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February 2, 2009

Congressional Research Service

Report RS21897

*The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions*

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January 3, 2008

**Abstract.** With the 2004 legalization of same-sex marriage in Massachusetts, many have questioned how the legalization of such marriages at the state level may affect the eligibility for and payment of federal Social Security benefits and private pensions. Social Security benefits are currently paid to the spouses of disabled, retired, or deceased workers entitled to Social Security. However, under current law, same-sex spouses are not eligible for Social Security benefits because they are unable to meet the genderbased definitions of "wife" and "husband" in the Social Security Act and the genderbased definition of "marriage" established by the Defense of Marriage Act. Federal employee pensions and private-sector pensions regulated by the Employee Retirement Income Security Act (ERISA) are required to provide certain benefits to the spouse of a participant in the event of the participant's death. Under the Defense of Marriage Act, both federal pensions and private-sector pensions regulated by ERISA are required to define a spouse only as "a person of the opposite sex who is a husband or a wife."

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## CRS Report for Congress

# The Effect of State-Legalized Same-Sex Marriage on Social Security Benefits and Pensions

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### Summary

With the 2004 legalization of same-sex marriage in Massachusetts,<sup>1</sup> many have questioned how the legalization of such marriages at the state level may affect the eligibility for and payment of federal Social Security benefits and private pensions. Social Security benefits are currently paid to the spouses of disabled, retired, or deceased workers entitled to Social Security. However, under current law, same-sex spouses are not eligible for Social Security benefits because they are unable to meet the gender-based definitions of “wife” and “husband” in the Social Security Act and the gender-based definition of “marriage” established by the Defense of Marriage Act. Federal employee pensions and private-sector pensions regulated by the Employee Retirement Income Security Act (ERISA) are required to provide certain benefits to the spouse of a participant in the event of the participant’s death. Under the Defense of Marriage Act, both federal pensions and private-sector pensions regulated by ERISA are required to define a spouse only as “a person of the opposite sex who is a husband or a wife.” This report will be updated as legislative activity warrants.

### Social Security

Generally, Social Security benefits are payable to the spouses of retired, disabled, or deceased workers covered by Social Security. Spousal benefits are intended for individuals who are financially dependent on spouses who work in Social Security-covered positions. The spousal benefit is equal to 50% of the retired or disabled worker’s benefit and 100% of the deceased worker’s benefit.

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<sup>1</sup> In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court ruled that under the state constitution, same-sex couples have the right to marry. The court later advised the state legislature that civil unions would not meet the requirements of the *Goodridge* decision.

The Social Security Act generally defers the determination of whether a marriage is valid for the purpose of qualifying for spousal or survivor benefits to the state of residence of the worker.<sup>2</sup> One might interpret this deferral to the state-level definition of marriage as permitting a same-sex spouse to be eligible for Social Security spousal benefits if such marriages are legal in that state. However, the definitions of “wife” and “husband” in the Social Security Act rely on gender-specific pronouns. The Social Security Act defines a person as the “wife” of an individual if *she* either (1) is the mother of *his* son or daughter; (2) is married to *him* for at least a year before filing for benefits; or (3) in the month prior to *her* marriage to *him* was entitled to (or if she had applied and been old enough would have been entitled to) Social Security benefits as a spouse, widow, parent, or disabled child.<sup>3</sup> Similarly, the act defines a person as the “husband” of an individual if *he* either (1) is the father of *her* son or daughter; (2) is married to *her* for at least a year before filing for benefits; or (3) in the month prior to *his* marriage to *her* was entitled to Social Security benefits as a spouse, widow, parent or disabled child.<sup>4</sup> The Social Security Administration (SSA) interprets this use of gender-specific pronouns as an indication that Congress did not intend same-sex spouses or survivors to be eligible for Social Security benefits.<sup>5</sup> Regardless of the SSA position, the Defense of Marriage Act of 1996 (DOMA, P.L. 104-199) established the legal definition of “marriage” as only a legal union between one man and one woman as husband and wife, and defined a “spouse” as only a person of the opposite sex who is a husband or wife when determining the meaning of any act of Congress, ruling, regulation, or interpretation by federal agencies. The SSA must use this federal definition of marriage when interpreting the Social Security Act. Therefore, the legalization of same-sex marriage at the state level has no effect in determining the validity of marriage for Social Security purposes.<sup>6</sup>

## Federal Employee Pensions

Federal employees with permanent appointments are eligible for retirement and disability benefits under either the Civil Service Retirement System (CSRS) or the Federal Employees Retirement System (FERS). All federal employees initially hired into permanent federal employment on or after January 1, 1984 are covered by FERS. Employees hired before January 1, 1984, are covered by CSRS unless they chose to switch to FERS during open seasons held in 1987 and 1998. Both FERS and CSRS provide survivor benefits for the spouse and dependent children of a deceased federal employee or retiree.<sup>7</sup> Title 5 of the U.S. Code, which governs benefits under CSRS and FERS, defines the term “spouse” without reference to the individual’s gender. Title 5 does

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<sup>2</sup> 42 U.S.C.416(h).

<sup>3</sup> 42 U.S.C. 416(b).

<sup>4</sup> 42 U.S.C. 416(f).

<sup>5</sup> See Section GN 00305.005 of the SSA *Program Operations Manual System*, Paragraph B(5). This manual is used by SSA employees to administer federal law, regulations, and rulings.

<sup>6</sup> Some have challenged the constitutionality of the Defense of Marriage Act. This legal question is beyond the scope of this report. Readers interested in this issue should refer to CRS Report RL31994, *Same-Sex Marriages: Legal Issues*, by Alison M. Smith.

<sup>7</sup> See CRS Report RS21029, *Survivor Benefits for Families of Civilian Federal Employees and Retirees*, by Patrick Purcell.

not define the word “marriage”; however, the *Code of Federal Regulations* defines “marriage” for purposes of determining eligibility for federal retirement benefits under Title 5 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, member, or retiree unless the law of that jurisdiction is contrary to the public policy of the United States.”<sup>8</sup>

Because federal employee retirement benefits under both CSRS and FERS are subject to the statutory interpretation required by the Defense of Marriage Act, in determining eligibility for survivor or dependant benefits under CSRS or FERS, “the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”<sup>9</sup>

Although a federal employee cannot name a domestic partner as his or her surviving beneficiary under either FERS or CSRS, an employee who is applying for a non-disability retirement can elect an Insurable Interest Annuity (IIA). Only one person may be named as the beneficiary of the IIA, and the election must be made at the time of retirement. The person named as the beneficiary must be someone who is financially dependent on the employee and the employee must establish, through one or more affidavits from other people, the reasons why the beneficiary might reasonably expect to suffer loss of financial support as a result of the employee’s death. The cost of an IIA can range from a 10% reduction in the employee’s retirement annuity if the beneficiary is 10 years younger than the employee to a 40% reduction if the beneficiary is 30 or more years younger.

Under both FERS and CSRS, an employee may designate a domestic partner as his or her beneficiary for a lump-sum refund of retirement contributions to the retirement system. However, if anyone qualifies to receive survivor annuity benefits by law (such as a spouse or dependent child), retirement contributions cannot be refunded. A federal employee also can name a domestic partner as the beneficiary under the Thrift Savings Plan (TSP), and he or she can designate a domestic partner as the beneficiary under the Federal Employee Group Life Insurance (FEGLI) program.

## Private-Sector Pensions

Employers in the private sector are not required to offer pension benefits, but those that do must comply with the Employee Retirement Income Security Act (ERISA, P.L. 93-406). Section 514(a) of ERISA provides that the law preempts all state laws relating to employee benefits that are covered by ERISA.<sup>10</sup> Employer-sponsored pension plans also must comply with the relevant provisions of the Internal Revenue Code (IRC) in order to qualify for the preferential tax treatment granted to qualified pension plans.<sup>11</sup> Under the IRC, a tax-qualified defined-benefit pension must provide a married participant with a qualified pre-retirement survivor annuity (QPSA) while working and a qualified

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<sup>8</sup> See 5 C.F.R. §831.603 and 5 C.F.R. §843.102.

<sup>9</sup> 1 U.S.C. §7.

<sup>10</sup> 29 U.S.C. §1144(a).

<sup>11</sup> Employer contributions to a qualified plan are a tax-deductible expense for the employer and are not included in the income of the employee.

joint and survivor annuity (QJSA) at retirement.<sup>12</sup> A married participant must obtain his or her spouse's written approval either to waive a QJSA or a QPSA or to use a pension benefit as security for a loan.<sup>13</sup> Defined-contribution plans, such as §401(k) plans, pay the account balance to the designated beneficiary if the participant dies. The employee's spouse is the automatic beneficiary of the employee's account upon his or her death unless the employee has designated another beneficiary. The spouse's consent is not required in order for a participant in a defined-contribution plan to designate another beneficiary or beneficiaries in the event of the participant's death.

In administering federal income taxes, the Internal Revenue Service (IRS) has historically maintained that an individual is considered to be a "spouse" if the applicable state law recognizes the relationship as a marriage. If, for example, state law recognizes common-law marriages as legal, an employer in that state will be required to recognize an employee's common-law spouse as his or her legal spouse and IRS will recognize the marriage as valid. The IRS has never recognized same-sex marriages for income tax purposes, and the Defense of Marriage Act prohibits it from doing so, regardless of any state law. Moreover, while an employer may voluntarily extend benefits to the same-sex domestic partners of its employees, the DOMA supersedes state or local laws that would require an employer to recognize a same-sex partner as an employee's spouse for purposes of administering employer-sponsored retirement plans.

As noted above, tax-qualified pension plans are required to provide a qualified joint-and-survivor annuity to a married participant and spouse, unless both spouses decline the QJSA in writing. Because DOMA prohibits employers from recognizing same-sex marriage for purposes of administering pension plans, a plan cannot require a participant with a same-sex partner to take a QJSA as the normal form of benefit, even if state law recognizes the same-sex partner as a spouse, because federal law (DOMA) prohibits federally regulated plans from recognizing a same-sex partner as a spouse.<sup>14</sup>

DOMA provides that, in interpreting any federal statute, ruling, or regulation — including, for example, ERISA and the Internal Revenue Code — a spouse can only be a person of the opposite sex who is a husband or wife. Consequently, a pension plan cannot be required to recognize a same-sex spouse even if same-sex marriages are permitted under state law.<sup>15</sup> Some benefits specialists have suggested that because Section 514(a) of ERISA preempts state laws that relate to employee benefits covered by ERISA, ERISA would therefore preempt any state law requiring the plan to recognize same-sex marriage for purposes of administering pension benefits. However, whether

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<sup>12</sup> 26 U.S.C. §401(a)(11) and §401(a)(17).

<sup>13</sup> 26 U.S.C. §417(a) and Treasury Regulation §1.401(a)-20, A-24, respectively.

<sup>14</sup> Some analysts have suggested that because the IRC does not restrict who is considered to be a "survivor," a plan could require a same-sex partner's consent to name anyone else as the recipient of a death benefit or contingent annuity, even though the plan could not require a retiring participant with a same-sex partner to take a qualifying joint and survivor annuity instead of a single-life annuity. See Neal S. Schelberg and Carrie L. Mitnick, "Same-Sex Marriage: Implications for Employee Benefit Plans," *Employee Benefits Journal*, vol. 29, no. 2, June 2004.

<sup>15</sup> For example, because DOMA prohibits recognition of same-sex marriage, an employer could not be required to comply with a qualified domestic relations order (QDRO) from a state court in which a spouse in a same-sex marriage was named as an alternate payee of a pension benefit.

ERISA alone would preempt state laws recognizing same-sex marriage is irrelevant because DOMA prohibits recognition of same-sex spouses in the interpretation and application of federal law.

**Bills in the 110<sup>th</sup> Congress.** Several bills have been introduced in the 110th Congress to address the issue of same-sex marriage. H.J.Res. 22 is a proposed constitutional amendment that would amend the United States Constitution to state that “marriage in the United States shall consist only of a legal union of one man and one woman” and that “no State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State.”

H.R. 107 would define marriage for all legal purposes in the District of Columbia to consist of the union of one man and one woman. H.R. 724 would amend Title 28 of the United State Code to limit federal court jurisdiction over questions under DOMA.

S. 2521, the Domestic Partner Benefits and Obligations Act, would extend benefits to domestic partners of federal employees. Under the act, same-sex domestic partners of federal employees would be eligible for benefits under the Federal Employees’ Health Benefits Program, long-term care insurance, and the Federal Employees’ Retirement System under the same conditions as spouses of married employees.