



November 14, 2013

Same-Sex Marriage Now Legal in New Jersey

Same-sex marriage became legal in the state of New Jersey on October 21, 2013. With the addition of the same-sex marriage law, NJ same-sex couples now have the option of forming a civil union, registering as a domestic partner (if age 62 or older), or marrying their same-sex partner. Notwithstanding this change to NJ state law, employers can still determine who is or is not eligible for health coverage, and self-insured sponsors can still choose to exclude same-sex spouses from coverage since they are not required to follow state law. Plan sponsors should consider their plan "spouse" definitions and domestic/civil union partner policies and determine if they need to make any health and benefit plan changes to address same-sex spouse issues. Updates may be needed to tax reporting systems, enrollment forms, beneficiary forms, SPDs, and other communications. Given this significant change in NJ, coupled with the recent Supreme Court decision on same-sex marriage, employers will need to be prepared to answer questions regarding rights of both same-sex and opposite-sex couples.

2013 DOMA Decision. Conner Strong & Buckelew published two Legislative Updates on the recent Supreme Court decision that struck down parts of the Defense of Marriage Act (DOMA) - [DOMA Decisions Impact on Welfare Plan Administration](#) and [IRS Recognizes Legal Same-Sex Spouse Marriages](#). These articles provide detailed information intended to assist employers with understanding the impact of the DOMA decision on welfare benefit plans and benefit tax issues. Employers in all states should refer to these articles for an understanding of how the DOMA ruling may impact their employer-sponsored health and welfare plans. NJ employers are encouraged to revisit these updates, paying particular attention to the sections intended to provide guidance for employers in states with same-sex marriage laws.

NJ Same Sex Partner Law – History. Since 2004, the state of NJ has implemented laws intended to give same-sex partners equivalent or similar rights, that at one point in time, only opposite-sex married partners in the state shared. The 2004 NJ Domestic Partnership Act established certain rights for same-sex (18 and older) and opposite-sex (after the age of 62) unrelated domestic partners. The DPA was amended by the 2006 Civil Union Partner Act (CUPA) which established civil unions under NJ law and changed certain provisions of the DPA. After the effective date of the CUPA, same-sex couples in NJ under the age of 62 could no longer form domestic partnerships, only civil unions, but the state continued to recognize previous domestic partnership formed. As amended by the CUPA, after February 2007, only individuals over the age of 62 (opposite or same-sex) may still register for a NJ domestic partnership.

NJ Same-Sex Partner Guidance. NJ recently issued a same-sex marriage [FAQ](#) to clarify interactions between the same-sex marriage law and the DPA and CUPA. Through this FAQ, NJ confirms that same-sex couples married in another state are not required to get married under NJ state law, and that the state will recognize same-sex marriages performed in other states. The FAQ also confirms that the CUPA (and presumably the DPA too since certain couples can still enter into a domestic partnership in NJ) remains in effect and neither civil unions nor domestic partnerships automatically convert to marriages. Unmarried civil union or domestic partners looking to marry must go through the standard process of applying for and receiving a marriage license and engage in a marriage ceremony. Notably, civil unions and domestic partnerships do not dissolve when the partners marry; partnership and unions remain intact and on file with the NJ Office of Vital Records. Under this guidance, individuals can technically be a legally married spouse while also being a civil union or domestic partner. This technicality will likely have little impact on most employer-sponsored welfare plans, but may impact some plans if the plan prohibits certain partners from eligibility. For example, an employer may design their eligibility definition so that coverage is not extended to a domestic partner, but is extended to a same-sex married spouse. An employee in a same-sex domestic partnership and legally married to his/her same-sex domestic partner can still get coverage for their domestic partner in this case because the employee is also married to the domestic partner. However, employers that recognized domestic partnerships before may decide to recognize only same-sex marriages going forward. These employers may want to consider grandfathering the participation of couples who are currently receiving benefits as domestic partners.

Impact on NJ Plan Sponsors. The application of the tax and ERISA rules in states allowing same-sex marriage are now very clear. Same-sex spouses must be treated the same as opposite-sex spouses, subject to the following considerations:

- *Self-Funded Health and Welfare Plans.* Self-insured plans are not required to offer benefits to same-sex spouses (however, legal challenges under federal discrimination law will likely be filed). Self-insured plans are not required to comply with state law and there is no federal law that requires an employer to offer spousal health coverage. Self-insured employers wishing to include or exclude same-sex or opposite sex spouses should have clear eligibility definitions that explicitly reflect the employer's intent. Simply stating that "spouses" are eligible for coverage may lead to the interpretation that this includes both same and opposite sex couples married under any state law. Employers wishing to customize or limit spouse eligibility should be careful to specify how the plan defines the word "spouse" to ensure the eligibility definition is consistent with the employer's intent.
- *Fully-Insured Health and Welfare Plans.* Since insurance contracts must be written to comply with state law, NJ insurers' definition of "spouse" will likely include both same-sex and opposite-sex spouses, considering the recent legality of same-sex marriage in the state. This means that plan sponsors of fully-insured health plans should have an eligibility definition that supports the insurance contract provisions and state law. Just as fully insured plan sponsors in NJ must offer health coverage to civil union partners if spousal coverage is provided (as required under the CUPA which gives civil union partners the same rights as legally married spouses), fully-insured plan sponsors are required to offer same-sex spouses health coverage if coverage is offered to opposite-sex partners under the plan.
- *Taxability of Benefits.* The IRS has confirmed in a [Same-Sex Marriage FAQ](#) that employer-paid health coverage for same-sex married partners (if provided) may now be paid on a pre-tax basis. Prior to this clarification (and the recent DOMA ruling), the value of health coverage for a same-sex married partner was subject to federal income taxes if the partner

was not the employee's tax dependent. Note that this rules does not apply to domestic or civil union partners covered under an employer's plan who are not married to the employee. Health benefits for unmarried civil union or domestic partners are still subject to imputed income if the partner is not the employee's tax dependent.

- *Mid-Year Request to add Same-Sex Spouse.* As more same-sex couples tie the knot in NJ, employers are likely to see requests to add recently married same-sex spouses to their employer-sponsored health and welfare plans. Provided that the employer provides benefits to a same-sex spouse, participants recently married will generally be permitted to add their same-sex spouse to their employer's plan outside of open enrollment. If timely requested, this would be a HIPAA special enrollment right, which enables the employee to add the spouse to the plan midyear. This would also be a permitted midyear change event under section 125 plan rules so long as the change was supported by the employer's section 125 plan document and the change was requested within the timeframe specified by the employer's plan.
- *NJ SHBP and SEHBP.* The NJ State Health Benefits Program (SHBP) and the School Employees' Health Benefits Program (SEHBP) have updated the state plan definition of spouse to include same-sex spouses. Under the state plan, same-sex spouses are awarded the same rights as opposite sex spouses. The State's Division of Pension and Benefits [webpage](#) now provides that "A spouse is defined as a member of the opposite sex or same-sex to whom you are legally married. A photocopy of the marriage certificate and additional supporting documentation are required for enrollment."
- *Other NJ State Considerations.* Similar to the way that the 2013 DOMA ruling impacted many federal laws such as HIPAA, COBRA and FMLA (see our recent DOMA update links above for more information), the recent change legalizing same-sex marriage in NJ will have an impact on certain NJ laws and the definition of "spouse" under these laws, included under NJ Family Leave and the NJ Family Leave Insurance, as well as other state laws.

Next Steps. Companies will need to carefully evaluate their plans in light of the DOMA decision and recent NJ same-sex spouse change, and determine what actions need to be taken, and what areas might need further clarification from the agencies or the courts. From a welfare benefit perspective, the rulings impact the design and taxation of group health benefits, COBRA health coverage elections, and special enrollment rights under HIPAA. NJ employers should carefully evaluate their plans, policies and communication materials in light of the recent changes" and determine whether amendments may be needed to take into account needed benefit and administration changes. Plans will need to consider if they want to keep or modify their eligibility rules for same-sex married couples, domestic partners, partners in civil unions, and their dependents.

Contact your Conner Strong & Buckelew account representative toll free at 1-877-861-3220 should you have any questions. For a complete list of Legislative Updates issued by Conner Strong & Buckelew, visit our online [Resource Center](#).



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