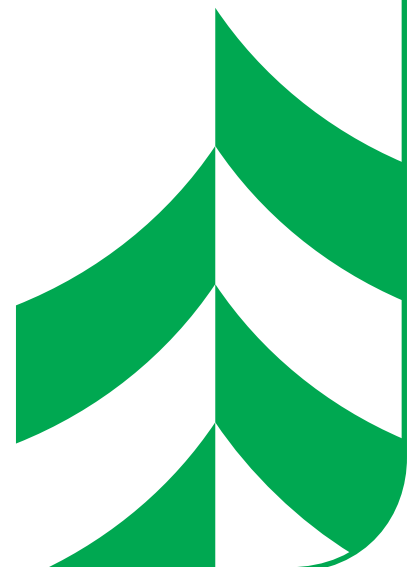


# The abolition of the Defense of Marriage Act (DOMA): Impact on health and welfare plans

Frequently asked questions



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## **INTRODUCTION**

In 1996, Congress passed the Defense of Marriage Act (DOMA), which defined marriage as between a man and woman. In June 2013, the U.S. Supreme Court overturned section 3 of DOMA, effectively leaving states to define marriage. Now, same-sex spouses who are married in a state or country that recognizes same-sex marriage will be entitled to the same federal benefits as other legally married spouses. The impact of the decision is far reaching, affecting over 1,000 federal laws. In the wake of the Supreme Court's decision, federal agencies have been tasked with interpreting federal statutes and regulations in an effort to determine what impact the elimination of DOMA will have upon same-sex spouses.

This white paper addresses the common questions employers have concerning how the changes in federal law will impact their health and welfare plans. The impact will depend upon multiple factors including whether the plan is fully insured or self-insured and, for fully insured plans, whether the policy was issued in a state that recognizes same-sex marriage. The following symbols are used in this white paper in order to help employers identify which changes may impact their plan(s):

 Signifies responses specific to states that recognize same-sex spouses

 Signifies responses specific to states that do not recognize same-sex spouses

## GENERAL QUESTIONS

### What is the significance of the Supreme Court's decision?


The U.S. Supreme Court overturned section 3 of DOMA, which defined marriage as between a man and woman. The Supreme Court left section 2 of DOMA intact, which allows states to define "spouse" and "marriage." Now that section 3 of DOMA has been overturned, federal laws apply equally to all legally married couples, regardless of gender. For instance, depending upon the employer's plan and how the state defines marriage, employees may now be able to use pre tax dollars to pay for health coverage and other benefits for their same-sex spouses. This was not a possibility before.


### When does this go into effect?

The Supreme Court's decision is immediate. Most federal laws will not require amendments because the limitation placed on the definition of marriage in most cases arose from section 3 of DOMA, not the underlying law.

## IMPACT ON MAJOR MEDICAL PLANS

### Are same-sex spouses eligible to participate in my fully insured health insurance plan?

 In states that recognize same-sex marriages, your insurance company is required to expand the definition of spouse to include same-sex spouses. Benefits will be expanded to all lawfully married spouses to the extent your plan provides coverage to spouses.

 In states that do not recognize same-sex marriage, insurance carriers are not legally required to extend coverage and other benefits to same-sex spouses. It is important to recognize, however, if your plan language fails to define the terms "spouse" or "marriage," there is now a presumption that spouse means all legally married couples including same-sex spouses. Generally, "legally married spouse" is determined by the place the couple was married (the place of celebration). However, be aware that some insurance carriers may use different criteria to determine "legally married spouse." Check with your carrier and benefits consultant regarding your carrier's interpretation. Employers in these states who wish to limit coverage to marriages between a man and a woman will want to review the definition of spouse in their plan documents for eligibility purposes.

### What changes are required for self-insured plans?

Most self-insured plans are governed by the Employee Retirement Income Security Act (ERISA), a federal law which generally preempts state laws that also regulate employee benefits. As such, self-insured ERISA plans will retain the discretion to either limit the definition of spouse (in the plan) to opposite-sex spouses or recognize all marriages, including same-sex marriages. Employers with self-insured plans must

recognize, however, that the federal agencies have been directed to confer all of the rights and privileges upon spouses (regardless of gender) as long as the marriage is valid in the state or country in which the couple married. This means if a self-insured plan fails to define the terms “spouse” or “marriage” in the plan document(s), these terms will be construed broadly to include all legally married spouses regardless of gender.

Employers with plans not subject to ERISA will want to review state non-discrimination laws and consult an expert to evaluate whether spousal coverage may be limited without violating state law.

**Are religious institutions required to recognize same-sex marriages?**


Religious institutions that have objections to extending benefits to same-sex spouses may choose to limit spousal coverage and benefits, regardless of the state definition of spouse. However, this raises several complicated legal considerations including first amendment rights, civil rights under state and local laws and ERISA preemption issues. Employers should consult their benefits consultant or legal counsel for further guidance.

**Our company offers domestic partner benefits. How does the overturning of DOMA affect domestic partner coverage?**

“Domestic partner” refers to unmarried partners, either same-sex or opposite-sex. Domestic partner benefits are not directly impacted by the Supreme Court’s decision. Employers may continue to offer domestic partner coverage where they chose to do so before. However, plans that now extend coverage to same-sex spouses may want to re-evaluate whether continuation of domestic partner coverage is warranted.


## ENROLLMENT AND TERMINATION


**My state recently passed a law recognizing same-sex marriages. Can my employee add his/her same-sex spouse to the plan?**

 Assuming the employer’s plan allows same-sex spouses (see answers above), same-sex spouses may be added to the plan under the same circumstances afforded to other spouses — either at the time of open enrollment or when there is a Health Insurance Portability and Accountability Act (HIPAA) special enrollment event.

For same-sex spouses who were previously legally married in another state, it is unclear whether a special enrollment right is created on the date the new law recognizing all marriages was implemented. What is clear is that in order to join a plan pursuant to a HIPAA special enrollment event, employees must take action within 30 days (or longer, if permitted by the plan document) of the date of marriage. Otherwise, employees must wait until open enrollment.

**Should Consolidated Omnibus Budget Reconciliation Act (COBRA) be extended to same-sex spouses?**


 COBRA is only available to qualified beneficiaries. For plans that extend coverage to same-sex spouses, this means any spouse who was recognized and covered by the plan on the day before the qualifying event.

 For plans that do not extend coverage to same-sex spouses, the same-sex spouse will not be considered a qualified beneficiary.


As a reminder, COBRA applies to employers with more than 20 employees. Employers should check whether state law requires them to provide coverage continuation to same-sex spouses (e.g., state mini-COBRA or other continuation laws).

## IMPACT ON OTHER BENEFITS


### **Can same-sex spouses use Flexible Spending Account (FSA), Health Savings Account (HSA) and Health Reimbursement Arrangement (HRA) funds to pay for their spouse's medical expenses?**


 Federal law now allows employees to use funds from these accounts to reimburse a same-sex spouse's medical expenses. However, all employers who allow these arrangements should review their plan documents and communications to determine how "spouse" is defined and, if necessary, update the definition of the term.

Presumably, same-sex spouses will now be limited to the family maximum for contributions to HSA's. Domestic partners who are allowed to elect family coverage are not subject to the combined HSA family contribution since they are not legally married.

 Plans that do not extend coverage to same-sex spouses are not required to allow an employee to use its FSA, HSA or HRA to pay for their spouse's benefits on a pre tax basis. If the plan does not recognize same-sex spouses, employers should ensure the cafeteria plan document defines "spouse" accordingly.


### **Can employees take FMLA to care for same-sex spouses?**


 With respect to FMLA, the Department of Labor (DOL) has clarified that the definition of "spouse" will be determined based upon how the term is defined in the state in which the employee resides. As a result, in states recognizing same-sex marriages, all spouses who are legally married may use FMLA time to care for their spouse.

 In states that do not recognize same-sex marriages, employers are not legally required to grant an employee FMLA to care for a same-sex spouse with a serious health condition.

It is important to note some states have leave laws that grant more extensive rights than federal law. For example, Wisconsin does not recognize same-sex marriages, however, the Wisconsin Family Medical Leave Act (WFMLA) provides up to two weeks of leave per calendar year for eligible employees to care for a domestic partner with a serious health condition.

### **Is there any impact on employees' retirement plans?**

 In states that recognize same-sex marriage, the biggest changes for retirement plans involve spousal consent and payment of benefits. Spousal consent is required when a married individual names a non-spouse as a beneficiary. In these states, spousal consent will need to be obtained from any legal spouse, regardless if same-sex or opposite-sex. Payment of benefits upon the employee's death should also take into consideration the legal spouse if the state recognizes same-sex marriages.

 For states that do not recognize same-sex spouses, spousal rights relating to death benefits and consent to non-spouse beneficiaries will remain limited to opposite-sex spouses.

### **Do I need to change anything in my employee handbook?**

With respect to federal benefits and privileges afforded to spouses, the term "spouse" is presumed to include same-sex spouses unless you state otherwise. Again, defining this key term is critical and will eliminate confusion on the part of your employees. For instance, where an


employer is not subject to the FMLA yet allows employees to take leave to care for a spouse, be certain to define the meaning of the term “spouse”.


## TAX IMPLICATIONS

Associated Financial Group does not provide tax or legal advice. The following information is intended to alert you to tax issues that may arise as a result of the revised definition of spouse and provide some practical suggestions for dealing with those issues. The information should not be construed as tax or legal advice. You should consult with your tax accountant or a tax attorney for further guidance.

### Are same-sex spouses’ health coverage subject to taxation?

The U.S. Department of the Treasury and the Internal Revenue Service (IRS) have ruled that same-sex couples who are legally married in jurisdictions that recognize their marriages will be treated as married for federal tax purposes. This rule applies regardless of whether the couple lives in a state that recognizes same-sex marriage or a state that does not recognize same-sex marriage (referred to as the “place of celebration” rule).

 Additionally, employees may now pay for benefits for same-sex spouses on a pre tax basis through the cafeteria plan, assuming the plan document allows for it. Employers in states that recognize same-sex marriage should check with their tax advisor or state Department of Revenue for specific guidance concerning state taxation of couples who have entered into legally recognized same-sex marriages.

 For plans who chose to offer benefits to same-sex spouses in states that do not recognize such marriages, same-sex spouses may be taxed by the state (not the IRS) for such benefits. For example, a same-sex couple that was married legally in Minnesota and resides in Wisconsin will not be taxed on their health insurance benefits for federal tax purposes but will pay state income tax on coverage.

The examples below are for demonstrative purposes only. They should not be relied upon in calculating the payroll tax for your employees.

**Example:** An employee earns \$2,000 per biweekly pay period. The employee has family coverage on your health plan including a legal same-sex spouse and no other benefits. While the couple is legally married, your state does not recognize

	ACTUAL INCOME	TAXABLE INCOME
<b>Gross pay</b>	\$2,000.00	\$2,000.00
Imputed income (for state tax)		\$150.00
Health insurance (pretax)	(\$250.00)	(\$250.00)
		<b>\$1,900 for state tax</b>
		<b>\$1,750 for federal tax</b>
<b>Taxes</b>		
Federal taxes (without imputed income)	(\$180.30)	
State taxes (with imputed income)	(\$115.30)	
FICA	(\$133.88)	
<b>Net pay</b>	<b>\$1,320.52</b>	



same-sex marriages. Employee normally pays \$250 per bi weekly pay period on a pretax basis for family coverage. The fair market value for the spouse’s coverage is \$150 per biweekly pay period.


Federal benefits do not extend to domestic partners, meaning domestic partners will continue to be taxed, at both the federal and state levels, on the value of the health insurance benefits. This means that if the plan allows an employee to pay for his or her domestic partner


coverage (or coverage of the domestic partner’s children) through the cafeteria plan (i.e., with pre tax dollars), the employer is required to impute income for the cost of such coverage.

**Example:** Same example as above, but the employee has family coverage that includes a domestic partner, rather than a same-sex spouse. Both federal and state tax includes the imputed income for the fair market value of the domestic partner’s coverage.

	ACTUAL INCOME	TAXABLE INCOME
<b>Gross pay</b>	\$2,000.00	\$2,000.00
Imputed income		\$150.00
Health insurance (pretax)	(\$250.00)	(\$250.00)
		<b>\$1,900.00</b>
<b>Taxes</b> (calculated on taxable income)		
Federal taxes	(\$297.20)	
State taxes	(\$115.30)	
FICA	(\$145.35)	
<b>Net pay</b>	<b>\$1,192.15</b>	


**Is coverage for dependent children of same-sex spouses subject to taxation?**

 Generally, benefits for a qualifying child (up to the age of 26) or tax dependent of the employee is tax-free. And, as indicated above, same-sex couples who are legally married in states that recognize their marriage will be treated as married for federal tax purposes regardless of where they reside. Because a “qualifying child” includes a stepson or stepdaughter, coverage for children of legally-married same-sex spouses must be afforded the same tax treatment as all other qualifying children.

 In states that do not recognize same-sex marriage, recognize that the children

of a same-sex spouse may still qualify as the employee’s dependent for benefits and tax purposes.

**Is my company or my employee eligible for a tax refund?**

 Following the overturning of section 3 of DOMA, the IRS has issued guidance clarifying that same-sex couples who are legally married in states or other jurisdictions that recognize their marriages will be treated as married for federal tax purposes, regardless of whether the same-sex couple resides in a state that recognizes same-sex marriages (referred to as the “place of celebration rule”). Because legally married same-sex spouses were imputed income

in connection with certain benefits provided to their spouse, they are entitled to a refund of any overpayment of income and Federal Insurance Contributions Act (FICA) taxes for 2013 and prior open tax years. Similarly, employers who previously paid FICA taxes on health coverage provided to same-sex spouses may want to claim a refund.

### **PROCEDURES FOR CORRECTING 2013 RETURNS**

There are two options for employers who treated excludable same-sex spousal benefits as wages on their Forms 941 for the first three quarters of 2013:

1. An employer is allowed to adjust for and reduce the wages and over-withheld taxes paid for the first three quarters of 2013 on its fourth quarter Form 941 if the employer repays or reimburses its employees for the amount of over-collected FICA and income taxes on or before December 31, 2013.
2. The employer files a Form 941-X for the fourth quarter of 2013 to correct FICA taxes paid in all quarters for 2013. In order to take advantage of this option, the employer must satisfy the usual requirements for filing a Form 941-X (i.e., reimbursing its employees for the over-collected FICA taxes or obtaining employee consents when filing a refund claim for any over-withheld employment taxes).

Employees in same-sex marriages will receive credit for the income taxes withheld from any excludable employer-provided spousal benefits

in 2013 when they file their individual income tax returns (Form 1040) in 2014.

### **PROCEDURES FOR CORRECTING PRIOR RETURNS 2010-2012**

For prior tax years still open under the statute of limitations (i.e., calendar years 2010 through 2012), the IRS allows an employer to file a single Form 941-X for the fourth quarter of an applicable year to correct and adjust for any overpayments made in any or all quarters for that prior year. This fourth quarter Form 941-X should include all adjustments for the overpayment of employment taxes with respect to the same-sex spousal benefits provided for the applicable calendar year.

Although an employer may file one Form 941-X to correct for all four quarters of a prior year, the employer is still obligated to file W-2c's (corrected W-2's), obtain the required written consents from the employees at issue and reimburse employees for the over-collected FICA taxes.

### **ADDITIONAL INFORMATION AND CONSIDERATIONS FOR EMPLOYERS**

1. Forms 941 or Forms 941-X must include the word "WINDSOR" in dark, bold letters across the top of page one to alert the IRS that the submissions are related to adjustments in response to the Windsor decision and Revenue Ruling 2013-17.
2. Employers may want to simply take credit for previous tax years, as the interest will likely be nominal.

If you have additional questions, please contact us at [info@AssociatedFinancialGroup.com](mailto:info@AssociatedFinancialGroup.com) or 800-258-3190.





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