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Benefits for Same-sex Couples and Domestic Partners

A significant number of U.S. companies provide benefits, such as health insurance coverage, for their employees' domestic partners or same-sex spouses. Businesses may decide to offer these benefits to attract and retain talented employees or because they desire to provide equal benefits regardless of marital status or sexual orientation.

At the federal level, there are no laws that require or prohibit domestic partner or same-sex spouse benefits in the workplace. However, employee benefits for domestic partners generally do not receive the same favorable federal tax treatment as benefits for spouses. Also, a number of states have enacted same-sex marriage, civil union and domestic partnership laws that affect benefits for domestic partners and same-sex spouses.

This Employment Law Summary provides an overview of the federal and state laws that affect domestic partner and same-sex spouse benefits for Florida employers. It also outlines action steps for employers to consider when providing benefits for employees' same-sex spouses and domestic partners.

Effective **Jan. 6, 2015**, Florida law allows two persons of the same sex to marry.

STATE LAW

Overview

Laws on same-sex marriage, civil unions and domestic partnerships vary from state to state. Up until recently, most states had laws or constitutional amendments that prohibited same-sex marriage. Now, same-sex marriage is legal in the majority of states. This legal change is due in large part to a string of federal court decisions that, beginning in late 2013, have declared state bans on same-sex marriage unconstitutional. Although many states had their same-sex marriage bans invalidated by court decisions, other states passed laws to legalize same-sex marriage.

Also, a small number of states have laws granting spousal-like rights to unmarried couples through civil unions and domestic partnerships.

Same-sex Marriage

Florida had a law that limited the terms "marriage" and "spouse" to unions between one man and one woman. On Aug. 21, 2014, a federal district court [ruled](#) that Florida's ban on same-sex marriage is unconstitutional. However, following the court's ruling, same-sex couples were not permitted to marry because the ruling was put on hold until Jan. 5, 2015, pending appeal.

On Dec. 3, 2014, the 11th U.S. Circuit Court of Appeals [declined to extend](#) the hold that expired on Jan. 5, 2015. This means that same-sex marriages are permitted in Florida, effective Jan. 6, 2015.

The judicial hold on same-sex marriages in Florida expired on Jan. 5, 2015. Therefore, same-sex couples in Florida are permitted to marry, effective Jan. 6, 2015.

This guide is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. It is provided for general informational purposes only. It broadly summarizes state statutes and regulations generally applicable to private employers, but does not include references to other legal resources unless specifically noted. Readers should contact legal counsel for legal advice.

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Other State Laws

Florida does not have a civil union or domestic partnership law that grants spousal-like rights to unmarried couples.

Florida's fair employment law does not cover discrimination based on sexual orientation or gender identity. However, in 1991, a Florida court concluded that discrimination based on gender identity falls under a fair employment prohibition on disability discrimination.

Also, since Florida does not have a state income tax on wages, health plan coverage for same-sex spouses is tax-free at both the federal and state levels in Florida.

FEDERAL LAW

Supreme Court's DOMA Ruling

The U.S. Congress enacted the Defense of Marriage Act (DOMA) in 1996 in response to concerns about state legalization of same-sex marriage. 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 violates 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.

The Supreme Court's ruling did not invalidate state laws prohibiting same-sex marriages. However, since the Court's DOMA decision, most federal courts reviewing challenges to state bans on same-sex marriage have concluded that the state bans are unconstitutional.

Same-sex Marriages

Due to the Supreme Court's decision, **same-sex marriages must be recognized on the same terms as opposite-sex marriages for purposes of federal employee benefits laws.** The Supreme Court's DOMA decision provides that the federal government may not discriminate against same-sex couples who are legally married. The decision does not require employers to provide the same benefits to opposite-sex and same-sex spouses.

After the Supreme Court's DOMA 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 tax 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. This rule applies regardless of whether the couple lives or works in a jurisdiction that recognizes same-sex marriage.

Due to the Supreme Court's DOMA ruling, these rules apply to employee benefits under federal law:

- An employer should not impute additional income to an employee who covers his or her same-sex spouse as a dependent under the employer's health plan.
- An eligible employee may pay for a same-sex spouse's health coverage on a pre-tax basis through a cafeteria (or section 125) plan in the same way as an employee with an opposite-sex spouse.
- An eligible employee may receive tax-free reimbursements for expenses of his or her same-sex spouse through a health flexible spending account (FSA), health reimbursement account (HRA) or health savings account (HSA).
- If a health plan provides coverage for same-sex spouses, special enrollment rights under HIPAA will be triggered when an employee acquires a same-sex spouse and same-sex spouses will have their own COBRA election rights.

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Additionally, a same-sex spouse is considered a spouse or family member for purposes of taking leave under the federal **Family and Medical Leave Act** (FMLA). For purposes of the FMLA, the term “spouse” includes a same-sex spouse if the marriage is recognized under the laws of the state where the employee resides. However, on June 20, 2014, the DOL issued a [proposed rule](#) that would change the definition of “spouse” under the FMLA to look to the law of the jurisdiction in which the marriage was entered into, as opposed to the law of the state in which the employee resides. Until final guidance is issued extending FMLA rights to all legally married same-sex spouses (regardless of residence), employers will not be required to make FMLA leave available to a same-sex spouse who resides in a state that does not recognize same-sex marriage.

The administration of benefits for same-sex couples may be complicated in states that do not recognize same-sex marriages. For example, even though health coverage for a same-sex spouse is tax-free at the federal level, it may still be taxable at the state level. Also, state law employee leave rights may not be available to same-sex spouses in states that do not recognize same-sex marriages.

Civil Unions and Domestic Partnerships

The Supreme Court’s DOMA decision applies only to same-sex marriages that are valid under state law. It does not affect same-sex couples in civil unions or domestic partnerships. **These couples will generally remain ineligible for the federal benefits and protections provided to spouses.** However, some states have laws that provide benefits and protections to couples in civil unions or domestic partnerships.

At the federal level, domestic partner benefits are non-taxable only if the domestic partner qualifies as a dependent under the Internal Revenue Code’s definition of “qualifying relative.” To qualify as a dependent under this definition, the domestic partner must generally:

- Have the same primary address as the employee/taxpayer for the year;
- Be a member of the employee/taxpayer’s household;
- Receive more than half of his or her support for the year from the employee/taxpayer;
- Not be anyone’s “qualifying child” for tax purposes; and
- Be a citizen or national of the U.S., or a resident of the U.S. or a country contiguous to the U.S.

If a domestic partner does not qualify as a tax dependent of the employee, employers are required to report and withhold taxes on the value of employer-provided health coverage for the domestic partner. In addition, an employee cannot pay for a domestic partner’s coverage on a pre-tax basis through a cafeteria (or section 125) plan if the partner is not the employee’s tax dependent.

It is common for employers to “gross up” an employee’s salary to offset the tax consequences of domestic partner benefits (that is, reimburse employees for the extra taxes they are required to pay on the value of domestic partner benefits).

Due to the Supreme Court’s DOMA decision, there has been speculation that employers may discontinue their domestic partner benefits, particularly in states where same-sex marriage has been legalized. However, domestic partner benefits will likely remain popular with employers that want to provide benefits to same-sex couples and have employees in states that have not legalized same-sex marriage.

HEALTH PLAN COVERAGE FOR SAME-SEX SPOUSES

Federal law does not require employers to offer coverage to same-sex spouses under their health plans. However, employers with fully-insured plans that offer spousal coverage may be required by **state insurance law** to offer coverage to both opposite-sex and same-sex spouses. This is generally the case in states that have legalized same-sex marriage.

Also, 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.

In addition, if an employer wants to offer coverage to same-sex spouses, the Affordable Care Act (ACA) prohibits health insurance issuers from discriminating based on sexual orientation. This means that a

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health insurance issuer in the group or individual market that offers coverage for an opposite-sex spouse is prohibited from refusing to offer coverage to a same-sex spouse. While issuers were encouraged to offer coverage for same-sex spouses in 2014, issuers must fully comply with this requirement for plan or policy years beginning on or after **Jan. 1, 2015**.

Employers with Insured Health Plans

- Review state insurance law to determine if it requires equal coverage for same-sex and opposite-sex spouses.
- In states that have legalized same-sex marriage, equal coverage is likely required.
- Even if 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.

Employers with Self-funded Health Plans

- Self-funded plans are generally not subject to state insurance law.
- 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.
- However, employers that do not offer equal benefits to same-sex spouses may be at risk for discrimination lawsuits.

ACTION STEPS

Effective Jan. 6, 2015, same-sex marriage is permitted in Florida and employers are generally required to treat employees in a same-sex marriage the same as employees in an opposite-sex marriage. This equal treatment also extends to federal benefits and protections, such as the FMLA leave, due to the Supreme Court's DOMA decision.

In addition, employers that are interested in providing domestic partner benefits should:

- Review their employee benefits package to determine which benefits should be offered to domestic partners;
- Consult with tax advisors and payroll vendors regarding the tax implications of providing benefits to domestic partners; and
- Communicate benefit changes to employees on a periodic basis, including changes for domestic partners and tax implications.