



Agencies Issue Guidance on Same-Sex Marriages and Employee Benefits

Details continue to emerge on how the federal government will implement the decision of the U.S. Supreme Court that part of the Defense of Marriage Act (DOMA) is unconstitutional. On Sept. 18, 2013, the Department of Labor's Employee Benefit Security Administration (EBSA) issued Technical Release 2013-04. With this release, the EBSA has joined the IRS in stating that, for purposes of federal tax and federal employee benefit requirements:

- The "place of celebration" rule will apply. This means that if the employee was legally married in any state or country, for federal tax and federal benefits purposes only the person will be considered legally married even if the employee is currently living, or the employer is located, in a state that does not recognize same-sex marriages. (These notices do not mean that a health plan must now cover a same-sex spouse.)
- The agencies only recognize actual marriages of same-sex spouses. This means that an employee who is in a civil union or domestic partnership is not covered by these new rules.

It is helpful to employers that the EBSA and the IRS are taking the same approach, since those agencies are jointly responsible for administering many benefits issues, such as COBRA, HIPAA, and qualified plans. There continue to be many areas of uncertainty, however, particularly since some areas are governed by state law and other areas are governed by federal law. Employers are encouraged to discuss their particular situation with local counsel before taking action.

Federal law does not require health plans to use a particular definition of a covered spouse, so state law and the terms of the plan become critical when deciding if a same-sex spouse must or may be covered. If, for example, the plan defines "spouse" as "the employee's lawful spouse" the plan will be obligated to cover a same-sex spouse, but not a partner in a civil union or a domestic

The UBA Compliance Center provides information to help employers and compliance professionals meet today's ongoing and increasingly complex group health plan challenges.



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partner. If the plan defines "spouse" as the "employee's opposite-sex spouse" under federal law the plan does not need to cover a same-sex spouse. If the employer is located in a state that recognizes same-sex marriages, however, there may be a requirement under the state's insurance code that same-sex spouses be covered, and the plan may need to be amended to meet that requirement. Employers should review their benefit plans to be sure that their definition of a covered spouse both is legal and reflects their intent.

Must a group health plan cover same-sex spouses?

- If the employer's state recognizes same-sex marriage
 - If the plan is fully insured – probably (check state insurance law and the policy's definition of "spouse")
 - If the plan is self-funded – maybe (check the plan's definition of "spouse;" be aware that opinions differ on whether ERISA will preempt state law)
- If the employer's state does not recognize same-sex marriage
 - If the plan is fully insured – unlikely (check the policy's definition of "spouse")
 - If the plan is self-funded – unlikely (check the plan's definition of "spouse")

May a group health plan cover same-sex spouses?

- If the employer's state recognizes same-sex marriage
 - If the plan is fully insured – probably (check the policy's definition of "spouse" or with the insurance carrier)
 - If the plan is self-funded – yes (check the plan's definition of "spouse;" verify with stop loss carrier)
- If the employer's state does not recognize same-sex marriage
 - If the plan is fully insured – probably not (check with the insurance carrier)
 - If the plan is self-funded – yes (check the plan's definition of "spouse;" verify with stop loss carrier)

Must a group health plan cover state-recognized civil union or domestic partners?

- If the employer's state recognizes civil unions or domestic partnerships
 - If the plan is fully insured – probably (check the policy's definition of "spouse") *
 - If the plan is self-funded – maybe (check the plan's definition of "spouse;" be aware that opinions differ on whether ERISA will preempt state law) *
- If the employer's state does not recognize civil unions or domestic partnerships
 - If the plan is fully insured – probably not (check the policy's definition of "spouse") *
 - If the plan is self-funded – no (check the plan's definition of "spouse")

May a group health plan cover state-recognized civil union partners or state-registered domestic partners?

- If the employer's state recognizes civil union partners or state-registered domestic partners
 - If the plan is fully insured – probably (check the policy's

- definition of "spouse" or with the insurance carrier) *
- If the plan is self-funded – yes (check the plan's definition of "spouse" and "dependent;" verify with stop loss carrier) *
- If the employer's state does not recognize civil union partners or state-registered domestic partners same-sex marriage
 - If the plan is fully insured – probably not (check the policy) *
 - If the plan is self-funded – yes (check the plan's definition of "spouse" and "dependent;" verify with stop-loss carrier) *

May a group health plan voluntarily cover domestic partners?

- If the plan is fully insured – maybe (check the policy's definition of "spouse" and "dependent" or check with the insurance carrier) *
- If the plan is self-funded – yes (check the plan's definition of "spouse" and "dependent;" verify with stop loss carrier) *

* **Important:** Although federal taxes (FICA and income) no longer apply to premiums paid for same-sex spouses, premiums to cover civil union and domestic partners are still taxable.

Should an HRA or health FSA reimburse the expenses of a same-sex spouse?

If the plan covers same-sex spouses, these expenses would be reimbursable. The agencies have not issued specific rules for this situation yet. Some employers and third party administrators may prefer to wait for the rules, as both the effective date and any retroactivity are still unknown. Those that wish to act can probably do so using an effective date after June 26, 2013 (which is the date of the Supreme Court decision).

Should an HSA reimburse the expenses of a same-sex spouse?

The agencies have not issued specific rules for this situation yet, so the effective date and any retroactivity are still unknown. Using an effective date for reimbursement that is after June 26, 2013, would seem to be reasonable.

Should a covered same-sex spouse be offered COBRA and HIPAA special enrollment?

The agencies have not issued specific rules for this situation yet, so the effective date and any retroactivity are still unknown. It would seem prudent, however, to offer COBRA and special enrollment in connection with marriages occurring after Sept. 16, 2013 (a date the IRS is using for other purposes). It is unclear how those in same-sex marriages occurring prior to that date should be treated. The agencies have promised to provide additional rules. Employers that do not wish to wait should contact local counsel.

Does FMLA follow the same rules?

No. The Department of Labor's Wage and Hour Division has issued a fact sheet stating that for FMLA purposes the law of the state in which the employee lives when FMLA is requested applies. This means that an employee who is legally married to a same-sex spouse but who moves to a state that does not recognize same-sex marriages is not entitled to FMLA to care for the same-sex spouse. (FMLA generally would be available in connection with caring for the same-sex spouse's children – in all states – because FMLA is available to anyone helping to raise a child.)

Employers with employees in multiple states that are concerned about treating employees differently have the option to provide similar, non-FMLA leave to employees located in states that do not recognize same-sex marriages. It may be wise to consult with insurance and stop-loss carriers before implementing this type of a policy.

This article simply provides a summary of federal guidance issued to date that relates to group health plans. Additional rules and details are expected from the

government agencies. This article does not address state issues (including state taxation of premiums, which may be an issue in a few states), the risk of lawsuits or the impact of this decision on qualified plans. Employers are encouraged to watch for additional developments and to consult with their attorneys to obtain assistance applicable to their specific situation.

State	Allows same-sex marriage?	Recognizes same-sex marriage performed in another state?
Alabama	No	No
Alaska	No	No
Arizona	No	No
Arkansas	No	Yes
California	Yes	Yes
Colorado	No, but recognize civil unions	No
Connecticut	Yes	Yes
Delaware	Yes	Yes
Dist. of Columbia	Yes	Yes
Florida	No	No
Georgia	No	No
Hawaii	No, but recognizes civil unions	Unclear
Idaho	No	No
Illinois	No, but recognize as civil unions	Recognize as civil unions
Indiana	No	No
Iowa	Yes	Yes
Kansas	No	No
Kentucky	No	No
Louisiana	No	No
Maine	Yes	Yes
Maryland	Yes	Yes
Massachusetts	Yes	Unclear
Michigan	No	No
Minnesota	Yes	Yes
Mississippi	No	No
Missouri	No	No
Montana	No	No
Nebraska	No	No
Nevada	No, but recognize domestic partnerships	Unclear
New Hampshire	Yes	Yes
New Jersey	No, but recognize as civil unions	Recognize as civil unions
New Mexico	No	Unclear
New York	Yes	Yes
North Carolina	No	No

North Dakota	No	No
Ohio	No	No
Oklahoma	No	No
Oregon	No, but recognize domestic partnerships	Unclear
Pennsylvania	No	No
Rhode Island	Yes	Yes
South Carolina	No	No
South Dakota	No	No
Tennessee	No	No
Texas	No	No
Utah	No	No
Vermont	Yes	Yes
Virginia	No	No
Washington	Yes	Yes
West Virginia	No	No
Wisconsin	No, but provide some domestic partner rights	No
Wyoming	No	Yes

The EBSA Technical Release may be accessed at <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

The IRS Revenue Ruling may be accessed at <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>.

The Wage and Hour Fact Sheet may be accessed at <http://www.dol.gov/whd/regs/compliance/whdfs28f.pdf>.

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