

# BENEFITS LAW

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# JOURNAL

## State-Level Developments

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### Connecticut Licenses Same-Gender Marriages

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Connecticut began to license same-gender marriages on November 12, 2008, in response to a decision from the state's highest court handed down in October 2008. In that decision, *Kerrigan v. Commissioner of Public Health*, the court ruled that limiting marriage to opposite-gender couples violates the equal protection clause of the state constitution. This article summarizes these developments and discusses the implications for plan sponsors. Because there is no residency requirement to marry in Connecticut, even plan sponsors outside the state should be prepared to answer questions about coverage for same-gender spouses.

#### *The Connecticut Attorney General's Guidance*

The Connecticut Attorney General has issued legal opinions to various state agencies discussing the implications of the *Kerrigan* decision, including the following:<sup>1</sup>

- Connecticut will license same-gender marriages and will also recognize same-gender marriages and civil unions entered into in other states.<sup>2</sup>

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- Civil unions (licensed in Connecticut beginning in 2005) will remain an option for same-gender couples, unless the legislature takes action to change the current civil union law.
- A civil union couple may marry each other without first dissolving their civil union.
- Parties to a same-gender marriage must be accorded the same tax treatment under state tax laws as accorded to other married couples.

### ***Implications for Plan Sponsors***

Some sponsors of private sector plans will be eager to extend benefits to same-gender spouses to the extent permitted under federal law. Others may take the position that because of the 1996 federal Defense of Marriage Act (DOMA)<sup>3</sup> same-gender marriages will not be recognized for any benefits governed only by federal law, such as qualified retirement plans, self-insured health benefit programs, the Health Insurance Portability and Accountability Act (HIPAA) special enrollment rights, and continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (COBRA).

### **Optional Coverage**

Under federal law, health plans—especially self-insured plans—have great flexibility in defining the group of dependents to whom coverage will be provided. As a result, a health plan may choose to provide the same coverage and rights to same- and opposite-gender spouses, or may extend coverage generally to these individuals without extending all the rights guaranteed by federal laws such as HIPAA and COBRA.

Plan sponsors need to be aware that existing health plan language stating that “spouses,” or “legal spouses” or “a person who is legally married to the participant” are eligible beneficiaries under the plan could be interpreted to encompass same- and opposite-gender spouses. Plan sponsors that do not intend this result would be well advised to add clarifying language to the plan documents and communicate those intentions clearly.

### **Required Coverage**

Because insured health plans are affected by state-law insurance mandates, plans that offer health benefits that are insured under policies issued in Connecticut will be required to cover same-gender spouses in these insured plans on the same basis as opposite-gender spouses. The Connecticut Insurance Department issued an Insurance Bulletin on November 18, 2008, stating that the term “spouse” as

used in insurance policies will “now” be interpreted to include a same-gender spouse.<sup>4</sup> Plan sponsors with insured benefits will need to stay in close communication with their insurers on how and when this change will be implemented.

Plan sponsors with self-insured benefits and insured stop-loss coverage should also be alert to how this development will impact those policies. Plan sponsors that extend coverage to same-gender spouses need to ensure that their stop-loss policies will cover these individuals. This will likely be the case as the Insurance Bulletin Alert mentioned above also applies to property and casualty insurers.

### **Federal Tax Issues**

Although same-gender spouses will be considered “married” for Connecticut state tax purposes, they will not meet the federal definition of “spouse,” and the benefits of the Internal Revenue Code (IRC) reserved for spouses will not be applicable. This is significant for a variety of reasons described below:

- **Imputing Income.** Unless the same-gender spouse meets the tax definition of a “dependent,” for purposes of federal income taxes, plan sponsors will be required to impute income to employees whose same-gender spouses are enrolled in the health plan. Plan sponsors with these mechanisms already in place for purposes of civil union coverage will only need to extend these to same-gender spouses.
- **Cafeteria Plans.** Extending health coverage to same-gender spouses who are not tax-qualified dependents raises a variety of cafeteria plan issues. Proposed rules under IRC Section 125, which governs cafeteria plans, would permit an employee to pay his or her share of a same-gender spouse’s premium with pre-tax dollars through a cafeteria plan, but the value of the health coverage must be imputed as income to the employee if the spouse is not tax-qualified. In addition, newly married employees may need to wait until open enrollment to add their same-gender spouse to the plan, because a same-gender marriage is unlikely to be considered a “marriage” for purposes of the IRC Section 125 change-in-status rules. Rules permitting a mid-year change in election that permit the addition of tax-qualified dependents would presumably come into play if the same-gender spouse is tax-qualified.
- **Account-Based Plans.** It is unclear whether an employee may be reimbursed through an individual account-based plan, such as a health Flexible Spending Account (FSA) or Health

Reimbursement Arrangement (HRA), for medical expenses incurred by a non-tax qualified dependent. Informal guidance from the IRS suggests that HRAs may reimburse medical expenses incurred by a same-gender spouse who is not tax-qualified if the value of the HRA is imputed up front as income to the employee. Reimbursements from a Health Savings Account (HSA) for a non-tax qualified dependent would result in taxable income and be subject to the 10 percent penalty.

Sibson Consulting has compiled a list of action steps that plan sponsors may find helpful as they respond to questions about same-gender marriages. The document is available on the following page of Sibson's Web site: [www.sibson.com/publications/presentations/sgmarriage.pdf](http://www.sibson.com/publications/presentations/sgmarriage.pdf).

### **Notes**

1. The Attorney General's press release, with links to the opinions, is available at <http://www.ct.gov/ag/cwp/view.asp?A=2341&Q=425978>.
2. According to the Connecticut Department of Public Health, the state will recognize same-gender marriages entered into in Massachusetts, as well as in California during the period of time same-gender marriages were legal in California (mid-June 2008, to November 4, 2008).
3. The DOMA defines "marriage"—for purposes of federal law—to mean only a legal union between one man and one woman as husband and wife. It also states that the word "spouse" refers only to a person of the opposite-gender who is a husband or a wife. According to DOMA, no state is required to recognize a same-gender marriage licensed under the laws of another state, but states may do so.
4. This Bulletin is available at <http://www.ct.gov/cid/lib/cid/BullIC21.pdf>.

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