

COMPLIANCE OVERVIEW



Health Plan Coverage for Same-sex Spouses

As a general trend, many employers that offer health plan coverage for opposite-sex spouses also offer coverage for same-sex spouses. However, other employers may be considering their legal options regarding health plan coverage for same-sex spouses.

Federal law does not specifically require employers to offer health coverage to same-sex spouses. However, on June 15, 2020, the U.S. Supreme Court [ruled](#) that Title VII of the federal Civil Rights Act (Title VII) protects individuals against employment discrimination based on their sexual orientation or gender identity. Due to this ruling, employers with health plans that do not offer equal benefits to same-sex spouses are at risk for discrimination lawsuits.

Also, if an employer has a fully insured health plan that provides coverage for spouses, state insurance law will likely require equal coverage for opposite-sex and same-sex spouses. In addition, some states have their own fair employment laws that prohibit employment discrimination on the basis of

LINKS AND RESOURCES

- Supreme Court [decision](#) from June 2015 that invalidated state bans on same-sex marriage
- Supreme Court [decision](#) from June 2020 that extended Title VII protections to include sexual orientation and gender identity
- [IRS Notice 2015-86](#) – IRS guidance on application of the Supreme Court’s same-sex marriage decision to employee benefit plans

sexual orientation.

Same-sex Marriage Laws

- Same-sex spouses have the same rights and protections under federal law as opposite-sex spouses.
- In June 2015, the U.S. Supreme Court ruled that state bans on same-sex marriage are unconstitutional.
- Due to this ruling, same-sex marriage is legal in every state.

Fair Employment Laws

- In June 2020, the Supreme Court ruled that that Title VII protects individuals against employment discrimination based on their sexual orientation or gender identity.
- Due to the Supreme Court’s ruling, employers that do not provide equal coverage for opposite-sex and same-sex spouses may violate Title VII.

COMPLIANCE OVERVIEW



Same-sex Marriage Laws

Federal Law

Until June 26, 2015, the federal Defense of Marriage Act (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, 2015, the U.S. Supreme Court struck down a key part of DOMA in [Obergefell v. Hodges](#) by ruling that the law’s definition of marriage violated 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.

Following the Supreme Court’s 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 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.

State Laws

Before the Supreme Court’s 2015 ruling on same-sex marriages, many states prohibited marriages between same-sex couples. However, the *Obergefell* ruling requires every state to allow marriages between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state.

Impact on Health Plan Coverage

The Supreme Court’s *Obergefell* decision does not require employers to provide health plan coverage for same-sex spouses. However, due to that decision, state insurance law generally requires fully insured health plans to provide equal coverage to opposite-sex and same-sex spouses. Also, on June 15, 2020, the U.S. Supreme Court ruled in [Bostock v. Clayton County](#) that Title VII of the federal Civil Rights Act (Title VII) protects individuals against employment discrimination based on their **sexual orientation or gender identity**. Due to this ruling, employers with fully insured or self-funded health plans that do not offer equal benefits to same-sex spouses are at risk for discrimination lawsuits.

Nondiscrimination Laws

Federal Law

Federal law prohibits several types of workplace discrimination. Title VII prohibits employers with 15 or more employees from discriminating against employees and job applicants on the basis of race, color, religion, national origin or sex. In *Bostock*, the Supreme Court ruled that **Title VII protects individuals against employment discrimination based on their sexual orientation or gender identity**. Federal courts had previously held that the law’s protections only extended to traditional notions of gender. Due to the Supreme Court’s ruling, employers that do not provide equal coverage for opposite-sex and same-sex spouses may violate Title VII.

State Laws

A number of states have laws that prohibit workplace discrimination based on sexual orientation and gender identity. These states include the following:

COMPLIANCE OVERVIEW



State Laws Prohibiting Discrimination on Basis of Sexual Orientation/Gender Identity

- California
- Colorado
- Connecticut
- Delaware
- District of Columbia
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Utah
- Vermont
- Washington
- Wisconsin

Employers located in states that prohibit workplace discrimination based on sexual orientation or gender identity may also violate state fair employment laws if they do not provide equal coverage for opposite-sex and same-sex spouses. It is not clear to what extent, if any, ERISA preempts state fair employment laws as applied to group health plans.

Health Insurance Issuers

In 2014, the Department of Health and Human Services (HHS) issued an [FAQ](#) on how the Affordable Care Act's guaranteed availability requirements affect health insurance coverage for same-sex spouses. The FAQ generally clarifies that the guaranteed availability mandate prohibits discrimination based on sexual orientation. The FAQ requires health insurance issuers offering non-grandfathered group or individual health insurance policies to offer coverage on the same terms and conditions to legally married same-sex spouses that is offered to opposite-sex spouses.

This guidance from HHS does not specifically require employers with insured health plans to offer coverage to same-sex spouses. Instead, HHS' guidance requires issuers offering non-grandfathered coverage to give employers the option to cover same-sex spouses under their health plans. However, because same-sex marriage has been legalized throughout the United States, state insurance laws generally require equal health insurance coverage for same-sex and opposite-sex spouses.

Application to Employers

State insurance laws generally require equal coverage for opposite-sex and same-sex spouses for employers with fully insured health plans that provide coverage for spouses. 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 will be at risk for discrimination lawsuits if coverage is offered only to opposite-sex spouses.

Employers With Fully Insured Health Plans

- State insurance law may require equal coverage for same-sex and opposite-sex spouses.
- Even if applicable 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.

COMPLIANCE OVERVIEW



Employers With Self-funded Health Plans

- Because self-funded plans are generally not subject to state insurance law, 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.

In addition, employers that offer health plan coverage for same-sex spouses should confirm that the administration of same-sex spouse benefits is consistent with federal and state tax law. For federal tax purposes, health plan coverage for a same-sex spouse is non-taxable to the employee, and the employee can pay for the coverage on a pre-tax basis through an employer's cafeteria plan. Also, due to the Supreme Court's ruling in *Obergefell*, health plan coverage for same-sex spouses is non-taxable at the state level.

[IRS Notice 2015-86](#) addresses issues relating to same-sex marriage and employee benefit plans, including Code Section 125 plans (or cafeteria plans). According to this guidance, a cafeteria plan that allows participants to make a change in election due to a significant improvement in coverage may permit a participant to revoke an existing election and submit a new election if same-sex spouses first become eligible for coverage under the terms of the plan during the period of coverage. This new election may be an election by a participant to add coverage for a same-sex spouse to a benefit option in which the participant is already enrolled, or an election by a participant who had not previously elected coverage to add coverage for the participant and a same-sex spouse.