

Domestic Partnership Laws

A growing number of U.S. companies provide benefits, such as health insurance coverage, for their employees' domestic partners. Businesses may decide to offer domestic partner 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 benefits in the workplace. However, the federal Defense of Marriage Act of 1996 (DOMA) impacted the administration of employer-provided domestic partner benefits. Also, a number of states have enacted same-sex marriage, civil union and domestic partnership laws that affect domestic partner benefits.

Two recent developments impact employee benefits for same-sex couples in Washington:

- Effective **Dec. 6, 2012**, the state of Washington legalized same-sex marriage.
- On June 26, 2013, the U.S. Supreme Court struck down the part of DOMA that limits marriage to opposite-sex unions for purposes of federal law.

This Employment Law Summary provides an overview of the domestic partnership laws affecting Washington employers. It also outlines compliance steps for employers to consider.

DEFENSE OF MARRIAGE ACT (DOMA)

Background

The U.S. Congress enacted 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.

Since its enactment, DOMA has been the subject of both political and legal controversy. In February 2011, the Obama Administration announced its position that DOMA's definition of "marriage" is unconstitutional and directed the Justice Department to stop defending the law in federal court. However, Republican leaders in the House of Representatives intervened to defend DOMA in legal challenges.

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 establish a constitutional right to same-sex marriage. This means that state bans on same-sex marriage continue to be valid. DOMA also allows states to choose whether to recognize same-sex marriages performed in other states. The Supreme Court did not address this portion of the law, which means that states can still refuse to recognize same-sex marriages that are legal in other states. This issue may be addressed in future court cases.

Effect of Supreme Court Decision on Employee Benefits

DOMA has not prohibited employers from providing health benefits to their employees' domestic partners or same-sex spouses. However, the administration and taxation of these benefits can be complex. In states that recognize same-sex marriage, DOMA



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created two different systems for same-sex couples. Under state law, these couples were treated as married but, under federal law, they were not.

As a result of the Supreme Court's DOMA ruling, same-sex marriages must be recognized on the same terms as opposite-sex marriages for purposes of federal employee benefits laws.

In [Revenue Ruling 2013-17](#), the IRS adopted a "state of celebration" policy for determining when a same-sex marriage will be treated as valid for purposes of federal tax law. In [Technical Release 2013-04](#), the Department of Labor (DOL) also adopted the state of celebration approach for purposes of federal employee benefit laws that fall under ERISA.

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 or not.

The Court's decision and the IRS' and DOL's guidance make the following changes with respect to employee benefits under federal law:

- An employer will no longer need to 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-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). For purposes of the FMLA, the DOL has confirmed that the term "spouse" includes a same-sex spouse if the marriage is recognized under the laws of the state in which the employee resides.

Domestic Partnerships and Civil Unions

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.

For these couples, 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).

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STATE LEGISLATION

The majority of states have laws or constitutional amendments barring same-sex marriages. However, a growing number of states have legalized same-sex marriage, while others recognize same-sex marriages performed in other states and nations. In addition, a small number of states have passed laws granting spousal-like rights to unmarried couples through civil unions and domestic partnerships.

Same-Sex Marriage

On Feb. 13, 2012, Governor Christine Gregoire (D) signed a [bill](#), which is commonly referred to as the Marriage Equality Act, to legalize same-sex marriage and convert most domestic partnerships into marriage. The Marriage Equality Act would have gone into effect on June 7, 2012, but opponents gathered enough signatures to place the law in front of voters in a referendum.

On Nov. 6, 2012, Washington residents voted on the referendum to approve or reject the Marriage Equality Act. The Marriage Equality Act was approved by voters and same-sex marriage became legal in Washington on **Dec. 6, 2012** (a day after the voter referendum was certified).

Under the Marriage Equality Act, employers in Washington are generally required to provide the same benefits to employees in a same-sex marriage that are provided to employees in an opposite-sex marriage. As a result of the Supreme Court's DOMA decision, equal treatment for same-sex spouses now extends to benefits and protections provided by federal law.

In addition, the state of Washington recognizes same-sex marriages that are legally performed in another state or jurisdiction.

Domestic Partnerships

Washington's domestic partnership law was approved by referendum in November 2009. Under this law, which is also known as the "everything but marriage law," state-registered domestic partners are essentially treated the same as married spouses. This means that any benefits that an employer provides to a spouse must also be provided to a registered domestic partner, with the exception of benefits that are subject to federal law (for example, FMLA leave).

To enter into a state-registered domestic partnership, both persons in the partnership must:

- Share a common residence;
- Be at least eighteen years of age;
- Not be married or registered as a domestic partner with a third person;
- Be capable of consenting to the domestic partnership;
- Not be related to each other as:
 - Next of kin nearer than second cousins, whether of the whole or half-blood computing by the rules of the civil law; or
 - A sibling, child, grandchild, aunt, uncle, niece or nephew to the other person; and
- Be of the same sex (if of the opposite sex, at least one of the partners must be at least age 62).

The Marriage Equality Act revises the rules regarding domestic partnerships in Washington, effective June 30, 2014. Under the new rules, domestic partnerships (same-sex or opposite-sex partners) may register only if at least one of the partners is age 62 or older and the other eligibility conditions outlined above are met.

Also, under the Marriage Equality Act, same-sex domestic partnerships that were entered into before June 30, 2014, and have not been dissolved or converted into marriages will automatically convert into marriages as of June 30, 2014, unless one of the partners is age 62 or older.

Fair Employment

Washington's fair employment law applies to employers with **eight or more employees**. Employers covered by Washington's fair employment law cannot discriminate on the basis of **sexual orientation**.

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IMPLEMENTATION STEPS

Due to the Marriage Equality Act, employers will generally be required to provide the same benefits to employees in a same-sex marriage that are provided to employees in an opposite-sex marriage. This equal treatment now extends to federal benefits and protections, such as the FMLA leave, based on the Supreme Court's DOMA decision. Washington employers should consider the following compliance steps:

- Update payroll systems to treat legally married same-sex couples as spouses and stop imputing income to employees for tax-free employee benefits provided to a same-sex spouse;
- Review employee benefit policies and procedures to confirm that they treat legally married same-sex couples as spouses and make any necessary updates; and
- Communicate benefit changes affecting same-sex spouses to employees.

In addition, the state's domestic partnership law already requires employers to provide equal benefits to opposite-sex spouses and registered domestic partners. Thus, Washington employers should confirm that registered domestic partners and spouses are generally treated the same for employee benefit purposes, such as health plan coverage. However, domestic partners are not treated as spouses for benefits governed by federal law.

Employers should also review policies regarding employment discrimination to make sure they prohibit discrimination based on sexual orientation and should periodically train managers and supervisors regarding the employment discrimination policies.