



# SecureOne Benefit Administrators, Inc. ACA Compliance News

August 2015

## Compliance News

### **BENEFIT ISSUES AROSE AFTER SUPREME COURT RULING ON SAME-SEX MARRIAGE**

The U.S. Supreme court's decision on same-sex marriage could pose both challenges and benefits to employers as they contemplate the patchwork system of laws across the country.

To re-cap, in a 5-4 ruling on June 26, 2015, the court determined, in *Obergefell v. Hodges*, that states must allow same-sex couples to marry and must recognize same-sex marriages lawfully performed in other jurisdictions. This effectively did away with the previous "recognition vs celebration" states confusion.

The court specifically said the states cannot refuse to recognize same-sex marriages entered into in other states because the state bans on same-sex marriage violate both the due process and equal protection clauses of the Constitution's Fourteenth Amendment. The ultimate result is that same-sex couples may exercise the right to marry in all states and receive the benefits of all individuals with the same standing. They did not specifically mention benefits, but it is part of the discussion when a benefit plan covers "spouses" or dependents.

In a way, the decision provides uniformity for all employers across the country. It will help simplify that all spouses will be treated the same regardless of where they live or work. It will also raise employee expectations that same-sex spouses will be treated equally in benefit plans.

The court's decision does not directly affect private entities, such as ERISA employers with self-funded plans. Arguably, preemption principles protect such employers from being required to do so by state law. Employers should be made aware that the EEOC and Department of Justice and other federal agencies have already announced that they plan to process complaints of sexual-orientation discrimination-which might include exclusion of same-sex spousal benefits as claims for sex discrimination under the Federal employment discrimination laws.

Employers should be aware that future litigation on this issue is likely to take place as employees push to receive benefits for same-sex spouses that opposite-sex spouses receive. Therefore, employers seeking to maintain plans that do not provide benefits for same-sex spouses should seek legal counsel.

### **HOW EMPLOYERS CAN ADDRESS THE ISSUE OF BENEFITS COVERAGE**

What employers will need to know could depend on whether the employer is private or public, as well as whether it's insured or self-funded.

- Public employers, generally state and local governments, will be required to recognize same-sex spouses and expected to treat all spouses equally for benefits purposes.
- Private employers differ because they are not required to provide health care benefits to any of their employees. However, if they do, they need to comply with Federal law. Along with power over their benefit plans, comes the power to decide whether they will recognize same-sex spouses or fail to provide equal treatment under their benefit plans. If the private employer determines that they will not provide coverage for all spouses equally, they could face litigation challenges alleging sex discrimination under Title VII of the Civil Rights Act of 1964. We note that recently, the Equal Employment Opportunity Commission announced that LGBT individuals are entitled to bring a claim of discrimination for benefits as well.

### **PLAN DOCUMENT IMPLICATIONS**

- Same-sex couples who reside in a state that did not previously allow same-sex marriages, can now marry and have their union recognized wherever it took place.
- Estate and gift tax laws will apply to same-sex couples equally. Pension and tax laws will also apply equally.
- Individuals who were in a state-sanctioned domestic partnership or civil union may now be required to enter into a same-sex marriage if they want their marriage recognized by the state. Presumably, opposite sex individuals in domestic partnerships can already take advantage of marriage. Plan sponsors will want to review their plan language to determine whether they have provisions for domestic partners, etc.
- Same-sex couples will be able to file Federal and State tax returns as a married couple, rather than filing separately.
- Situations where employers required one spouse to pay for imputed income on benefits received for health coverage no longer exist. Other tax implications including deductions, tax credits, etc. apply. Plan sponsors will want to review their plan language to determine whether they are in compliance with Federal law on this issue.





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### **SAME-SEX & TRANSGENDER EMPLOYEES PROTECTED ACCORDING TO EEOC**

Continuing legal actions after the Supreme Court's decision on same-sex spousal benefits have sharpened the U.S. Equal Employment Opportunity Commission's focus on employee rights on sexual orientation discrimination cases. In particular, the EEOC ruling in *Complainant v. Foxx* expanded the agency's position that lesbian, gay, bisexual and transgender (LGBT) employees may bring valid sex discrimination claims under Title VII of the Civil Rights Act of 1964 as a sex discrimination case. The case involved an action brought by an employee where discrimination based on sexual orientation was alleged. In another case, *Cote v. Wal-Mart Stores, Inc.* filed by employees in legal same-sex marriages alleged that Wal-Mart began offering health benefits to same-sex spouses in January 2014, but prior to that time, the company refused to provide such benefits. The employee, Cote, attempted to enroll her same-sex spouse in the company's health plan but was refused. This case is still in the courts, but it serves as a warning to employers that refusal to provide health benefits to same-sex spouses will be considered discrimination under Title VII of the Civil Rights Acts of 1964.

Title VII makes it illegal to discriminate against a job applicant or employee with respect to compensation, terms, conditions or privileges of employment because of race, color, religion, sex or national origin. Title VII applies to employer-provided benefits and requires that coverage under an employer-sponsored group health plan be provided without regard to any of the prohibited factors.

The EEOC internal memorandum detailing how charges could be tracked and coordinated involving same-sex couples or transgender employees is now available online at [www.EEOC.gov](http://www.EEOC.gov). The EEOC has instructed its investigators and attorneys to counsel individuals who believe they have been discriminated against because of their sexual orientation or transgender status, in the event that they file a complaint of sex discrimination under Title VII. It is also important to remember that Title VII's protections against sex discrimination apply equally to both heterosexual and LGBT employees. Employers choosing to provide domestic partner benefits only to same-sex couples, may be open to challenge by opposite-sex domestic partners.

### **ARE HRA'S SUBJECT TO THE PCORI FEE?**

If a plan sponsor provides a health reimbursement arrangement (HRA) and a major medical self-funded plan that have the same plan year, the HRA and the major medical plan may be treated as one plan. The HRA would not be subject to a separate fee. The HRA and the major medical plan need not be consolidated into one plan document.

Plan sponsors providing HRAs and a fully-insured group health plan are given different treatment. Section 4375 imposes separate fee on the issuer of a health insurance policy. An HRA that is offered along with an insured group health plan is subject to a fee, as well as the insurer of the group health plan, even though the HRA and the insured group health plan are maintained by the same plan sponsor. The regulations do not permit a plan sponsor to treat the HRA and a fully-insured plan as a single plan for purposes of the PCORI fee.

If the only plan maintained by the plan sponsor is an HRA, then the plan sponsor may treat each participant's HRA as covering a single life (therefore the plan sponsor is not required to include any dependents as covered lives).

For more information on the PCORI fee, see the IRS webpage below.

<http://www.irs.gov/uac/Newsroom/Patient-Centered-Outcomes-Research-Institute-Fee>

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