



**HealthLawAdvocates**  
*Fighting for Health Care Justice*

# Same-Sex Spousal Health Benefits

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# Introduction

A major benefit of marriage is access to health coverage through a spouse's plan. For gay and lesbian couples that are legally married and reside where their marriage is recognized, it seems natural to assume that they have the same access to health insurance as other married couples, particularly since the federal Defense of Marriage Act (DOMA) has been ruled unconstitutional. Yet, this is not always the case. This document attempts to address some of the questions that may arise with regard to same-sex spousal health coverage.

The information in this document does not constitute legal advice. For assistance with legal questions specific to your situation, seek help from a lawyer.

Whether an employee can legally force a private-sector employer to provide same-sex spousal health benefits depends upon the type of insurance offered and, in some cases, the terms of the insurance contract itself.

(Definitions and information about all terms in *boldface italic type* are defined in the Glossary at the end of the document.)

## Rights of same-sex spouses of private sector employees

All private employers have the option of providing health insurance to their employees and their families, including same-sex spouses.

Most private employer-sponsored group health plans are governed by a federal law called ***ERISA***. ERISA sets minimum requirements for employers, but employers are always free to exceed those requirements.

ERISA recognizes two types of plans: *insured* plans, which are subject to state insurance regulation, and *self-insured* plans, where it is thought that ERISA trumps state insurance laws. In general, larger employers

and unions are more likely to offer self-insured plans than are small employers. Some employers offer both types of plans.

*Insured vs. Self-insured: How do I know what my plan is?*

It is not always clear when a plan is self-insured (also called “self-funded”). For example, self-insured employers often hire insurance companies to pay health plan claims, so having an insurance ID card does not mean the plan is fully insured. The Summary Plan Description (SPD) that an employer must give to plan members contains important information about the plan, including how it is funded. It is also a good idea to contact the insurance company or the employer’s human resources office for confirmation of the plan’s status.

***Insured*** plans are subject to the state’s insurance regulations where the owner of the plan is situated. If the owner of the plan is situated in a place that recognizes the marriages of same-sex couples and the state has an employment anti-discrimination law that includes “sexual orientation” as a protected characteristic, then the plan must cover same-sex spouses on the same terms as they cover different-sex spouses. However, if the owner of the plan is situated in a state that doesn’t respect the marriage or doesn’t have “sexual orientation” as a protected characteristic in its state employment anti-discrimination law, then some owners are claiming that they are not legally required to offer this benefit to same-sex spouses. In all cases, the plan *can* always cover same-sex spouses. So if a plan excludes same-sex spouses, the owner of the plan is consciously deciding to discriminate.

***Self-insured*** plans may extend equal coverage to same-sex spouses, and unless an employer’s self-insured plan defines “spouse” in a way that clearly excludes same-sex spouses, or otherwise specifically notes that the plan does not apply to same-sex spouses, the plan should treat same-sex spouses the same as different-sex spouses. Since self-insured plans are believed to be controlled by federal law, and since the federal employment anti-discrimination law, Title VII, does not explicitly prohibit discrimination based on “sexual orientation,” some employers

are claiming that they are not legally required to provide this benefit to same-sex spouses. However, all employers can provide coverage to a same-sex spouse if they so choose.

***If your employer is discriminating against same-sex spouses, contact GLAD Answers.***

## Rights of same-sex spouses of state, county and municipal employees

If you live in a state that recognizes your relationship and your state has “sexual orientation” as a protected characteristic in its employment anti-discrimination law, health plans for state, county and municipal employees cannot discriminate against same-sex spouses.

## Rights of same-sex spouses of federal government employees

Now that the federal Defense of Marriage Act (DOMA) has been ruled unconstitutional by the United States Supreme Court, health plans offered through the Federal Employees Health Benefits Program (**FEHB**) must cover same-sex spouses of federal employees who are legally married ***regardless of where they reside***. For more information go to <http://www.glad.org/doma/topics/c/benefits-and-protections-for-civilian-federal-employees-and-their-spouses>. The same applies to same-sex spouses of military personnel covered by the **TRICARE** program. For more information go to: <http://www.glad.org/doma/topics/c/military-spousal-benefits-poc>.

## Rights of same-sex spouses of self-employed individuals

ERISA does not apply to health benefits for self-employed individuals. Therefore, a self-employed person living in a place that recognizes the marriage and has “sexual orientation” as a protected class in its state employment anti-discrimination law should be able to purchase a family

plan covering his or her same-sex spouse on the same terms as any other married couple.

## COBRA and state-based continuation of health coverage following loss of employment or divorce

A federal law called **COBRA** requires private employers with 20 or more employees to offer continued group coverage for a defined period to employees and their covered dependents under certain circumstances, including termination of employment and divorce. **COBRA** is a right available through federal law, and we are still waiting for guidance as to whether employers will be required to provide same-sex spouses who are on the employer's health plan **COBRA** coverage regardless of where the couple lives or only in that states that recognize the marriage.

Some states have their own **Mini-COBRA** laws and in states that recognize the marriages of same-sex couples these programs would be available to those couples.

## Open enrollment period for same-sex spousal health benefits (HIPAA)

Another federal law that has a major impact on health insurance rights is **HIPAA**. This law provides for "special" enrollment rights, which allow dependents of a covered employee to enroll outside of a group plan's open enrollment period when a major event happens like getting married or having a child. This benefit is now available to same-sex married couples, *regardless of where the couple resides*.

## Tax issues related to health benefits

While DOMA was in effect, if a same-sex spouse was enrolled on the health plan, the employer was required to calculate the "fair market value" of the spousal benefit and add that amount, called imputed income, to the employee's federal taxable income, thus resulting in the employee being taxed on that benefit. In addition, in most cases the part



of the premium that the employee paid for the spouse's benefit was also taxed. Now that DOMA is gone, there will no longer be federal imputed income and in most cases the entire premium will be treated as pre-tax for federal purposes, *regardless of where the couple resides*.

Similarly, an employee may now make pre-tax contributions to a "cafeteria" plan on behalf of a same-sex spouse, and a same-sex spouse is eligible for federally tax-free reimbursement for medical expenses from an employee spouse's Health Savings Account (HSA), Flexible Spending Account (FSA) or Health Reimbursement Arrangement (HRA).

## Where to get legal help

GLAD and Health Law Advocates encourage people experiencing a denial of same-sex spousal health benefits to call or e-mail to discuss their specific situations. GLAD Answers can be contacted by email or live chat at [www.GLADAnswers.org](http://www.GLADAnswers.org) and by phone at 800-455-GLAD (4523) and Health Law Advocates can be reached at 617-338-5241. Please note that Health Law Advocates limits its services to income-eligible individuals that reside in or have an employment connection with Massachusetts.

# GLOSSARY

***Insured*** - With an *insured* group health plan, the employer pays premiums to an insurance company or HMO. The insurance company or HMO accepts the financial risk of paying claims for benefits.

***Self-insured*** - When a group health plan is *self-insured* (or *self-funded*), the employer retains some or all of the financial risk for employees' claims for benefits.

***ERISA*** - Employee Retirement Income Security Act of 1974 (for more information visit <http://www.dol.gov/ebsa/>)

***FEHB*** - Federal Employee Health Benefits Program  
<http://www.opm.gov/insure/health/index.asp>

***TRICARE*** – health care program for active duty and retired uniformed services members and their families <http://www.tricare.osd.mil/>

***DOMA*** - Defense of Marriage Act (for the text of this statute visit <http://www-unix.oit.umass.edu/~leg450/doma.htm>)

***COBRA*** – Consolidated Omnibus Reconciliation Act of 1985 (for more information visit <http://www.dol.gov/ebsa/> (Consumer Information, Health Plans)

***HIPAA*** – Health Insurance Portability and Accountability Act of 1996 (for more information visit <http://www.dol.gov/ebsa/> (Consumer Information, Health Plans) and <http://www.cms.hhs.gov/hipaa/>)

***Mini-COBRA*** – A state law that is modeled after federal COBRA, which provides continuation of coverage to employees of small employers and their dependents. For more information visit [http://www.mass.gov/doi/Consumer/css\\_health\\_minicobra.html](http://www.mass.gov/doi/Consumer/css_health_minicobra.html)



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