

# Best-Practice Benefits for Same-Sex Couples

7/2/2010

By Stephen Miller

SAN DIEGO—The legal landscape for domestic partners and same-sex married couples remains in flux, leaving many employers confused about what they must provide, what they can provide and what they are barred from providing, according to Todd A. Solomon, a partner with law firm McDermott Will & Emery LLP in Chicago.



Todd A. Solomon of  
McDermott Will &  
Emery LLP.

Speaking June 28, 2010 at the SHRM Annual Conference here, Solomon noted that five states and the District of Columbia recognize same-sex marriages performed in their jurisdictions, and a few others don't permit same-sex marriages but recognize those marriages performed elsewhere. But the federal Defense of Marriage Act (DOMA) prohibits federal programs from recognizing same-sex spouses, and 41 states constitutionally ban any state recognition of same-sex spouses under state DOMAs.

And that's just for starters. Some states, including a few with state DOMAs, recognize civil unions or domestic partnerships though they do not necessarily have full-state law spousal equivalency for same-sex partners. Hawaii recognizes "reciprocal beneficiaries," and Colorado recognizes "designated beneficiaries."

## Spouse or Not?

When it comes to benefits for same-sex spouses or partners under employee benefits plans, employers are often at a loss to know what to do. To begin with, Solomon advised determining whether the employee lives in a DOMA state where employers do not have to recognize same-sex marriage for plan eligibility purposes.

"An employer's response also depends on whether the plans are self-insured or not," he noted. "Insured plans are affected by state law benefit mandates and may have to recognize same-sex marriages, if that's the law in the state where the insurance was issued," even for employees that reside in states where same-sex marriages are not recognized. Conversely, if the insurance was issued in a state that forbids recognition of same-sex spouses, that would apply even if covered employees live in states where same-sex marriages are recognized.

## Employer Options

Regardless, employers can take steps to provide more-equal treatment to all employees, within limits. For instance, many benefits generally available to opposite-sex spouses might be provided to same-sex spouses and partners, including moving expenses, adoption assistance, tuition assistance and bereavement leave.

Regarding defined benefit pension plans, under the federal DOMA employers are not required to offer same-sex spouses payment in the form of a qualified joint and survivor annuity (QJSA) with pre-retirement spousal death benefit coverage, although some

employers do so. Regarding 401(k) plans without a named beneficiary, if a participant dies his or her assets would automatically go to an opposite-sex spouse but not to a same-sex spouse; employers can amend their plans to provide equity to same-sex spouses and partners.

The biggest benefit for most employees, however, is health care coverage. Unlike for opposite-sex spouses, the federal DOMA prohibits employees' same-sex spouses or partners from receiving benefits free of federal income taxes. Instead, they must pay imputed taxes on the value of these benefits. In addition, same-sex spouses cannot receive federal pretax reimbursements from the employee's flexible spending account, health savings account or health reimbursement arrangement, though in some states they might receive state income tax breaks on the value of these benefits. "To be perfectly frank, many employers don't get this right," Solomon observed. He advised creating a grid to map the conflicting state and federal laws that might apply in a specific jurisdiction.

Solomon noted that some employers provide a "gross up" in income to help make whole those employees who pay extra to cover the imputed tax on their same-sex spouse's or partner's benefits (see, for example, [Google to Add Pay to Cover a Tax for Same-Sex Benefits](#), *New York Times*, June 30, 2010).

Among other actions employers can take:

- Review enrollment forms and administrative procedures. Where the plan says "spouse," consider clarifying the definition.
- Implement Pension Protection Act rules regarding non-spouse rollovers and hardship withdrawals.
- Make sure all benefits and policies not covered by the Employee Retirement and Income Security Act are amended to include same-sex spouses and domestic partners.

*Stephen Miller is an online editor/manager for SHRM.*

Reprinted with permission of the Society for Human Resource Management ([www.shrm.org](http://www.shrm.org)), Alexandria, VA, publisher of *HR Magazine*. © SHRM

