

# Marital Rights for Same-Sex Couples

The U.S. Supreme Court's rulings in *United States v. Windsor* (2013) and other cases were key to proving the Defense of Marriage Act (DOMA) was unconstitutional, clearing the way for same-sex couples to receive some 1,138 federal benefits and protections that were previously denied them. These include Social Security survivor and spousal benefits, Medicare spousal benefits and Medicaid's long-term care spousal impoverishment protections.

In June of 2015, the U.S. Supreme Court in *Obergefell v. Hodges* decided that all states must license a marriage between two people of the same sex, **and** must recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State.

Following are selected federal benefits and protections of particular interest to senior clients that are now accorded to legally married same-sex couples, with some pros and cons:

**Veteran's benefits:** Spouses of deceased veterans will be eligible to receive veteran's benefits. But veterans whose same-sex spouses have significant income may lose benefits they are now eligible for because a spouse's income is counted in determining veterans' eligibility for certain benefits.

**Social Security spousal and survivor benefits:** Same-sex spouses will be eligible for benefits accorded opposite-sex spouses, such as entitlement to one-half of a working spouse's full retirement benefit upon reaching full retirement age. If one spouse dies, the surviving spouse is entitled to the worker's full retirement benefits once the surviving spouse has reached full retirement age, assuming that amount is higher than the one he or she was currently receiving.

**Supplemental Security Income:** Because eligibility depends in part on a spouse's income, some who would have previously qualified as individuals won't be eligible if their spouse has substantial income.

**Federal estate and gift taxes:** This was the federal benefit at issue in the case the Supreme Court decided. An unlimited marital deduction now applies on both the state and federal level. If one spouse wishes to leave all assets to the living spouse, he or she will be able to do so free of estate tax. Married same-sex couples should also be able to share assets without being subject to gift taxes and be able to receive tax-free access to a trust's income or principal.

**Income Taxes:** Gay married couples can file joint federal income tax returns. In general, this will mean higher taxes for couples where both partners have similar incomes and lower taxes for those where one spouse earns much more than the other. This should be discussed with your accountant, to learn the best way to file if you want to marry.

**Retirement plan rollover:** A deceased spouse's Individual Retirement Arrangement (IRA) can roll over to the survivor's without being subject to tax. Also, if one spouse is not working and one is, the working spouse can put money into the non-working spouse's IRA or Roth, as well as into his or her own IRA or Roth

**Employer-provided health insurance:** This is a tax-free benefit when given to employees, their spouses, and their children. Under DOMA, same-sex couples had to pay income tax on spousal health benefits, but not anymore.

**Medicaid's spousal impoverishment protections:** The U.S. Department of Health and Human Services (DHHS) announced years ago that it would permit states to extend Medicaid long-term care protections available to spouses of nursing home residents to same-sex domestic partners as well. Maine and many other states did not implement this at the time. Now these protections apply to all legally married same-sex couple.

Transfers between spouses do not cause a penalty period for Medicaid / MaineCare eligibility, making it easier to save assets, especially real estate. There are also planning measures that benefit married couples that cannot be used by unmarried couples. Transfers between non-married couples do cause a penalty period of five years. For example, if real estate or a bank account is owned jointly, and one partner needs nursing home care and transfers her / his share to the other partner, the penalty period comes into effect. This does not happen between spouses.

The asset and income protections primarily help lower-income seniors. Although under the MaineCare rules non-married seniors may not freely transfer assets to each other, they are not subject to the asset limits. Presuming assets are held separately, the healthy partner can keep all of his or her assets and the nursing home partner need only spend down his / her own assets. If the healthy partner in a same-sex couple is well off or has all of the couple's assets in his / her name, the introduction of spousal protections will mean he or she may keep less of his / her assets if the partner is to qualify for MaineCare.

**Medicare:** Married same-sex spouses will now be able to enroll without paying a premium even if they lack the requisite quarters of work history.

**Federal protections against discrimination:** Gays and lesbians are still not federally protected against discrimination *based on sexual orientation* in employment or public accommodations. But they will enjoy various rights against discrimination based on their *marital status*.

**Benefits for spouses of federal employees:** Before the *Windsor* decision, gay federal employees couldn't get most spousal benefits. The biggest change is in health insurance, but there are lots of other issues, from relocation allowances to who gets a deceased federal worker's last paycheck. The extension of same-sex spousal benefits is especially important for military service members, whose compensation is heavily weighted toward benefits (including housing allowances that depend on marital status) rather than salary.

**Employee benefits for private workers:** Many companies already gave benefits to same-sex spouses, but federal law still matters. For example, COBRA continuation coverage for health insurance is available to employees and their spouses, but DOMA meant that same-sex spouses had no right to it. ERISA prohibits workers from waiving certain employee benefit rights without spousal approval.

**Immigration:** Marriage is an important factor for immigration eligibility: If you are a foreigner with a work visa to come to the U.S., you can often bring your foreign spouse along, and if you marry an American, that usually makes you eligible to immigrate. Extending such rights to same-sex couples was a sticking point in negotiating a comprehensive immigration reform bill. Now, the federal government

will recognize valid state marriages for immigration purposes and may also recognize foreign ones.

**Federal education loans and grants:** Eligibility for these is determined in part based on the spouse's income. Gay students whose spouses have significant income may lose benefits.

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