

# AFTER DOMA

## WHAT IT MEANS FOR YOU

The Supreme Court victory in *United States v. Windsor* striking down the discriminatory federal Defense of Marriage Act (DOMA) affirms that all loving and committed couples who are married deserve equal legal respect and treatment from the federal government. The demise of DOMA marks a turning point in how the United States government treats the relationships of married same-sex couples for federal programs that are linked to being married. At the same time, a turning point is part of a longer journey, not the end of the road. There is much work ahead before same-sex couples living across the nation can enjoy all the same protections as their different-sex counterparts.

### Keep in Mind:

- The Supreme Court's ruling in *Windsor* applies only to the federal government. It does not change discriminatory state laws excluding same-sex couples from state-conferred marriage rights.
- The ruling striking down DOMA will not be effective until 25 days from the decision. Even when effective, federal agencies—large bureaucracies—may need and take some time to change forms, implement procedures, train personnel, and efficiently incorporate same-sex couples into the spousal-based system.
- Until same-sex couples can marry in every state in the nation, there will be uncertainty about the extent to which same-sex spouses will receive federal marital-based protections nationwide. For federal programs that assess marital status based on the law of a state that does not respect marriages of same-sex couples, those state laws will likely pose obstacles for legally married couples and surviving spouses in accessing federal protections and responsibilities.
- Securing fair access to federal protections that come with marriage for all same-sex couples in the nation will take some time and work. In some situations, it may require Congressional action or formal rule-making by agencies.
- Before making a decision, it is essential that you consult an attorney for individualized legal advice. This is particularly important for people who are on certain public benefits, as getting married may jeopardize your eligibility without providing you the full measure of protections other married couples enjoy. In addition, couples who travel to another place to marry and then return to live in a state that does not respect their marriage may be unfairly unable to obtain a divorce, which can lead to serious negative legal and financial consequences. People must make careful decisions when and where to marry, even as we work together to end this injustice.
- We are committed to winning universal access to federal marital protections for married same-sex couples through ongoing public policy advocacy, and, where necessary, strategic litigation. Contact our organizations if you have questions, for updates and to learn more about what you can do to achieve full equality for those who are LGBT.

This Guidance is intended to provide general information regarding major areas of federal marriage-based rights and protections based on how the various federal agencies have administered federal benefits. ***It should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.*** Past practice is no guarantee of future developments. While laws and legal procedure are subject to frequent change and differing interpretations in the ordinary course, this is even more true now as the federal government dismantles DOMA and extends federal protections to same-sex couples. None of the organizations publishing this information can ensure the information is current or be responsible for any use to which it is put.

No tax advice is intended, and nothing therein should be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Contact a qualified attorney in your state for legal advice about your particular situation.

## PRIVATE EMPLOYMENT ISSUES AND BENEFITS

Although discrimination against married same-sex couples under the Defense of Marriage Act (DOMA) did not bar private employers from offering most spousal employment benefits to employees' same-sex spouses, it subjected same-sex couples to discriminatory tax treatment and other forms of unequal treatment. For example, married same-sex couples had to pay additional income taxes on the value of employer-sponsored health insurance that married different-sex couples did not need to pay, and married same-sex couples who divorced were barred by federal law from obtaining a court order sharing pension benefits as part of a divorce agreement.

Now that DOMA has been struck down, we urge married same-sex couples with employer-sponsored retirement benefits to ***immediately review your beneficiary designations and form of benefit elections*** to ensure that your designations and elections are accurate and complete, and that they reflect your wishes. Your rights may have changed, and waiting may hurt you and your family.

This Guidance addresses some of the marriage-related issues regarding employer-sponsored retirement plans and health insurance benefits that are regulated by federal law.

For more information about federal regulation of employee benefits, see:

[www.dol.gov/ebsa/faqs/faq\\_compliance\\_pension.html](http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html)

[www.aging.senate.gov/crs/pension7.pdf](http://www.aging.senate.gov/crs/pension7.pdf)

### What rights does federal law provide to married employees with respect to employer-sponsored health insurance benefits?

If your spouse is covered under your employer's health plan *and* you are considered validly-married by the federal government, you and your spouse should be eligible for the following additional federal protections:

- The value of your spouse's health insurance will not be treated as taxable income to you (the employee) or to your spouse.
- Your spouse and children have the right to remain in your health plan if you lose your job or your hours are reduced, or if you divorce or separate. This is known as "COBRA coverage" or "COBRA continuation coverage." While your employer has to allow you and your children and spouse to remain insured, you can be required to pay the full cost of those benefits. (Nothing prevents a plan from providing continuation coverage to domestic partners, but such coverage is not *required* by federal law.)
- While most health plans only let you enroll at specific times, marriage or divorce are "qualifying events" that will let you enroll or un-enroll outside those specific time periods.

In addition to these protections, you and your spouse may have other rights under state law.

This series of fact sheets produced together by:

American Civil Liberties Union | Center for American Progress | Family Equality Council | Freedom to Marry | Gay & Lesbian Advocates & Defenders  
Human Rights Campaign | Immigration Equality | Lambda Legal | National Center for Lesbian Rights | National Gay and Lesbian Task Force | OutServe-SLDN.

### What rights does federal law provide to married employees with respect to private retirement benefits?

If you are considered validly married by the federal government and eligible for a pension or other employer-sponsored retirement plan, federal law has specific requirements that your plan *must* follow in order to maintain tax-qualified status:

- The default form of benefit for a defined benefit pension plan (i.e., a traditional pension that guarantees a specific monthly payment at retirement) must be a joint and survivor spousal annuity (QJSA). This means that a portion of your pension will continue to be paid to your spouse if you die before your spouse does, although you and your spouse together can decide to waive this right and name someone else as the beneficiary.
- If you die before reaching retirement age, your spouse is entitled to a pre-retirement survivor annuity (QPSA) from a defined benefit pension plan.
- Your spouse has to give written consent if you want to name anyone else as your beneficiary for your retirement plan.
- Being married entitles your spouse to more options in taking distributions (regarding the timing of payments, and the amount you can receive) from your retirement plan, and to preferential tax treatment of those distributions.
- Your plan may also allow you to take money out of a retirement account without tax penalty to pay expenses like medical costs, tuition, or funeral expenses for your spouse.
- Finally, if you get divorced, the courts can ensure that your ex-spouse receives a portion of your retirement plan assets as part of the divorce agreement. This is called a Qualified Domestic Relations Order, or QDRO.

### Which marriages will be considered valid by the federal government for benefits purposes?

- **If you live in a state that respects your marriage:** The federal government will consider your marriage valid, and you have a right to all the protections that are required to be offered to spouses under federal law.
- **If you live in a state that doesn't respect your marriage:** Because some of these programs are regulated by the Internal Revenue Service and the Department of Labor, it may take some time to obtain guidance from the relevant agencies as to which marriages will be treated as valid by the federal government. There may be some initial uncertainty for a period of time because the IRS ordinarily follows the law of the state of domicile (primary residence) in determining whether to recognize a marriage. However, there is no statute or regulation compelling this approach, and the IRS has recognized "common law" marriages for tax purposes as long as they were valid in the state where they were entered into. In our mobile society, it would make more sense for the federal government to recognize all marriages that were valid where entered. If you encounter problems or have questions, contact one of the legal organizations listed below.

### Which employers are subject to the federal laws that regulate pensions and other employment benefits?

These federal laws generally apply to employers that offer retirement and health benefits, sometimes referred to as "ERISA plans." Some of these requirements, particularly the retirement plan obligations, do not apply to

federal, state, or local government employers, or to churches or religious associations or conventions of churches (although some religious employers choose to be governed by these federal laws). Health plans maintained by private-sector employers with 20 or more employees, employee organizations, or state or local governments are covered by COBRA.

### Does my employer have to change its pension plan before my spouse will be entitled to these protections, or will my spouse automatically be eligible?

It depends on what your plan documents say, and may depend on which kind of benefit is at issue. If your plan, like most, simply refers to "spouses," your employer doesn't necessarily need to change anything in order to include spouses of the same sex. If your plan states that "spouse" means only different-sex couples, or is determined by reference to the law of a state that does not respect your marriage, your plan documents likely need to be revised to comply with federal law. But, you and your spouse should be entitled to protections in the meantime even if your plan doesn't change its language. Talk with someone in your human resources department. If you still have questions, contact one of the organizations listed below, or a lawyer who specializes in employee benefits.

### What should I do if I am told that my plan won't cover my spouse?

If your employer or your retirement or health plan tells you that your spouse will not be treated as different-sex spouses are, it may be important to act quickly to preserve your rights. Sometimes the issue can be cleared up with a conversation, but you must follow the specific time limits to appeal determinations made by your plan. Contact one of the organizations listed below, or a lawyer who specializes in employee benefits.

### If my employer decides to start allowing spouses of the same sex to enroll in the health plan, when can I enroll my spouse? Will I need to wait until open enrollment?

It depends. Generally, "marriage" is a qualifying event for adding a spouse to the health plan. Even if you may have already been married for several years before DOMA was struck down, you should ask your employer if this change in federal law is a qualifying event. It's also possible that some plans will wait until the next open enrollment season in advance of a new plan year to allow employees to make changes to their benefits to add spouses who had been unable to obtain coverage previously.

### What if I got divorced while DOMA was still in effect, and I was unable to get an order sharing my retirement savings with my ex-spouse as part of my divorce?

Federal law has strong protections for your retirement savings, and generally prevents your plan from paying benefits to anyone but you or your beneficiary. One exception allows you to share those savings with your ex-spouse as part of a divorce agreement. This is called a Qualified Domestic Relations Order, or QDRO. If you were unable to obtain a QDRO when you divorced and now want to seek one, consult a qualified attorney about whether it is possible to re-open the divorce proceeding.

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**What if my spouse retired or died while DOMA was in effect, and I was told I was not entitled to a spousal survivor annuity?**

It's possible, though not certain, that you still might be able to receive a survivor annuity (QJSA or QPSA). If you did, you would continue to receive payments, but you also might have to pay back some of the money your spouse has already received from the plan, since taking a QJSA ordinarily means that the employee receives a lower payment at retirement, so that his or her spouse can continue to receive some of the benefit if the employee dies before the spouse. We recommend that you talk with an employee benefits lawyer to find out whether it would make sense to apply for a spousal annuity in your individual circumstances.

**FOR MORE INFORMATION, CONTACT****AMERICAN CIVIL LIBERTIES UNION**

[aclu.org/lgbt](http://aclu.org/lgbt)

**NATIONAL CENTER FOR LESBIAN RIGHTS**

[nclrights.org](http://nclrights.org)

**GAY & LESBIAN ADVOCATES & DEFENDERS**

[glad.org](http://glad.org)

**LAMBDA LEGAL**

[lambdalegal.org](http://lambdalegal.org)

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