Same-Sex Marriage and Employee Benefit Plans: Legal Considerations

Jennifer Staman
Legislative Attorney

September 12, 2011

Congressional Research Service
7-5700
www.crs.gov
R41998

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

In recent years, the topic of same-sex marriage has engendered intense debate. On July 24, 2011, New York became the sixth and largest state to recognize same-sex marriage. However, the majority of states have statutes or constitutional amendments limiting marriage to one man and one woman, and pursuant to the Defense of Marriage Act (DOMA), federal law does not recognize same-sex marriage. These restrictions have been subject to a number of challenges on constitutional grounds. In light of this evolving legal landscape, discussion has centered around the impact that same-sex marriages have on the provision of federally regulated private-sector employee benefit plans, including retirement and health plans, as these plans afford certain benefits and other protections to spouses of plan participants. Because of DOMA, these plans may not be required to recognize same-sex spouses, even if the spouses are legally married under state law. However, in various instances, plans may still voluntarily extend to same-sex couples the benefits and protections afforded to opposite-sex couples. This report provides background on federal regulation of employee benefit plans, and addresses some of the ways in which DOMA affects private-sector employment-based retirement and health benefits under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC). The report also addresses recent legal developments with respect to the legal challenges to DOMA, as well as federal legislation that would affect the provision of these employee benefits to same-sex spouses.

Contents

Contacts

Introduction

In recent years, the recognition and legalization of same-sex marriage has become an increasingly controversial topic. Currently, federal law does not recognize same-sex marriages. The Defense of Marriage Act (DOMA)[1] prohibits federal recognition of same-sex marriages and allows individual states to refuse to recognize such marriages performed in other states. In addition, the majority of states have statutes or constitutional amendments limiting marriage to one man and one woman. However, six states and the District of Columbia now allow same-sex couples to marry.[2] Other states do not recognize same-sex marriages performed within the state, but do recognize marriages celebrated in other states and jurisdictions. Further, some states recognize civil unions or domestic partnerships, which grant same-sex couples at least some of the state-level rights, benefits, and/or obligations of marriage.[3] Because of these conflicting approaches, discussion has centered around the impact these laws have on the provision of employee benefits, which can carry certain benefits and protections for spouses. This report examines federal regulation of private-sector employee benefits under the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC), and how these benefits are affected by DOMA.[4] It also addresses legal developments and discusses legislation in the 112th Congress that could affect the provision of private-sector employment-based benefits to same-sex partners.

Federal Regulation of Employment-Based Retirement and Health Benefits Under ERISA and the Internal Revenue Code[5]

Private-sector employee benefit plans such as retirement plans and health and other welfare benefit plans are largely regulated at the federal level under ERISA and the IRC.[6] While ERISA does not require an employer to provide employee benefits, it does mandate compliance with its provisions if such benefits are offered. In general, employee benefit plans governed by ERISA must comply with certain standards, including plan fiduciary and reporting and disclosure

[1] P.L. 104-199, 110 Stat. 2419 (1996).

[2] These states are Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont. California recognizes approximately 18,000 same-sex marriages that were preformed between June 17, 2008 and November 4, 2008.

[3] These states include New Jersey, Illinois, Delaware, Nevada, Oregon, Washington, California. Beginning in 2012, Delaware and Hawaii will recognize civil unions. While the focus of this report is the effect of DOMA on same-sex marriages, the effects of DOMA on civil unions and domestic partnerships can be similar, as they are not recognized as "spouses" for purposes of federal law.

[4] This report does not examine benefits provided by federal, state, or local governments to their employees. For a discussion of same-sex marriage and federal employee pensions, see CRS Report RS21897, *The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits, Pensions, and Individual Retirement Accounts (IRAs)*, by John J. Topoleski.

[5] It should be noted that there are other federal laws that affect the employee benefits provided to spouses. For example, the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., requires an employer to provide unpaid leave for the care of an employee's spouse, child, or parent.

[6] Not all employee benefits are regulated at the federal level. Benefits such as bereavement leave and employee discount programs may only be subject to state law.

requirements. While ERISA was enacted primarily to regulate pension plans, ERISA also regulates welfare benefit plans[7] offered by an employer that may provide health and other non-pension type benefits.

One of the most critical and controversial features of ERISA is its preemption of state laws. Section 514 of ERISA preempts state laws[8] that "relate to any employee benefit plan."[9] According to the Supreme Court, Congress's intention behind ERISA preemption was to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[10] However, there are exceptions to ERISA preemption. For example, a state law that relates to an ERISA plan may avoid preemption if it regulates insurance within the meaning of ERISA's "saving clause."[11] This provision "saves" from preemption "any law of any State which regulates insurance, banking, or securities." Among other things, the savings clause permits states to regulate health insurance without running afoul of ERISA's preemptive scheme, and states may therefore impose requirements on health insurers and other entities that are more comprehensive than the requirements set forth under ERISA.

The Internal Revenue Code regulates the tax treatment of employee benefit plans and the benefits provided by an employer to employees, their spouses, and dependents. In order to encourage employers to establish pension plans, Congress has granted certain tax deductions and deferrals for amounts contributed by employees and employers to these retirement plans. To be qualified for these tax preferences under the Internal Revenue Code, plans must meet requirements with respect to, among other things, pension plan contributions, benefits, and distributions.[12] In addition, the tax burden of both employers and employees may be reduced when an employer provides health benefits to an employee. For example, under the Code, gross income does not include amounts paid by an employer to provide health insurance for an employee.[13] Further, under current law, employer-provided health insurance coverage is excluded from employees' income for determining their federal income taxes.[14]

[7] ERISA considers a number of non-pension benefit programs offered by an employer to be "employee welfare benefit plans." For example, health plans, life insurance plans, and plans that provide dependent care assistance, educational assistance, or legal assistance can all be deemed welfare benefit plans. *See* 29 U.S.C. § 1002(1).

[8] 29 U.S.C. § 1144(a). "State law" includes "[a]ll laws, decisions, rules, regulations, or other State actions have the effect of law of any State. A law of the United States, applicable only to the District of Columbia, shall be treated as a State law rather than a law of the United States." 29 U.S.C. § 1144(c)(1).

[9] While ERISA preemption has been considered among the broadest in federal law, the Supreme Court has found that section 514 is not without limits. *See, e.g.,* New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995)(Supreme Court holds state law requiring commercial insurers, but not Blue Cross and Blue Shield, to pay hospital surcharges not preempted by ERISA; Court indicated its intent not to displace general state health care regulation).

[10] New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995).

[11] 29 U.S.C. § 1144(b)(2)(A).

[12] 26 U.S.C. § 401 et seq.

[13] 26 U.S.C. § 106.

[14] 26 U.S.C. § 3121(a)(2).

DOMA and Employee Benefits Affecting a "Spouse" Under ERISA and the IRC

In 1996, Congress passed and President Clinton signed into law the Defense of Marriage Act (DOMA) "[t]o define and protect the institution of marriage."[15] The act does not specifically prohibit same sex marriage, nor does it diminish a state's ability to permit same-sex marriage within its borders. However, DOMA aims to limit the recognition of same-sex marriage in two ways. First, it allows all states, territories, possessions, and Indian tribes to refuse to recognize an act of another jurisdiction that designates a relationship between same-sex individuals as a marriage.[16] Further, DOMA declares that "in determining the meaning of any Act of Congress ... the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife." [17] According to GAO, as of 2003, there were at least 1,138 provisions in the U.S. Code "in which marital status is a factor in determining or receiving benefits, rights, and privileges."[18]

Under two of the primary federal laws governing private-sector employee benefits, ERISA and the IRC, spouses are given certain defined rights and benefits as part of employee benefit plans.[19] Because DOMA's definitions may apply to these federal laws, provisions of these laws that refer to "marriage" or "spouse" may only be read to apply to individuals in opposite-sex marriages. As such, DOMA can restrict the availability of these federally regulated rights and benefits for same-sex couples, even if the couples are legally married under state law. These defined rights and benefits in the retirement plan context generally deal with how the pension assets are disposed (e.g., upon death of the employee). In general, spousal rights with respect to health and welfare benefit plans typically center around eligibility for benefits.

Retirement Benefits

In general, federal law regulates two types of pension plans—defined benefit[20] and defined contribution plans[21]—and both types of plans are required to have certain spousal protections. For example, ERISA and the IRC require defined benefit plans and certain other plans to provide

[15] P.L. 104-199, 110 Stat. 2419 (1996).

[16] 28 U.S.C. § 1738C.

[17] 1 U.S.C. § 7.

[18] *See* GAO, Defense of Marriage Act: Update to Prior Report, GAO-04-353R (Jan. 23, 2004) (as cited in Massachusetts v. United States DSS, 698 F. Supp. 2nd 234, 2010 U.S. Dist. LEXIS 67927 (D. Mass 2010)).

[19] It should be noted that there are other federal laws that affect benefits provided to spouses. For example, the Family and Medical Leave Act (FMLA) requires an employer to provide unpaid leave for the care of an employee's spouse, child, or parent. There are other provisions in the Internal Revenue Code and ERISA that affect the provision of employee benefits that are not addressed in this report.

[20] Under a defined benefit plan, an employee is promised a specified future benefit, traditionally an annuity beginning at retirement. Benefits often are based on average pay and years of service. To fund the plan, employers (and, depending on the terms of the plan, employees) make contributions to the common pension fund that are actuarially expected to grow through investment to cover the promised benefits.

[21] A defined contribution plan (e.g., a 401(k) plan) is one in which the contributions are specified, but not the benefits. A defined contribution plan (also called "an individual account" plan) is one that provides an individual account for each participant that accrues benefits based solely on the amount contributed to the account and any income, expenses, and investment gains or losses to the account. The employee bears the investment risk in a defined contribution plan.

automatic survivor benefit payments in the form of qualified joint and survivor annuities to married participants, and qualified pre-retirement survivor annuities to a surviving spouse of a married plan participant, unless the participant elects another payment form and the participant's spouse consents to that election.[22] However, pursuant to DOMA, plans cannot treat a spouse in a same-sex marriage as married for purposes of these requirements. Although plans may be able to make these annuities available to participants regardless of marital status, plans cannot require participants in same-sex marriages to receive this type of annuity that is contingent upon spousal consent.[23] Additionally, while ERISA requires that benefits provided under a qualified retirement plan may not be assigned or alienated, pension plan amounts may be assigned to alternate payees under qualified domestic relations orders (QDROs), which impose familial support obligations. [24] Because DOMA prohibits recognition of same-sex marriage for purposes of the QDRO provisions in ERISA, an employer may not be required to comply with an order from a state court in which a spouse in a same-sex marriage was named as an alternate payee of a pension benefit.[25]

While participants in defined contribution plans may designate a beneficiary other than their spouse to receive plan distributions, another example of spousal rights with respect to retirement plans applies to minimum required distributions. Under the IRC, employer-sponsored retirement plans, such as 401(k), 403(b) and 457 plans, and individual retirement accounts and annuities (IRAs) must make certain annual required minimum distributions in order to maintain their "qualified" (i.e., tax-favorable) status.[26] The theory behind these required distributions is to ensure that tax-deferred retirement accounts that have been established to provide income during retirement are not used as permanent tax shelters or as vehicles for transmitting wealth to heirs. For employer-sponsored plans, required minimum distributions to participants must start no later than April 1 of the year after the year in which the participant either attains age 70½ ,or retires, whichever is later.[27] Under the IRC, if a surviving spouse inherits the assets in a qualified defined contribution plan before required minimum distributions have begun, the spouse can avoid incurring a tax and delay receiving distributions until the time when the deceased employee would have reached age 70½.[28] But for qualified defined contribution plans, benefits paid to a non-spousal beneficiary must be withdrawn within five years, subject to exception.[29]

Health and Other Welfare Benefits

Spousal rights under health and other welfare benefit plans arise under ERISA and the IRC. For example, the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amended ERISA and the IRC and requires the sponsor of a group health plan to provide an option of

[22] 29 U.S.C. § 1055(a). Analogous provisions may be found in the Internal Revenue Code. *See* 26 U.S.C. § 401(a)(11).

[23] Matthew L. Gouaux, *The Impact of Same-Sex Marriage on Retirement Plans*, 16 Journal of Pension Benefits 39 (2008).

[24] A qualified domestic relations order (QDRO) is a domestic relations order that requires the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant. 29 U.S.C. § 1056(d)(3)(B). *See also* 26 U.S.C. § 414(p)(1)(A).

[25] For a general discussion of QDROs, *see* Albert Feuer, *Who Is Entitled To Survivor Benefits From ERISA Plans?,* 40 J. Marshall L. Rev. 919 (2007).

[26]26 U.S.C. § 401(a)(9).

[27] *Id*. An exception to this rule applies if the employee is a 5 percent owner of the employer. These owners must receive a distribution the year after the owner turns 70 ½, subject to exceptions. 26 U.S.C. § 401(a)(9)(C)(ii).

[28] 26 U.S.C. § 401(a)(9)(b)(iv).

[29] 26 U.S.C. § 401(a)(9)(B).

temporarily continuing health care coverage for plan participants and beneficiaries under certain circumstances that would otherwise result in a loss of health coverage (e.g., the death of the covered employee, or the termination, other than by reason of the employee's gross misconduct, or reduction of hours of the covered employee's employment.[30] Under COBRA, plans must provide coverage to "qualified beneficiaries," if such coverage is offered to these individuals under the plan, and a qualified beneficiary is defined to include spouses. Second, title I of the Health Insurance Portability and Accountability Act (HIPAA)[31] amended ERISA and other federal laws to improve portability and continuity of health coverage. Under these requirements, group health plans and health insurance issuers offering health insurance coverage that offer coverage to spouses and/or dependents must provide a special enrollment opportunity to allow these individuals to enroll in a health plan without waiting until the plan's next regular enrollment season.[32] For example, special enrollment rights must be extended to a person who becomes a new dependent through marriage, birth, adoption or placement for adoption, or to an employee or dependent who loses other health coverage.[33] While an employer's plan can offer these protections voluntarily, it appears they are not required. [34]

In addition, spouses may receive certain tax advantages related to health coverage under the Internal Revenue Code. For example, under sections 105 and 106 of the Internal Revenue Code, medical benefits provided under an employer's group health plan to employees, retirees, and their spouses and other dependents, or insurance premiums paid by an employer for such benefits are generally exempt from federal income taxation.[35] Spouses may participate in a cafeteria plan under section 125 of the Code, under which pre-tax contributions for health insurance premiums allowed under these plans may be made on behalf of an employee, the employee's spouse, and dependents. In addition, medical expenses for spouses can be reimbursed from a health flexible spending account (FSA). Accordingly, as a result of these and other provisions as affected by DOMA, medical benefits provided to an employee's same-sex spouse are subject to federal tax unless the same-sex spouse meets the requirements for being a dependent under section 152(d) of the Code.[36] Under 26 U.S.C. § 152(d), a dependent is an individual who, among other things, resides with the taxpayer as a member of the household and who receives over half of his or her support from the taxpayer. However, it should be noted that depending on state law, health coverage for same-sex couples may be eligible for favorable tax treatment with respect to their state income taxes.[37]

---

[30] *See, e.g.*, 29 U.S.C. § 1163. For more information on COBRA, *see* CRS Report R40142, *Health Insurance Continuation Coverage Under COBRA*, by Janet Kinzer.

[31] P.L. 104-191, 110 Stat. 1936 (Aug. 21, 1996).

[32] 29 U.S.C § 1181(f). *See also* 29 C.F.R. § 2590.701-6. It should be noted that a similar provision may be found under the Public Health Service Act and the Internal Revenue Code. *See* 42 U.S.C. § 300gg; 26 U.S.C. § 9801.

[33] However, it should be noted that the HIPAA regulations define dependent "any individual who is or may become eligible for coverage under the terms of a group health plan because of a relationship to a participant." *See, e.g.*, 26 C.F.R. § 54.9801-2.

[34] The proposed rules on the establishment of exchanges and qualified health plans issued pursuant to the Patient Protection and Affordable Care Act (PPACA) also include special enrollment periods. The preamble to the regulations states that "[f]or purposes of special enrollment periods provided herein, we interpret dependent to mean any individual who is or may become eligible for coverage under the terms of a [qualified health plan] because of a relationship to an enrollee (including the enrollee's spouse)." 76 Fed. Reg. 41866, 41883 (July 15, 2011). *See* discussion of PPACA *infra*.

[35] *See also* 26 C.F.R. § 1.105-2; 26 C.F.R. § 1.106-1.

[36] *See generally* Priv. Ltr. Rul. 9717018 (Jan. 22, 1997); Priv. Ltr. Rul. 9231062 (July 31, 1992).

[37] *See, e.g.,* New York State Department of Taxation and Finance, Technical Memorandum (July 29, 2011).

ERISA Preemption and Insured v. Self-Insured Health Plans

As mentioned above, ERISA and the IRC do not require employers to offer employee benefits. Further, if an employer chooses to provide benefits, under ERISA it is generally free to define who is entitled to benefits under an employee benefit plan (i.e., whether to cover employees' dependents, a spouse, and/or other beneficiaries). However, when a private-sector employer does provide coverage to spouses, the question of whether this coverage may or must also be provided to same-sex couples is somewhat complicated, as the answer can turn on factors such as the type of plan in question (i.e., whether it is an insured plan, that is, one purchased from an insurance carrier) or self-insured (funded directly by the employer),[38] as well as the insurance requirements of a particular state.[39]

Additionally, as discussed above, ERISA must be read in accordance with DOMA's definition of a spouse. But even absent DOMA, an employer located in a state that permits same-sex marriage would not necessarily be required to provide benefits to same-sex couples under a plan that provides spousal benefits. A primary reason for this scenario is based on ERISA preemption.[40] ERISA can preempt state laws that relate to employee benefit plans, and, as the Supreme Court has found, a state law that requires certain benefits to be provided to plan participants can be superseded by ERISA.[41] Thus, states may run a risk of a preemption challenge if the same-sex marriage law were somehow applied to require private employers to offer health benefits to same-sex couples.[42] Accordingly, even in states that recognize same-sex marriage, ERISA plans may still be in a position to limit health coverage for spouses to opposite-sex couples.

---

[38] Under self-insured (or self-funded) plans, an employer acts as the insurer itself and pays the health care claims of the plan participants. While self-insured plans may use an insurance company or other third party to administer the plan, the employer bears the risk associated with providing health coverage. For more information on self-insured health plans, see CRS Report R41069, *Self-Insured Health Insurance Coverage*, by Bernadette Fernandez.

[39] Other factors may also influence whether a same-sex spouse receives benefits under a particular plan, including how the plan document defines "spouse." The Supreme Court has emphasized the importance of reliance on plan documents in determining eligibility for benefits. *See* Kennedy v. Plan Admin. for Dupont Savings and Investment Plan, 555 U.S. 285 (2009)(Court holds that terms of the plan documents are controlling despite an otherwise valid state-court order waiving entitlement to pension benefits).

[40] *See* Frederic S. Singerman and Jennifer A. Kraft, Who Is A Spouse? Changing Marriage Laws Impact Employee Benefit Plans? The Metropolitan Corporate Counsel (July 1, 2004) ("Because ERISA generally preempts state laws affecting employee benefits, employers who choose to limit spousal benefits to traditional opposite-sex spouses should be able to do so under prevailing law. This will be true even in jurisdictions like Massachusetts and Vermont that recognize same-sex marriages or civil unions.").

[41] *See e.g.*, Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1982) (New York law which required plans to provide pregnancy-related benefits was found preempted; Court found the law it burdened the administration of employee benefit plans).

[42] *See e.g.,* Air Transp. Ass'n of Am. v. City & County of San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998) (ordinance barring the City of San Francisco from contracting with companies whose employee benefit plans discriminate between employees with spouses and employees with domestic partners preempted by ERISA; court explains that the statute "b[ound] plan administrators to a particular choice of rules for determining beneficiary status"); Council of the City of N.Y. v. Bloomberg, 846 N.E.2d 433, 813 N.Y.S.2d 3 (2006) (law requiring city agencies to contract only with organizations that provided benefits to domestic partners of employees equal to those provided to spouses of employees preempted by ERISA). *See also* Egalhoff, (Washington law that provided the designation of a spouse as the beneficiary of a non-probate asset (e.g., a pension plan) would be revoked automatically upon divorce preempted by ERISA; Supreme Court states that the "law required administrators to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in plan documents" and thereby "implicated an area of core ERISA concern."); Catholic Charities of Me., Inc. v. City of Portland, 304 F. Supp. 2d 77 ("[I]f the Ordinance demanded that all employers in the City offer domestic partner coverage, it would be preempted."). *But see generally*, Jeffrey G. Sherman, *Domestic Partnership and ERISA Preemption*, 76 Tul. L. Rev. 373 (2001)(arguing that domestic partner (continued...)

However, while a state's same-sex marriage law may not, in and of itself, require the provision of benefits to same-sex couples under an ERISA plan, a state's insurance laws and regulations could have an effect. As discussed above, a state may regulate insurance under the authority of ERISA's savings clause, and may require insurers to provide benefits to same-sex couples to the same extent as opposite-sex spouses.[43] While fully insured plans would be subject to this type of requirement,[44] self-insured plans, which are only subject to ERISA and immune from state law, would not be. In other words, while a fully insured plan would likely have to provide health benefits to same-sex couples if a state insurance code required them to do so, a self-insured plan may be able to avoid providing benefits to same-sex spouses. However, federal law does not prevent a self-insured plan from voluntarily providing these benefits to employees with a same-sex spouse.

Patient Protection and Affordable Care Act (PPACA)

The recently enacted Patient Protection and Affordable Care Act (PPACA),[45] as amended, greatly expanded the scope of federal regulation over health insurance coverage, including employment-based group health coverage. In an effort to meet goals such as increased access to health insurance for individuals, PPACA sets new minimum standards for private health insurance coverage, such as an extension of dependent coverage to age 26; the elimination of preexisting condition exclusions; a bar on lifetime and certain annual benefit limits; a prohibition on health insurance rescissions except under limited circumstances; and coverage of preventive health services without cost sharing, among many other things. Many of these requirements apply to both individual and employment-based group health coverage. PPACA does not require health coverage to be provided by an employer to employees or their same-sex or opposite-sex spouses.[46] However, if such coverage is provided by an employer, various reforms made by PPACA would likely apply.

In addition, PPACA provides that, beginning in 2014, each state, or if a state fails to do so, the Secretary of Health and Human Services (HHS), must establish at least one American Health Benefit Exchange that facilitates the purchase of individual and group health insurance plans from insurers.[47] Individual health insurance coverage and group health plans for small employers will be able to be offered both inside and outside of an exchange.[48] Large group health plans can

(...continued)

benefit laws should withstand ERISA preemption).

[43] *See, e.g.,* the California Insurance Equality Act, Cal. Ins. Code § 10121.7 (2010).

[44] It may be noted that the state in which the policy was issued could also matter, as insurers licensed to sell insurance in that state would be required to follow the benefit mandate and other requirements. *See* Richard C. Libert, Andrew Orlinger, and Kenneth A. Raskin, *Same-Sex Marriage and Employee Benefits: The Approaching Revolution*, 63 Employee Benefit Plan Review 22 (2009).

[45] P.L. 111-148 (2010), §§ 1001-104, 1201-1255. PPACA was amended by the Health Care Education and Reconciliation Act of 2010, P.L. 111-152 (2010). (HCERA). These acts will be collectively referred to in this report as "PPACA."

[46] Under PPACA, there is no explicit mandate for an employer to offer employees acceptable health insurance. However, beginning in 2014, certain "large" employers with at least 50 full-time equivalent employees can face tax penalties if they do not provide health coverage, or they do not provide coverage meeting certain requirements, and certain other conditions are satisfied. For a discussion of these requirements, *see* CRS Report R41159, *Summary of Potential Employer Penalties Under the Patient Protection and Affordable Care Act (PPACA)*, by David Newman.

[47] P.L. 111-148, §§ 1301 et seq.

[48] P.L. 111-148, § 1312(d). Before 2016, states will have the option to define "small employers" either as those with (1) (continued...)

be offered outside an exchange, and beginning in 2017, states may allow issuers of health insurance coverage in the large group market to offer qualified health plans through an exchange at the discretion of each state.[49] PPACA does not expressly address the provision of health coverage for same-sex spouses in exchange plans offered by employers. [50] However, it should be noted that health insurance exchanges must offer coverage to qualified individuals, and if a same-sex partner was not eligible to receive employment-based coverage, same-sex partners may still be able to get exchange coverage as an individual. Provision of health benefits to same-sex couples through exchanges may be a topic of further exploration and analysis as the exchanges are established.

Legal Challenges to DOMA

Litigation over same-sex marriage has addressed both the constitutionality of state laws that limit same-sex marriage, as well as the federal restrictions on same-sex marriage recognition under DOMA.[51] Legal challenges to DOMA have confronted the issue of whether the federal government can deny certain federally provided benefits to same-sex couples that only opposite-sex couples are eligible to receive, and plaintiffs have had some recent success with respect to these actions. For example, in *Gill v. Office of Personnel Management*,[52] several same-sex couples and survivors of same-sex spouses claimed that because of § 3 of DOMA (which defines "marriage" and "spouse" to exclude same-sex spouses under federal law), they were impermissibly denied certain federal marriage-based benefits in violation of the equal protection guarantees of the Fifth Amendment.[53] The benefits at issue in *Gill* included federal employee health benefits, Social Security benefits, and the ability to file federal income taxes jointly with their spouses.[54] On July 8, 2010, the U.S. District Court for the District of Massachusetts struck down § 3 of DOMA on constitutional grounds. The court applied rational basis review, the level of judicial review most deferential to legislative judgment, and found that Congress's goal of preserving the status quo (pending resolution of current debate going on at the state level about recognizing same-sex marriage), and ensuring consistency in the provision of federal benefits did not bear a rational relationship to this classification of individuals under DOMA.[55] In a

(...continued)

100 or fewer employees, or (2) 50 or fewer employees. Beginning in 2016, small employers will be defined as those with 100 or fewer employees. P.L. 111-148, § 1304(b).

[49] P.L. 111-148, § 1312(f)(2). A "large employer" will be an employer that had an average of at least 101 employees the preceding calendar year and at least one employee on the first day of the plan year. P.L. 111-148, § 1304(b).

[50] While outside the scope of this report, premium tax credits towards the purchase of coverage in an exchange may be offered to low income individuals who are not eligible for "minimum essential coverage," as defined by PPACA. See 26 U.S.C. § 36B. While same-sex couples may not file jointly or be considered married for purposes of determining their eligibility for the credit, each same-sex partner may still qualify for the credit when filing separately, if the income and other requirements are met. For more information on premium credits, see CRS Report R41137, *Health Insurance Premium Credits in the Patient Protection and Affordable Care Act (PPACA)*, by Bernadette Fernandez and Thomas Gabe.

[51] For a comprehensive discussion of the litigation over same-sex marriage, *see* CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

[52] 699 F.Supp. 2d 374 (D. Mass. 2010).

[53] *Id*. at 376-77. For a discussion of equal protection principles, see Congressional Research Service, CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, P. 1886 et seq.

[54] *Id*. at 379-83.

[55] *Cf*. Wilson v. Ake, 354 F.Supp. 2d 1298 (M.D. Florida 2005)(in upholding the validity of DOMA, court finds, (continued...)

companion case to *Gill*, *Massachusetts v. Department of Health and Human Services*,[56] the district court also found that § 3 of DOMA also exceeded Congress's power under the Spending Clause and violated the Tenth Amendment. The court explained, among other things, that it is within the authority of a state to recognize same-sex marriages among its residents, and that DOMA interferes with this "firmly entrenched province of the state."[57]

While the *Gill* and *Massachusetts* cases did not examine private-sector employee benefits, one may argue that these cases open the door for private sector employees to bring a constitutional challenge against DOMA on similar grounds.[58] However, it should be noted that these legal challenges to DOMA are not addressing the question of whether same-sex couples have a right to marry, but instead what benefits are available if their marriages are recognized. It should also be noted that these cases did not challenge § 2 of DOMA, relating to the ability of states to disregard same-sex marriages recognized in other states.

The government filed a notice of appeal in the *Gill* and *Massachusetts* cases. However, on February 23, 2011, Attorney General Eric Holder announced that the Department of Justice will no longer defend the constitutionality of § 3 of DOMA in cases where the President and the Attorney General determine the provision in question will not meet a higher level of judicial scrutiny.[59] The Attorney General opined that this type of classification based on sexual orientation requires this heightened standard of review. The Attorney General specifically mentioned two cases pending in district court in the Second Circuit, *Windsor v. United States*, [60] and *Pedersen v. OPM*,[61] where, as the Attorney General points out, there is no binding precedent on the appropriate review for classifications based on "sexual orientation." Following this announcement, the House Bipartisan Legal Advisory Group voted to defend DOMA, and filed a motion to intervene in various cases, including *Gill* and *Massachusetts*. Despite some uncertainty that may arise with respect to the defense of future legal challenges to DOMA, the Department of Justice still indicated that § 3 of DOMA remains in effect and the Executive Branch will continue to enforce the law unless Congress repeals it or there is a "final judicial finding" that overturns it.[62] The Attorney General's announcement did not address § 2 of DOMA.

(...continued)

among other things, that under a rational basis analysis, DOMA did not violate equal protection guarantees).

[56] 698 F. Supp. 2d 234 (D. Mass. 2010).

[57] *See also* Dragovich v. U.S. Department of the Treasury, 764 F. Supp. 2d 1178 (N.D. Cal. 2011)(court refused to dismiss claim that § 3 of DOMA is unconstitutional as it applied to a federal long-term care insurance program).

[58] *See* Teresa S. Renaker, *Gill Lays Groundwork for DOMA Challenges to Employee Benefits*, BNA Pension & Benefits Daily (Aug. 24, 2010).

[59] U.S. Department of Justice, "Statement of the Attorney General on Litigation Involving the Defense of Marriage Act," press release, February 23, 2011, located at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[60] No. 1:10-cv-8435 (S.D.N.Y filed Nov. 9, 2010).

[61] No. 3:10-cv-1750 (D.Conn. filed Nov. 9, 2010)

[62] It should be noted that questions may be raised regarding the implications of the Department of Justice enforcing a law that will not defend. *See, e.g.,* Florence Olsen*, Obama Administration's DOMA Decision Raises Questions for Employers, Practitioners*, BNA Pension & Benefits Daily (Mar. 15, 2011).

Federal Legislation in the 112th Congress

Legislation has been introduced in the 112th Congress that, if enacted, could impact the provision of employee benefits for same-sex couples. While some of the legislation broadly addresses federal recognition of same-sex marriage, other bills are more narrowly focused on certain types of benefits that same-sex spouses may currently be precluded from receiving.

Among the legislation that would allow for federal recognition of same-sex marriage is the Respect for Marriage Act of 2011 (S. 598, H.R. 1116). This proposed act would repeal § 2 of DOMA, which currently provides that states and others may refuse to recognize acts of other jurisdictions that allow same-sex marriages. In addition, the proposal would amend the definition of marriage and spouse under federal law created by DOMA, and would provide that "[f]or the purposes of any Federal law in which marital status is a factor, an individual shall be considered married if that individual's marriage is valid in the State where the marriage was entered into or, in the case of a marriage entered into outside any State, if the marriage is valid in the place where entered into and the marriage could have been entered into in a State." Thus, while the proposal does not attempt to compel states to allow same-sex marriages to be celebrated in a particular state, the legal marriages of same-sex couples from another state would apparently have to be recognized. This proposed amendment to DOMA also does not speak to civil unions or domestic partnerships that may be recognized under state law; the proposed amendment may not affect this type of status.

Conversely, federal legislation has been introduced that could supplement current restrictions on same-sex marriage. H.J.Res. 45 is a proposed constitutional amendment stating, among other things, that marriage in the U.S. can only be between a man and a woman. While ratification of this type of amendment to the Constitution could create national constancy with respect to the definition of marriage, individual states would no longer have the ability to define it within their borders. In addition, H.R. 875, the Marriage Protection Act of 2011, aims to restrict federal courts, including the Supreme Court, from reviewing questions regarding § 2 of DOMA, relating to state recognition of other states' marriage laws.[63] However, it should be noted that H.R. 875 does not address § 3 of DOMA, relating to the definitions of spouse and marriage for purposes of federal law, and thus would not seem to affect the legal challenges that have been brought against this provision.

Other federal legislation would not repeal or amend DOMA, but instead would attempt to broaden access to employee benefits for non-spousal beneficiaries. For example, as noted above, DOMA prevents same-sex partners from being considered spouses for purposes of COBRA continuation coverage. Under the Equal Access to COBRA Act of 2011 (S. 563, H.R. 2310), plan sponsors (e.g., employers) would be required to provide COBRA continuation coverage to a "domestic partner" of an employee (as the term is defined by the plan), as well as a dependent child of the domestic partner who is covered under the sponsor's health plan prior to an event that triggers COBRA coverage. The proposed legislation does not require health plans to provide coverage for domestic partners. But if coverage is offered, the employee elects this coverage for

[63] A series of federal court decisions seem to indicate that in most cases, some forum must be provided for the vindication of constitutional rights. For a discussion of this issue, s*ee* CRS Report RL32171, *Limiting Court Jurisdiction Over Federal Constitutional Issues: "Court-Stripping"*, by Kenneth R. Thomas.

the employee's same-sex partner, and a qualifying event under COBRA occurs, the COBRA continuation coverage would be required to be offered to the employee's same-sex partner.

In addition, the Tax Parity for Domestic Partner and Health Plan Beneficiaries Act of 2011 (S. 1171, H.R. 2088) would amend the tax code primarily to allow the employee income tax exclusion for employment-sponsored health benefits to apply to "eligible beneficiaries," defined by the legislation as any individual who is eligible to receive benefits under the plan. Thus, while an employer would not have to offer health benefits to non-spousal beneficiaries, participants in these plans would be able to take advantage of the tax benefit if such health coverage is provided. Among other things, the bills would also extend preferential tax treatment for eligible beneficiaries with respect to qualified medical expenses from health savings accounts, flexible spending arrangements, and health reimbursement arrangements.

Author Contact Information

Jennifer Staman
Legislative Attorney
jstaman@crs.loc.gov, 7-2610