



Pension Analyst

Update on the issues

Plan administration and operation

September 2009

Same-sex marriage laws present challenges for retirement plan sponsors

Who's affected

These developments directly affect sponsors of and participants in non-ERISA qualified defined benefit and defined contribution plans, section 403(b) plans, and governmental section 457(b) plans. They may also be of interest to sponsors of plans covered by ERISA.

Background and summary

In 2004, **Massachusetts** became the first state to issue marriage licenses to same-sex couples. For four years, it was the only state to do so, although **Canada** has recognized same-sex marriages since 2005. Then, from June 2008 through November 2008, **California** recognized same-sex marriages. In 2009, several states enacted same-sex marriage laws, with various effective dates:

- **Connecticut** began issuing marriage licenses to same-sex couples in 2008, while its new marriage law officially took effect on July 1, 2009;
- **Iowa's** law took effect on April 27, 2009;
- **Vermont's** law took effect on September 1, 2009;
- **Maine's** law was scheduled to take effect on September 11, 2009; and
- **New Hampshire's** law is scheduled to take effect on January 1, 2010,

In addition, **New Jersey** offers *civil unions* with all state-level rights and responsibilities of marriage, and effective July 26, 2009, **Washington** law made state-registered *domestic partnerships* the equivalent of marriages. Meanwhile, California, Nevada, Oregon, the District of Columbia, Colorado and Maryland all have domestic partnership laws that grant varying state-level rights and responsibilities of marriage. New York and the District of Columbia currently recognize same-sex marriages from other jurisdictions.

In Maine and Washington, opponents of the recent changes have gathered sufficient signatures to mount voter referenda. In Maine, the "People's Veto" efforts succeeded in placing Proposition 1, asking voters if they want to reject the new law, on the November 3, 2009 ballot. As a result, the application of the same-sex marriage law was suspended until that date. In Washington, Referendum 71 appeared destined to put the expanded domestic partnership law on the November 3, 2009, ballot as well, with the application of the new law on hold until then.

In contrast to these state laws, the federal "Defense of Marriage Act" (DOMA), which was enacted in 1996, defines "marriage" as "a legal union between one man and one woman," for purposes of determining the meaning of any federal law or regulation (such as the Internal Revenue Code and ERISA). DOMA also allows states to prohibit same-sex marriages and refuse recognition to same-sex marriages validly created elsewhere. Currently, more than 37 states have enacted DOMA laws or have constitutional amendments prohibiting same-sex marriage.

This conflict between federal law and some state and local laws creates concerns for sponsors of retirement plans that are generally subject to federal law. Even sponsors of plans that are not subject to ERISA and are therefore subject to state law face conflicts with Internal Revenue Code requirements

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Action and next steps

Plan sponsors with participants who live in any of the states mentioned above may already be struggling with these issues. Eventually, other sponsors will need to consider the issues as their employees move from one state to another. How same-sex marriage, domestic partnership and civil union issues affect any retirement plan will depend on a variety of factors including the type of plan (401(a), 403(b), 457(b)), the terms of the plan, federal law, state law and the plan sponsor's policies.

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Related documents

[Same-Sex Marriages in Massachusetts](#)
[Same-Sex Marriages in California](#)
[Same-Sex Marriages in Connecticut](#)
[Same-Sex Marriages in Iowa](#)
[Same-Sex Marriages in Vermont](#)
[Same-Sex Marriages in Maine](#)
[Same-Sex Marriages in New Hampshire](#)
[Civil Unions in New Jersey](#)

Marriage vs. civil union vs. domestic partnership

In the states that recognize same-sex marriages, same-sex and different-sex married couples have the same state-level legal rights and obligations.

At the next level are civil unions. The civil union concept originated in Vermont as a legal status that was identical to marriage. This concept was later adopted in Connecticut, New Hampshire, and New Jersey. However, with Vermont, Connecticut, and New Hampshire recognizing same-sex marriages, New Jersey will be the only state that still offers civil unions.

Finally, a number of states and localities offer domestic partnership status to same-sex couples. The domestic partnership concept was originally created by the state of Hawaii in 1997. The rights and responsibilities of domestic partners vary from state to state (and locality to locality). Currently, California, Oregon, and Washington offer domestic partnerships that are nearly equivalent to marriage with respect to the rights that they provide to partners.

Detailed information about the existing state laws recognizing same-sex marriages, civil unions, and marriage-like domestic partnerships is provided in a set of "related documents" to this publication.

Federal Defense of Marriage Act (DOMA)

For purposes of applying federal laws and regulations, the federal DOMA defines "marriage" as "a legal union between one man and one woman." It also allows states to prohibit same-sex marriages and refuse recognition to same-sex marriages validly created elsewhere. Currently, more than 37 states have enacted DOMA laws or have constitutional amendments prohibiting same-sex marriage.

In contrast, New York recognizes same-sex marriages performed in other states, and in 2007, the Rhode Island Attorney General advised that state to honor such marriages as well. Most recently, the District of Columbia began recognizing same-sex marriages performed elsewhere.

Additionally, in March 2009, the Massachusetts Attorney General filed a federal lawsuit challenging the federal DOMA on several grounds. The lawsuit seeks federal marriage rights for same-sex couples who marry in states that allow such marriages.

Impact of conflicting laws on retirement programs

Sponsors of retirement programs that are not subject to ERISA must pay close attention to these evolving state laws. Affected plans include qualified governmental and non-electing church plans, governmental and church 403(b) plans, 403(b) plans that are not subject to ERISA, and governmental section 457(b) plans. Sponsors of these plans will need to recognize and comply with applicable state marriage, civil union and domestic partnership laws. However, several federal tax aspects of their plans (such as required minimum distributions) will remain covered by federal law, including the DOMA definition of "spouse."

Sponsors of retirement programs that are subject to ERISA are technically only required to comply with the federal DOMA rules when identifying participants' spouses for various plan purposes. However, plan sponsors that have large employee populations in any of the states that recognize same-sex marriages, civil unions, or domestic partnerships that are the equivalent of marriage, may want to voluntarily incorporate those rules to the extent possible.

Marriage matters

A participant or beneficiary's status as a spouse is important for many aspects of retirement plan administration. For example, plans that are subject to ERISA may need to provide some or all of the following special spousal benefits or rights:

- **Qualified plan QPSA payments.** Qualified defined benefit plans and some qualified defined contribution plans must pay Qualified Preretirement Survivor Annuities (QPSAs) to a participant's surviving spouse, unless the coverage has been waived and the spouse has consented to the waiver. Under many defined benefit plans, if the participant dies before his Annuity Starting Date (ASD) and does not have a surviving spouse, no death benefit is payable at all.
- **Death benefits under certain defined contribution plans.** If a participant dies before his ASD, qualified defined contribution plans that do not provide a Qualified Joint and Survivor Annuity (QJSA) as the normal form of payment must pay the participant's entire vested account balance to the participant's surviving spouse, unless the spouse has consented to the designation of an alternative beneficiary.
- **Qualified plan QJSA payments.** When a qualified plan's normal form of payment is a QJSA (all defined benefit plans and some defined contribution plans), the annuity payable to a participant must include a survivor annuity payable to the surviving spouse, unless the participant elects a different form of payment and the spouse has consented to that election. If the participant is not married, the QJSA is simply a single life annuity, with no survivor annuity payable, unless the participant selects a different form of payment.
- **Qualified plan QOSA coverage.** Plans that are required to provide QJSAs must also provide Qualified Optional Survivor Annuities (QOSAs), which provide a different level of survivor annuity to a participant's surviving spouse.
- **In-service withdrawals and plan loans.** Participants in qualified defined contribution plans that are subject to the spousal consent rules must obtain spousal consent to take in-service withdrawals (including hardship withdrawals) or loans.
- **Qualified Domestic Relations Orders (QDROs).** A QDRO may require the division of a participant's accrued benefit or account balance between the participant and a former spouse.
- **Optional plan provisions.** Some plans contain provisions that are not required by law but reflect optional choices by the plan sponsor. For example, some plans that are not subject to spousal consent requirement still require spousal consent to participant loans.

In addition, spousal status affects all plans, whether or not they are subject to ERISA, with respect to:

- **Payment of Required Minimum Distributions (RMDs).** Generally, a plan must begin distributing benefits to a participant no later than April 1st of the year following the later of the year the participant reaches age 70½, or terminates employment with the employer. Payments made from defined contribution plans and 403(b) plans are

based on special factors if the participant's designated beneficiary is his or her spouse. In addition, special rules apply to the timing and calculation of payments to be made to a surviving spouse.

- **Tax withholding and reporting of distributions to spouse.** Plans must comply with federal and state income tax withholding and information reporting requirements (e.g., Form 1099-R). Recognition of same-sex marriages could result in "split reporting," where a participant must be treated as married on the state but not the federal copy of Form 1099-R.

Still few answers

The required or permitted treatment of same-sex marriage under retirement plans remains uncertain. Government regulators have issued little guidance and there are few answers. Sponsors of plans covered by ERISA may decide not to recognize such marriages since federal and many state DOMA laws permit non-recognition. Other sponsors of ERISA-covered plans may choose to recognize same sex marriages for policy, state law or other reasons. Sponsors who opt for recognition, however, may determine that federal law prevents the extension of some rights to same-sex spouses and former spouses of participants. For example, federal law would prevent a plan from paying a same-sex former spouse pursuant to a QDRO or recognizing a same-sex former or surviving spouse for purposes of required minimum distributions.

Key considerations

Prudential Retirement suggests that affected plan sponsors discuss the treatment of same-sex marriage with their own legal counsel and that any discussion include the following key considerations:

- **Plan document review.** Plan documents frequently contain vague definitions of "spouse" and related terms. As a result, many plan sponsors will wish to review and amend these documents to ensure that they reflect the intent of the sponsor. Many plans are currently being restated to comply with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), so this may be a good time to undertake this review. However, sponsors should keep in mind that most of the pre-approved EGTRRA plan documents were drafted and approved by the IRS before the recent adoption of most state same-sex marriage laws,
- **State-by-state analysis.** In determining what state laws require or permit, most plan sponsors will find it necessary to review state law, including the provisions of any state DOMA law and any state legal guidance on same-sex marriages. We have prepared high-level summaries of the same-sex marriage and certain civil union and domestic partner laws that are currently in effect in various states, which may be of some assistance in this review. You can access these documents from the links provided in the "In this issue" box on page 2 of this publication.
- **Federal law limitations.** The federal DOMA law may prevent a plan sponsor that wishes to recognize same-sex marriages from doing so for all purposes (e.g., tax reporting).

Next steps

If you are required or choose to recognize same-sex marriages or similar relationships under your retirement plan or plans, or have questions about how same-sex marriage policies may affect your plan participants, please contact your Prudential Retirement representative.

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Editor: Mitzi Romano

(860) 534-2768