tax treatment, so California and Massachusetts tax laws apply equally to same- and opposite-sex spouses.

Does same-sex marriage trigger HIPAA special enrollment? Because of DOMA, the health plan enrollment rights triggered by marriage apply only to opposite-sex couples under the federal Health Insurance Portability and Accountability Act (HIPAA). But other special enrollment triggers may apply (such as when an employee's same-sex spouse loses other coverage and the employee's plan allows same-sex spouses to be covered). Any cafeteria plan election changes must follow federal law, which may prohibit a midyear status change due to same-sex marriage.

Are same-sex spouses with employer health coverage eligible for COBRA?

Under the federal Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA), a same-sex spouse has no independent right to continued group health plan coverage after divorce or the employee's death. But a former employee has a COBRA right to retain a same-sex spouse's coverage or elect this spousal coverage during open enrollment if similarly situated active employees can do so.

For insured plans, states may have continuation mandates. In California, HMOs and insured plans for small groups (covering two to 19 employees) must extend continuation rights to employees, spouses and family members facing loss of coverage. In Massachusetts, an insured plan must maintain an ex-spouse's coverage at the same premium for an indefinite period.

What steps should health and welfare plans take?

Determine which laws apply and decide coverage. For self-insured health and welfare plans, ERISA controls, so employers can set their own terms. For insured health and welfare plans, the laws of the state where the policy was issued usually control, but other states' laws may apply as well (see sidebar on this page). For any non-ERISA benefit, all employers should follow relevant state laws.

Which state laws apply to insured benefit plans?

Determining which state's laws and regulations govern an insured plans involves two considerations:

State of issue. The state where a policy is issued typically regulates the policy's terms, no matter where employees are located. HMOs are usually regulated by each state where they operate, so rules may vary.

Policies and contracts issued in Massachusetts that offer spousal coverage must extend benefits to both same- and opposite-sex spouses; similar terms presumably will apply in California. New York's position won't be known until regulators issue guidance.

Extraterritorial issues. Some states extend certain insurance laws to out-of-state policies and contracts covering state residents.

In California, for example, an employer that has its principal place of business or a majority of its employees in the state must comply with California insurance laws if the employer's policy – wherever issued – was purchased from any insurer authorized to do business in the state.

Massachusetts doesn't require out-of-state policies to cover same-sex spouses, but any policy extending this coverage must comply with certain insurance laws relating to spouses.



For more information

For additional information, please contact your Mercer consultant.

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Revise plan documents, forms and communications. Plan documents, summary plan descriptions, enrollment materials, election and beneficiary designation forms, and other employee communications should identify who is and isn't covered under what circumstances. Employers also may want to disclose the federal and state tax implications of any benefits provided to same-sex spouses.

Review stop-loss and payroll agreements. Make sure that benefit plan provisions match insurance or stop-loss coverage contracts, and work with payroll vendors to ensure proper tax reporting and withholding.

Stay informed about legal developments. In November 2008, California voters will consider a ballot initiative to ban same-sex marriage. Further legislative and regulatory guidance on same-sex marriage is anticipated in California and other jurisdictions.

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