



HealthLawAdvocates
Fighting for Health Care Justice

Same-Sex Spousal Health Benefits

In Massachusetts
After Goodridge

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Introduction

Although this publication was originally created only to deal with married same-sex couples living in Massachusetts, most of the legal information contained in this publication can be applied to state which recognizes the marriages or civil unions of same-sex couples. If you have specific questions, please contact GLAD's Legal InfoLine at 800-455-GLAD (4523).

In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court ruled that, under the Massachusetts Constitution, marriage means the voluntary legal union of two persons. As a result, as of May 17, 2004, same-sex couples have been able to marry in Massachusetts.

A major benefit of marriage is access to health coverage through a spouse's plan. Now that gay and lesbian couples can legally marry in Massachusetts, it seems natural to assume that they have the same access to health insurance as other married couples. Yet, the law in this area is still evolving, and there are many questions for which there are no clear answers. This document attempts to address some of the questions that may arise with regard to same-sex spousal health coverage post-*Goodridge*.

<p>The information in this document does not constitute legal advice. For assistance with legal questions specific to your situation, seek help from a lawyer.</p>
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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. As a general rule, private employers whose health plans are governed by federal law (and are not subject to Massachusetts insurance laws) have discretion to decide whether or not to provide same-sex spousal benefits.

(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 in Massachusetts

All 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 recognizes two types of plans: **insured** plans, which are subject to state insurance regulation, and **self-insured** plans, which are exempt from 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 Massachusetts (or any other state that allows same-sex couples to marry or to have a civil union), 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 marriages or civil unions of same-sex couples, then the owner of the plan can decide to exclude same-sex spouses from the plan. 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, but whether equal coverage is provided depends upon the terms of the particular plan. Under ERISA, a self-insured plan can choose whether to expressly exclude or allow coverage for same-sex spouses. (ERISA is a federal law that preempts state laws other than state insurance laws.) However, unless a Massachusetts 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.

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

As a result of the *Goodridge* decision, health plans for Massachusetts state employees, which are offered through the Group Insurance Commission (*GIC*), cannot discriminate against same-sex spouses. Same-sex spouses of Massachusetts county and municipal employees are also entitled to the full array of health insurance rights given to different-sex married couples.

Rights of same-sex spouses of federal government employees

In 1996, Congress passed the “Defense of Marriage Act” (*DOMA*), which defines marriage for the purpose of federal programs and laws as exclusively between a man and a woman. Because of *DOMA*, health plans offered through the Federal Employees Health Benefits Program (*FEHB*) do not cover same-sex spouses of federal employees who are legally married in Massachusetts. The same prohibitions apply to same-sex spouses of military personnel covered by the *TRICARE* program.

Rights of same-sex spouses of self-employed individuals

ERISA does not apply to health benefits for self-employed individuals. Under *Massachusetts insurance laws*, a self-employed person is eligible for either small group or non-group coverage. Because of *Goodridge*, small group and non-group health plans issued in Massachusetts cannot discriminate against same-sex spouses. Therefore, a self-employed person in Massachusetts should be able to purchase a family plan covering his or her same-sex spouse on the same terms as any other married couple.

Domestic partner health coverage

Prior to the *Goodridge* decision, a number of employers in Massachusetts chose to offer health benefits to same-sex domestic partners of employees. After *Goodridge*, some employers announced plans to eliminate domestic partner coverage now that same-sex couples have the right to marry in Massachusetts. However, according to the August 2010 New England Human Resources Association's survey of New England organizations providing domestic partnership benefits to unmarried partners, compared to the last time the survey was conducted in 2004, the vast majority of organizations have not made significant changes to their domestic partnership policies. In light of widespread discrimination at the federal level, and in other states, marriage is not a viable option for every committed same-sex couple. GLAD and Health Law Advocates therefore support the maintenance of domestic partner health benefits by Massachusetts employers. (See GLAD's Publication: "Domestic Partnership Benefits Still Matter in the Age of Equal Marriage.")

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. Since COBRA is a right available through federal law, *DOMA* allows employers to deny COBRA continuation coverage to same-sex spouses. Notably, *DOMA* does not prohibit employers from voluntarily providing continuation coverage to their employees. Thus, subject to insurance availability, private employers may provide COBRA-like continuation benefits to the same-sex spouses of their employees. As a practical matter, however, insurance policies with such coverage may be limited or unavailable in some insurance markets.

Several *Massachusetts insurance laws* require insured plans to provide continued coverage for the covered spouse of an employee after certain events, including plant closings, involuntary layoffs and divorce. Also, same-sex spouses of employees of small companies in Massachusetts (with 2 to 19 employees) have continuation rights under the state's "*mini-COBRA*" law. As a result of the *Goodridge* decision, same-sex spouses are entitled to the protections of these state continuation-of-coverage laws.

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. Because of *DOMA*, private employer plans in Massachusetts are not required to grant same-sex spouses these federal rights. However, for reasons of fairness and administrative simplicity, plans that cover same-sex spouses will likely do so on the same terms as for married different-sex couples.

Tax issues related to health benefits

Employers may provide tax-free health benefits to their employees' different-sex spouses. However, *DOMA* prevents recognition of marriages by same-sex couples for federal tax purposes. Therefore, if a same-sex spouse receives health benefits through the partner's employer-sponsored plan, the fair market value of those benefits is treated as income to the employee and subject to federal income tax. Similarly, an employee may not make pre-tax contributions to a "cafeteria" plan on behalf of a same-sex spouse, and a same-sex spouse is not eligible for federally tax-free reimbursement for medical expenses from an employee spouse's Health Savings Account.

Because of the *Goodridge* decision, however, the value of such health benefits to a same-sex spouse is not counted for Massachusetts state tax purposes. The Massachusetts Department of Revenue has issued Technical Information Release 04-17 (available at [http://www.mass.gov/?pageID=dorterminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Technical+Information+Releases&L5=TIRs+-+By+Year\(s\)&L6=2004+Releases&sid=Ador&b=terminalcontent&f=do_r_rul_reg_tir_tir_04_17&csid=Ador](http://www.mass.gov/?pageID=dorterminal&L=7&L0=Home&L1=Businesses&L2=Help+%26+Resources&L3=Legal+Library&L4=Technical+Information+Releases&L5=TIRs+-+By+Year(s)&L6=2004+Releases&sid=Ador&b=terminalcontent&f=do_r_rul_reg_tir_tir_04_17&csid=Ador)), which discusses some of the tax issues associated with marriage for same-sex couples. Persons seeking further guidance should consult a tax professional.

Rights of married same-sex couples who work outside of Massachusetts

The entitlement of employees who work outside of Massachusetts to same-sex spousal health coverage will depend, in part, on the law of the state in which the employee works, where the owner of the plan is located, whether the health plan is insured or self-insured, and the employer's non-discrimination policies, practices and contractual commitments. Despite the existence of discriminatory marriage laws in certain states, it is important to note that no state or federal law expressly requires private employers outside of Massachusetts to deny health benefits to the same-sex spouses of their married employees.

Individuals in New England seeking further guidance about eligibility for employment-based spousal health benefits outside Massachusetts may want to contact GLAD. For inquiries concerning states outside New England, contact Lambda Legal Defense and Education Fund (www.lambdalegal.org).

Where to get legal help

The issue of same-sex spousal health benefits raises complex legal issues that require careful consideration and a well-developed and coordinated legal strategy. GLAD advises against undertaking a direct challenge to DOMA in the employee benefit context or to ERISA for same-sex spousal benefits. A premature or inadequately supported legal action may set unfavorable precedents. For further discussion of this issue see *Make Change, Not Lawsuits* at <http://www.glad.org/uploads/docs/publications/make-change-not-lawsuits09.pdf>.

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's Legal InfoLine can be reached at 800-455-GLAD (4523) and Health Law Advocates 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.

GLAD has filed two federal lawsuits, *Gill et al v. OPM et al* and *Pedersen et al v. OPM et al*, to challenge the discrimination that married couples experience because of Section 3 of DOMA (see www.glad.org/doma for detailed information). Should GLAD succeed in these lawsuits, or should Congress repeal DOMA Section 3, married same-sex couples who live in states where their marriage is respected would be able to be treated the same as different-sex married couples for purposes of spousal health benefits.

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>

GIC – Group Insurance Commission www.mass.gov/gic

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

Massachusetts insurance laws – There are numerous Massachusetts laws that apply to health insurance. A good source for more information about these laws is the Massachusetts Division of Insurance website at www.mass.gov/doi (Consumer Guides and Brochures, Health).

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