



Benefits for Same-sex Couples and Domestic Partners

Due to recent changes in federal and state laws, employers may be considering their options and obligations for providing employee benefits, such as health insurance coverage, for their employees' domestic partners or same-sex spouses.

At the federal level, there are no laws that specifically require domestic partner or same-sex spouse benefits in the workplace. However, state laws regarding same-sex marriage, civil unions and domestic partnerships may 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 Texas employers. It also addresses compliance steps for employers, including when employers may be required to offer health plan coverage to same-sex spouses.

STATE LAWS

Same-sex Marriage

Supreme Court Decision

Until recently, laws on same-sex marriage varied from state to state. On June, 26, 2015, the U.S. Supreme Court ruled in [*Obergefell v. Hodges*](#) that the Constitution guarantees same-sex couples the right to marry. The Supreme Court held that every state must allow marriages between two people of the same sex and must also recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

By ruling that state laws prohibiting same-sex marriage are unconstitutional, the Supreme Court legalized same-sex marriage in all 50 states. Same-sex couples will be allowed to marry in any state, and will be entitled to all the rights, benefits and obligations given to opposite-sex spouses under both federal and state law.

Also, due to the Supreme Court's ruling, employers will generally be required to treat employees in same-sex marriages the same as employees in opposite-sex marriages for many federal and state law purposes.

The Supreme Court's *Obergefell* decision does not require employers to provide health plan coverage for same-sex spouses. However, most states will likely update their insurance laws to require that fully-insured health plans provide equal coverage to opposite-sex and same-sex spouses. Also, the Supreme Court's holding may strengthen claims of workplace discrimination based on sexual orientation or gender identity.

Texas Law

Prior to the Supreme Court's *Obergefell* decision, Texas prohibited same-sex marriage and did not recognize same-sex marriages legally entered into in other jurisdictions. As a result of the Supreme Court's decision, Texas must allow same-sex couples to marry and it must recognize same-sex marriages that are legally entered into in other jurisdictions.

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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Thus, all married couples (same-sex or opposite-sex) should have the same benefits, rights and protections under Texas law. Any employee benefits governed by state law (for example, state continuation coverage rights) should apply equally to same-sex and opposite-sex spouses.

Also, Texas 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 Texas.

Domestic Partnerships

There are no federal laws that require states to provide legal rights to unmarried couples in domestic partnerships or civil unions. However, a handful of states have enacted domestic partnership or civil union laws that provide legal rights to couples in these relationships. Texas does not have a civil union or domestic partnership law that grants spousal-like rights to unmarried couples.

Fair Employment Laws

A number of states have laws that prohibit workplace discrimination based on sexual orientation or sexual orientation and gender identity. Texas' fair employment law does not cover discrimination based on sexual orientation or gender identity.

FEDERAL LAW

Recognition of Same-sex Marriages

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.

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.

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.

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).

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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.

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).

Because same-sex marriage is now legal in every state, some employers are dropping their domestic partner benefits and requiring couples to get married in order to qualify for employee benefits. However, other employers—especially those that offer both same-sex and opposite-sex domestic partner benefits—are continuing to provide domestic partner benefits for a variety of reasons. One of the main reasons for continuing to offer domestic partner benefits is to attract and retain talented employees who need benefits for their partners but prefer not to marry. Also, some states have laws that require health insurance coverage for domestic partners or civil union couples.

Fair Employment Laws

Federal law currently prohibits several types of workplace discrimination. Employers generally may not discriminate against workers on the basis of race, color, sex, religion, national origin, age or disability. There are currently no federal laws that specifically protect workers from discrimination based on sexual orientation or gender identity.

However, under the Obama Administration, there has been more support for employee protections against discrimination based on gender identity and sexual orientation. According to the [Equal Employment Opportunity Commission \(EEOC\)](#), lesbian, gay, bisexual and transgender (LGBT) individuals may bring valid sex discrimination in employment claims under existing federal law.

HEALTH PLAN COVERAGE FOR SAME-SEX SPOUSES

Federal law does not require employers to offer coverage to same-sex spouses under their health plans, regardless of whether the health plan is fully-insured or self-funded.

If an employer has a fully-insured plan that provides coverage for spouses, state insurance law will likely require the health insurance issuer to make coverage available to both opposite-sex and same-sex spouses.

Also, even if an employer's health plan is not subject to state insurance law (that is, 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.

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Employers with Insured Health Plans

- Review state insurance law to determine if it requires equal coverage for same-sex and opposite-sex spouses.
- Because same-sex marriage is now legal throughout the country, equal coverage may be required in all states.
- 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.
- 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

Employers in Texas are generally required to treat employees in a same-sex marriage the same as employees in an opposite-sex marriage for many federal and state law purposes. For example, federal and state law employee leave rights for legally married spouses should extend to employees with same-sex spouses.

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 determine whether to “gross up” employee pay to offset the tax consequence of these benefits;
- Consider what eligibility documentation will be required of domestic partners (or their children), such as a written statement describing the relationship; and
- Update the health plan’s documents and enrollment forms and inform employees about the eligibility change and tax implications of coverage.