

EXPERT UPDATE



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Same-Sex Spouses - Benefit Eligibility

In late September, the DOL released its new guidance on same-sex marriages and employee benefit plans. The release comes on the heels of the U.S Department of Treasury (IRS) ruling that addresses the taxation of employer-provided health insurance coverage for same-sex spouses. Both Departments have indicated that same-sex spouses will be recognized as married regardless of what state the couple currently reside in. This position extends to ERISA benefit eligibility and federal tax, including filing status, claiming personal and dependency exemptions, claiming the earned income tax credit or child tax credit and the taxation of employee benefits.

DOL Perspective for FMLA

An [updated DOL Fact Sheet](#) defines spouse for the purposes of FMLA as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including 'common law' marriage and same-sex marriage”. While FMLA is now recognizing same-sex spouses for family leave and qualifying exigencies, it defines spouse differently than summarized above, looking to the state of residence for determining who is considered a spouse.

Word of Caution – Don't swim against the current

ERISA does not prohibit an employer from having a group health plan that covers only opposite-sex spouses; but, if an employer extends benefits to opposite-sex spouses only, it can expect litigation.

ERISA and the US Supreme Court's [Windsor](#) decision do not mandate that states recognize same-sex marriages because states control the state insurance codes. Insurers can refuse to cover same-sex spouses in states that do not mandate coverage for same-sex spouses. Employers that have health insurance contracts in states that do not recognize same-sex marriages should begin to offer coverage to same-sex spouses. If the insurer refuses to comply with the employer's request to amend the group contract, we are strongly suggesting the employer find an insurer that is willing to do so.



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References:

[IRS FAQ – Answers to Frequently Asked Questions for Individuals of the Same Sex Who are Married Under State Law](#)

[DOL News Release](#)

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