



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.

BENEFITS AND PROTECTIONS FOR CIVILIAN FEDERAL EMPLOYEES AND THEIR SPOUSES

Current and former civilian employees of the federal government may be eligible for an array of protections and benefits for their spouses. The following offers general information about major categories of such protections and benefits. Current and former federal employees and their spouses and surviving spouses should obtain more specific information about their particular circumstances and rights. The federal Office of Personnel Management (“OPM”) administers benefit programs for current and former federal civilian employees. OPM’s website provides extensive information on these programs and contact information for making further inquiries. See www.opm.gov.

There may be initial uncertainty about how OPM will process some types of applications for benefits and protections for employees’ spouses. There may be uncertainty about how the federal government will treat marriages for particular purposes if the state where the employee works and/or lives does not respect the employee’s marriage. There also may be uncertainty about the timing of when current and former employees may add their existing spouses to their federal benefits, such as during a regularly scheduled Open Season for new enrollments, or whether OPM will establish special Open Seasons to address the needs of federal employees whose same-sex spouses have only now become eligible for protections after DOMA’s fall. Federal employees and their spouses with questions about these issues may contact the OPM. Our organizations will endeavor to provide any updates as we acquire more information. Please contact the legal organizations listed below if you encounter problems or have additional questions.

HEALTH BENEFITS FOR SPOUSES UNDER THE FEDERAL EMPLOYEE HEALTH BENEFITS PROGRAM (FEHB)

Spouses of federal employees may be eligible for employer-provided health insurance coverage. The types of health plans, premium levels, and application requirements may vary depending on the federal agency and the state where the employee works or lives. See www.opm.gov/healthcare-insurance/healthcare/plan-information/. Employees should check with OPM and/or their agency human resources staff for more information.

Q. If a federal employee gets married, can the employee add the new spouse to the employee’s health insurance plan?

A. Generally, a federal employee’s marriage is considered a “qualifying life event” (QLE), when an employee may change his or her insurance coverage by adding the new spouse to the employee’s policy. The employee must submit the enrollment change between 31 days before

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to 60 days after the QLE, i.e., the marriage. For more information on adding a spouse as a QLE, go to: www.opm.gov/healthcare-insurance/life-events/.

Q. Can a federal employee who has been married for more than 60 days add his or her spouse to the employee's health insurance plan during an "Open Season" or under other circumstances?

A. The federal government has an annual "Open Season" period when an employee may make changes to the employee's enrollment status, including the addition of a spouse to the employee's coverage. In 2012, the FEHB Open Season ran from November 12 – December 10, 2012, during which period changes could be made for the 2013 plan year. OPM generally posts information about an upcoming Open Season in October. See www.opm.gov/healthcare-insurance/healthcare/plan-information/enroll/#Employees.

Under certain circumstances, loss of pre-existing health insurance coverage by an employee's spouse is a QLE, allowing the employee to add the spouse to the employee's FEHB plan outside of Open Season. See www.opm.gov/healthcare-insurance/healthcare/plan-information/changes-you-can-make-outside-of-open-season/.

Q. Can the spouse of a federal employee who retires continue health insurance coverage on the employee's FEHB plan?

A. A spouse of an employee is eligible to continue health benefits coverage upon the federal employee's retirement if:

- the employee is entitled to retire on an immediate annuity under a retirement system for civilian employees, *and*
- the non-employee spouse has been covered as a family member in any FEHB plan for the 5 years of the federal employee's service immediately before the date the annuity starts, or for the full period of service since the spouse's first opportunity to enroll (if less than 5 years).

See www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/annuitants-and-compensationers/.

Q. If a federal employee divorces, can the employee's spouse remain on the employee's FEHB plan?

A. Divorce, annulment or legal separation are QLEs, when an employee can make changes to the employee's plan outside of the Open Season. See www.opm.gov/healthcare-insurance/healthcare/plan-information/changes-you-can-make-outside-of-open-season/.

A federal employee's spouse loses eligibility for coverage under the employee's Self and Family Plan when a divorce decree ending the marriage becomes final. However, the spouse may be entitled either to temporary continuation of coverage or to convert to an individual policy with the employee's insurance carrier. After divorce, a former spouse of an employee may under certain circumstances be eligible for coverage under "spouse equity" provisions

See www.opm.gov/healthcare-insurance/healthcare/reference-materials/reference/former-spouses/.

Q. If the employee lives in a state that does not recognize the marriages of same-sex couples, is the employee still entitled to FEHB coverage for a same-sex spouse?

A. We believe that the federal employee should be entitled to have his or her validly-entered marriage respected by the federal government for purposes of

FEHB spousal coverage, even if the employee lives in a state that does not respect the employee's marriage. There is no statute or regulation prohibiting FEHB coverage for such spouses. However, there may be some initial uncertainty about how the federal government will process applications for spousal coverage from employees living in states that do not respect the employees' marriages. If an employee or spouse encounters problems or questions, they should contact a legal organization listed below.

BENEFITS FOR SPOUSES UNDER THE FEDERAL EMPLOYEE DENTAL AND VISION INSURANCE PROGRAM (FEDVIP)

Dental and vision benefits are available to eligible federal employees and their eligible family members, including spouses, on an enrollee-pay-all basis. For general information, see www.opm.gov/healthcare-insurance/dental-vision/.

Q. Can a federal employee obtain FEDVIP dental and vision insurance for the employee's spouse?

A. Yes. A marriage is a qualifying life event (QLE), allowing a federal employee to add the spouse to dental and vision coverage by submitting the enrollment change between 31 days before and 60 days after the marriage.

See www.benefeds.com/BenefedHelp/FEDVIP/qualifying_life_events.htm. A federal employee can also add the spouse to FEDVIP during the annual Federal Benefits Open Season.

Q. If a federal employee divorces, can the former spouse retain FEDVIP dental and vision coverage?

A. No. Unlike for FEHB health insurance coverage, former spouses of federal employees are ineligible for continued FEDVIP coverage. See www.opm.gov/healthcare-insurance/dental-vision/eligibility/.

Q. Can the spouse of a federal employee who retires continue dental and vision insurance coverage on the employee's FEDVIP plan?

A. Yes.

Q. If the employee lives in a state that does not recognize the marriages of same-sex couples, is the employee still entitled to FEDVIP coverage for a same-sex spouse?

A. We believe that the federal employee should be entitled to have his or her validly-entered marriage respected by the federal government for purposes of FEDVIP spousal coverage, even if the employee lives in a state that does not respect the employee's marriage. There is no statute or regulation prohibiting FEDVIP coverage for such spouses. However, there may be some initial uncertainty about how the federal government will process applications for spousal coverage from employees living in states that do not respect the employees' marriages. If an employee encounters problems or questions, they should contact a legal organization listed below.

FEDERAL LONG TERM CARE INSURANCE PROGRAM (FLTCIP)

The Federal Long Term Care Insurance Program (FLTCIP) provides long term care insurance to help pay for costs of care when enrollees need help with activities they perform every day, or if they have a severe cognitive

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impairment, such as Alzheimer's disease. Federal employees and annuitants and their qualified relatives are eligible to apply for insurance coverage under the FLTCIP. Spouses, as well as domestic partners, are qualified relatives who can apply for the long term insurance coverage. See www.opm.gov/healthcare-insurance/long-term-care/.

Q. If the employee lives in a state that does not recognize the marriages of same-sex couples, can a federal employee's same-sex spouse apply for long term insurance coverage?

A. We believe that the federal employee should be entitled to have his or her validly-entered marriage respected by the federal government for purposes of FLTCIP spousal coverage, even if the employee lives in a state that does not respect the employee's marriage. There is no statute or regulation prohibiting FLTCIP coverage for such spouses. In addition, already the domestic partner of an employee may apply for FLTCIP coverage. If an employee or spouse encounters problems or questions, they should contact a legal organization listed below.

FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM (FEGLI)

The FEGLI program offers some group life insurance protections for the spouse of a federal employee.

Q. How does a spouse of a federal employee become a beneficiary of the employee's FEGLI policy?

A. Eligible federal employees are automatically enrolled in "Basic" insurance, providing an insurance benefit to a beneficiary upon the death of the employee. Federal employees may also opt to purchase additional insurance to benefit a beneficiary upon the employee's death. A federal employee may designate a person of the employee's choice to be the beneficiary of these FEGLI policies. This person could be the employee's spouse or unmarried domestic partner. If the federal employee has not designated anyone as beneficiary, the employee's surviving spouse automatically takes priority as beneficiary. An employee can update and change a beneficiary designation. See www.opm.gov/healthcare-insurance/life-insurance/reference-materials/handbook.pdf#page=39.

Q. Can a federal employee purchase FEGLI group life insurance to insure the employee's spouse?

A. Eligible federal employees can purchase an "Option C" FEGLI policy to insure the life of the employee's spouse. Upon the death of the spouse, insurance proceeds will be paid to the employee. An employee may elect Option C coverage on a spouse by submitting an election for the coverage within 60 days of the marriage, which is considered a qualifying life event, or during an Open Season. www.opm.gov/healthcare-insurance/life-insurance/reference-materials/handbook.pdf#page=39.

Employees who already have been married more than 60 days to a same-sex spouse and who wish to acquire Option C coverage for the employee's spouse should inquire with OPM whether they can apply for the coverage right away. They should also inquire when FEGLI may hold its next Open Season. FEGLI Open Seasons do not occur on an annual basis and are held only when specifically scheduled by OPM. The Administration should be encouraged to give federal employees already married to same-sex spouses access to these FEGLI spousal protections without delay.

Q. If the employee lives in a state that does not recognize the marriages of same-sex couples, can a federal employee's same-sex spouse qualify as a spouse for FEGLI purposes?

A. We believe that the spouse would be eligible to apply for the coverage if the spouse lives in a state that does not respect the couple's marriage. There is no statute or regulation dictating a different approach. However, there may be some initial uncertainty about whether the federal government will recognize for FEGLI purposes the marriages of employees living in states that do not respect the employees' marriages.

For extra protection, federal employees who want their same-sex spouses to be the beneficiaries of the employees' FEGLI policies can formally designate their spouses as their beneficiaries and not rely only on the default rule making a surviving spouse the beneficiary when no express designation has been made. That way, it should not matter whether there could have been any question whether OPM would recognize the marriage depending on the law of the particular state where the couple has lived. The spouse will have been expressly designated as the beneficiary of the employee's FEGLI policies and protected as a beneficiary.

If an employee or spouse encounters problems or questions, they should contact a legal organization listed below.

FEDERAL FAMILY AND MEDICAL LEAVE ACT (FMLA) BENEFITS AND OTHER FAMILY-RELATED LEAVE

Federal employees are entitled to take leave under certain circumstances to care for a spouse or to arrange and attend a spouse's funeral.

Q. Can a federal employee take FMLA leave to care for a spouse?

A. Yes. Under the Family and Medical Leave Act of 1993 (FMLA), federal employees are entitled to a total of up to 12 work weeks of unpaid leave during any 12-month period for:

- the care of a spouse who has a serious health condition, or
- in the event of a qualifying exigency arising because a spouse is on covered active duty or has been notified of an impending call or order to covered active duty in the Armed Forces.

Under certain conditions, an employee may use the 12 weeks of FMLA leave intermittently. An employee under some circumstances may elect to substitute annual leave and/or a limited amount of sick leave for any unpaid leave under the FMLA. FMLA leave is in addition to other paid time off available to an employee.

Federal employees may also be entitled to a total of 26 weeks of leave during any 12-month period to care for a spouse in the military who has become injured or ill in the line of duty while on active duty.

Q. What job benefits and protections does a federal employee receive under the FMLA?

A. Upon return from FMLA leave, an employee must be returned to the same position or to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment. An employee who takes FMLA leave is also entitled to maintain health benefits coverage. An employee on unpaid FMLA leave may pay the employee share of the premiums on a current basis or pay upon return to work.

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Q. Must an employee provide notice of intent to take family and medical leave to care for a spouse?

A. Yes, an employee must provide notice of his or her intent to take family and medical leave not less than 30 days before leave is to begin or, in emergencies, as soon as is practicable. An agency may request medical certification for FMLA leave taken to care for an employee's spouse who has a serious health condition.

For more information on FMLA leave to care for the spouse of a federal employee, see www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/family-and-medical-leave/.

Q. Does a federal employee have other protections if he or she needs to take leave because something happens to the employee's spouse?

A. A federal employee may use up to 13 days of annual sick leave under certain circumstances to care for a family member or attend the family member's funeral. "Family member" includes a spouse, and, under a 2010 federal regulation, an unmarried domestic partner as well. The sick leave may be used to:

- provide care for a family member, including a spouse or domestic partner, who is incapacitated as a result of physical or mental illness, injury, pregnancy, or childbirth;
- attend to a family member receiving medical, dental, or optical examination or treatment;
- provide care under certain circumstances for a family member who has been exposed to a communicable disease; or
- make arrangements necessitated by the family member's death or attend the family member's funeral.

See www.opm.gov/policy-data-oversight/pay-leave/leave-administration/fact-sheets/sick-leave-for-family-care-or-bereavement-purposes/.

Q. If the employee lives in a state that does not recognize the marriages of same-sex couples, is the employee still entitled to FMLA leave to care for a same-sex spouse?

A. We believe that the federal employee should be entitled to have his or her validly-entered marriage respected by the federal government for federal FMLA, even if the employee lives in a state that does not respect the employee's marriage. There may be some initial uncertainty about how the federal government will process requests for federal FMLA leave to care for spouses from employees living in states that do not respect the employees' marriages. If an employee encounters problems or questions, they should contact a legal organization listed below.

FEDERAL FLEXIBLE SPENDING ACCOUNT (FSAFEDS)

An FSAFEDS account is an account in which an eligible federal employee can contribute money from the employee's salary BEFORE taxes are withheld, and then receive reimbursement for family out-of-pocket health care—including a spouse's health expenses—and dependent care expenses.

Q. If a federal employee's marital status changes, can the employee change his or her flexible spending account (FSA) election accordingly?

A. A federal employee may change the FSA election between 31 days before and 60 days after a Qualifying Life Event (QLE), including marriage, legal

separation, divorce, or the death of a spouse. See www.fsafeds.com/forms/qscfact.pdf. Otherwise, the employee may make changes to his or FSA election during the annual Open Season. See www.opm.gov/healthcare-insurance/flexible-spending-accounts/.

Q. If a federal employee lives in a state that does not respect his or her marriage to a spouse of the same sex, will the employee's spouse be treated as a family member whose health expenses may be reimbursed from the FSAFEDS account?

A. Because the FSAFEDS benefit is a tax benefit regulated by the Internal Revenue Service (IRS), the answer awaits guidance from the IRS. The IRS ordinarily follows the law of the state of domicile (primary residence) in determining whether to recognize a marriage. However, the IRS has recognized "common law" marriages for tax purposes as long as they were valid where celebrated, even if they are not recognized in the state of domicile. In our mobile society, it would make more sense for the IRS to use a place of celebration rule, under which a marriage is recognized by the federal government so long as it was valid where entered, for all marriages and not just for "common law" marriages. Our organizations are encouraging use of the place of celebration rule as broadly as possible. If an employee or spouse encounters problems or questions, they should contact a legal organization listed below. *This is not intended as tax advice; consult with your own tax advisor for information about your own situation.*

RETIREMENT AND SURVIVORS BENEFITS (CSRS, FERS)

Eligible federal employees are entitled to federal retirement benefits under either the Civil Service Retirement System (CSRS), or the Federal Employees Retirement System (FERS). Each of these plans includes certain benefits for the employee's spouse. Employees covered under CSRS may elect to switch to coverage under FERS. See www.opm.gov/retirement-services/publications-forms/csrsfers-handbook/c011.pdf.

Q. What kinds of benefits are available to spouses of retired employees through CSRS or FERS?

A. There are several types of benefits available to spouses of retired employees under FERS; fewer are available under CSRS, though employees may elect to switch to FERS coverage. The types of benefits available include:

1. Basic employee death benefit: The spouse of a retiree with a FERS plan may receive a basic employee death benefit in the form of a one-time payment of over \$30,000 (for deaths on or after December 1, 2011) plus an additional amount based on the employee's salary. This benefit is not available to a spouse of an employee with a CSRS plan. This benefit is available to spouses of FERS employees if:

- the surviving spouse was married to the deceased for at least nine months, or
- the employee's death was accidental, or
- there was a child born of the marriage to the employee.

The basic employee death benefit may be payable to a *former spouse* (in whole or in part), if a qualifying court order, awarding a benefit, is on file at OPM and the former spouse was married to the deceased employee for a total of at least nine months and did not remarry before reaching age 55. See www.opm.gov/retirement-services/fers-information/.

2. Survivor annuity: The surviving spouse of a federal employee with a FERS account (not applicable to CSRS), may receive a survivor annuity

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in the form of a monthly payment after that employee's death. Federal employees have a portion of their paychecks withheld, which goes toward their retirement accounts. Upon retirement, an employee wishing to provide a survivor annuity to his or her spouse receives a reduced fixed sum out of this account each month until death (a monthly annuity). If the employee has a surviving spouse, that spouse may be eligible to receive a monthly survivor's annuity after the employee dies, based on a percentage of the amount of the employee's monthly annuity.

To qualify for the monthly benefit the surviving spouse must have been married to the employee for at least nine months, or, if the death occurred before nine months, a survivor annuity may still be payable if the employee's death was accidental, or there was a child born of the marriage.

Monthly benefits may also be paid to the former spouse of a deceased employee under a court order. A former spouse must also meet the nine month marriage requirement and the employee must have re-elected to provide a survivor annuity to his or her former spouse within two years of the divorce being final or must have provided for the survivor annuity in the divorce decree.

See www.opm.gov/retirement-services/fers-information/survivors/#url=Overview.

3. Lump sum payment: A lump sum payment is made when an employee dies without anyone who qualifies to receive a survivor annuity and a balance remains in the retirement account. The employee may make an advance designation of beneficiary to receive such a lump payment. If the employee has not made an advance designation, the employee's surviving spouse has first priority to receive the lump sum payment. See www.opm.gov/retirement-services/csrs-information/survivors/#url=No-Beneficiary;

Q. Can a spouse receive a survivor annuity under FERS regardless of whether the employee married before or after retiring?

A. Widow(er)s who were married to the employee at the time of the employee's retirement are entitled to an annuity, unless the spouse consents not to receive the annuity. See www.opm.gov/retire/pubs/handbook/C052.pdf. If a federal employee marries *after* retirement and wants the spouse to be able to receive an annuity, the employee must file an election within two years of the date of the marriage. See www.opm.gov/retirement-services/my-annuity-and-benefits/life-events/#url=MarriageDivorce. While it is unclear how the federal government will assess the two-year period for employees who have already retired and are already married to a same-sex spouse and want the spousal annuity now that DOMA has been struck down, employees should consider filing an election designating the spouse to receive the annuity and should seek further information from OPM.

Q. If a federal employee lives in a state that does not respect his or her marriage to a spouse of the same sex, will the employee's spouse qualify as a spouse for federal FERS or CSRS purposes?

A. There currently is uncertainty about this. Existing federal regulations applying to FERS and CSRS define "marriage" as "a marriage recognized in law or equity under the whole law of the jurisdiction with the most significant interest in the marital status of the employee . . . or retiree." See 5 C.F.R. § 843.102 (FERS); 5 C.F.R. § 831.603 (CSRS). Applying this definition to other types of marriages, courts and the OPM have generally considered the jurisdiction with the most significant interest to be the place where the couple predominately lived while the employee was working, after retirement, and/or at the time of the employee's death. This may mean that a federal employee who has never lived or worked in a state that respects the

employee's marriage may be deemed not to qualify for protections for the employee's spouse under those regulations. However, the federal government may interpret the regulations and the circumstances of married same-sex couples to permit recognition of such marriages. It may also amend the regulations to clarify that same-sex couples who entered into marriages valid where celebrated, regardless of where the couple happens to live, will be respected as married for FERS and CSRS purposes. That process would likely take months. Our organizations are encouraging adoption of such a "place of celebration" rule to allow a same-sex couple's marriage to be recognized for such federal purposes wherever they live or relocate.

ETHICS AND CONFLICTS OF INTERESTS RULES GOVERNING FEDERAL EMPLOYEES AND THEIR SPOUSES

Federal employees and their spouses should also be aware that ethics and conflicts of interest rules governing the conduct of federal employees and their spouses will now apply to same-sex married couples. Federal employees and same-sex spouses should be alert to such considerations and seek advice from their own counsel if they have questions. The United States Office of Government Ethics may offer additional information. See www.oge.gov.



FOR MORE INFORMATION, CONTACT

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