



“Marriage Isn’t Everything: Issues Facing LGBT Seniors”

King County Bar Association, 1200 Fifth Avenue, Suite 700, Seattle

July 17, 2014

1.00 Ethics **AV** CLE Credit Approved: approval # 381470

AGENDA

Presentation: “Marriage Isn’t Everything: Issues Facing LGBT Seniors ” by Eleanor Doermann, JD

- Who are LGBT elders and what issues do they face?
- What is the current status of marriage equality law?
- Which LGBT elder issues are addressed by marriage equality, and which require a different approach?

SPEAKER:

Eleanor Doermann, JD - Eleanor graduated from Seattle University School of Law in 2012 and opened her own law practice, Pathway Law, PC in June, 2013, following a 25-year career as a physical therapist at Swedish Medical Center. Her law practice focuses on estate planning, elder law, benefits, and LGBT civil rights law. The Windsor Supreme Court decision has serendipitously wrapped those practice areas together by making benefits for LGBT elders a pressing civil rights issue.

Since graduating from law school, in addition to launching her practice, Eleanor authored an advocacy report, “Terror in Twilight” in 2013 in conjunction with the Korematsu Center at Seattle University, documenting the experiences of the Latino community with the U.S. Border Patrol on Washington’s Olympic Peninsula. Eleanor was also selected as one of the first four attorneys to participate in Seattle University Law School’s Incubator Program, established in 2014 to support recent law graduates in establishing solo practices that provide legal services for clients of moderate means.

HOW DO I EARN CREDIT FOR SELF-STUDY OR AUDIO/VISUAL (A/V) COURSES?

Lawyers are allowed a maximum of 22.5 audio-visual credits out of the 45 credits required for reporting period compliance.

Only 22.5 credits must be live.

For pre-recorded A/V (self-study) programs, although the sponsor should apply for accreditation, **lawyers need to report the credits earned for taking the course.** If the program has been approved, you can simply add it to your roster and

(a) indicate the date(s) you took the course, and

(b) the number of credits you earned.

- To add an approved course to your roster, follow the procedures below:
- Go to the "mywsba" website at www.mywsba.org/.
- Log in.
- Click on the "Access MCLE" link in the "MCLE Info" box on your home profile page.
- Click on "Add Activity." Search to find the approved course in our system. (See search suggestions on the screen.)
 - ** If you already know the Activity ID number for the course, you need only enter that information on the search screen.
 - ** If you do not know the Activity ID number, you will need to do a search to see if a Form 1 has been approved for the course.
 - ** "Add Approved Activities" lists can be sorted, by clicking on the column headings, to make finding a course easier.
- Locate the approved course (activity) on the list and click on the Activity ID link to add it to your roster.
 - For live courses, correct the number of credits earned, if needed.
 - For A/V courses, (1) indicate the date(s) you took the course, and (2) the number of credits you earned.
- Click the "Add Activity" Button.

If you were not able to find the Form 1 for the course, click the Live or A/V Form 1 button on the search results screen, fill out the form, and submit the course for accreditation review. Form 1 applications must include a detailed agenda of the activity, including the start and end times for each session and break. Without a detailed agenda, no credit can be granted.

One (1) MCLE credit may be claimed for each 60 minutes of participation in an accredited activity. Time spent on course registration, introductions, breaks, and business meetings are not included in activity accreditation and may not be counted. Bar members are responsible for making appropriate adjustments to their records when the actual time spent in an accredited activity is less than the maximum approved credit-hours. Adjustments must also be made for late arrival, early departure or other periods of absence or non-participation.

- You can Edit or Delete any activity on your Current Reporting Period roster by clicking on the hyperlink to the right of an activity.
- Your online CLE credit roster is provided only for your convenience and is not an official record. At the end of your reporting period you must certify your credits with the online or paper CLE Certification (C2) form to meet Supreme Court MCLE compliance requirements.
- A "Certificate of Attendance" or other sponsor-provided certification is not sufficient to receive course credit.

For further assistance, contact the State Bar Service Center at 206-443- (9722) or 800-945-9722, or questions@wsba.org.

“Marriage Isn’t Everything: Issues Facing LGBT Seniors”

presented to

The Guardianship and Elder Law Section of the King County Bar Association

July 17, 2014

Eleanor Doermann, JD
Pathway Law, PC
14900 interurban Ave. S., Ste. 271
Tukwila, WA 98168

Telephone: (206) 499-3289
Fax: (888) 204-1703
Website: www.pathwaylaw.net
E-mail: eleanor@pathwaylaw.net

Outline:

1. Who are LGBT elders and what issues do they face? Results of some recent studies.
2. Current status of marriage equality law, including new policies released June 20, 2014.

Bio:

Eleanor graduated from Seattle University School of Law in 2012 and opened her own law practice, Pathway Law, PC in June, 2013, following a 25-year career as a physical therapist at Swedish Medical Center. Her law practice focuses on estate planning, elder law, benefits, and LGBT advocacy. The *Windsor* Supreme Court decision serendipitously wrapped those practice areas together, by making benefits for LGBT elders a pressing civil rights issue.

Since graduating from law school, in addition to launching her practice, Eleanor has authored an advocacy report, “Terror in Twilight” in 2013, documenting the experiences of the Latino community on the Olympic Peninsula with U.S. Border Patrol. Eleanor was also selected as one of the first four attorneys to participate in Seattle University Law School’s Incubator Program, established in 2014 to support recent law graduates in establishing solo practices that provide legal services for clients of moderate means.

Contents of Handout:

Resources	p.2
Notes on Aging and Health Report	pp. 3 - 5
Notes on LGBT Older Adults in Long-Term Care	p. 6
Notes on Opening Doors: An Investigation of Barriers to Senior Housing for Same Sex Couples.	p. 7
History of Legal Recognition of Same-Sex Marriage	p. 8
Post-DOMA Rollout	pp. 9 – 12
New Social Security POMS	pp. 13-16

RESOURCES

LGBT ADVOCACY ORGANIZATIONS:

- National Resource Center on LGBT Aging <http://www.lgbtagingcenter.org/>
- National Center for Lesbian Rights <http://www.nclrights.org/>
- SAGE: Services & Advocacy for Gay, Lesbian, Bisexual, and Transgender Seniors
<http://www.sageusa.org/>
- Seattle Senior Services/LGBT Information <http://www.seniorservices.org/lgbt/Home.aspx>
- Northwest LGBT Senior Care Providers Network <http://www.nwlgbtSeniorcare.org/>

WRITTEN RESOURCES:

- *LGBT Older Adults in Long-Term Care Facilities: Stories from the Field*, based on survey between October 2009 and June, 2010. Collaboration between the National Senior Citizens Law Center, National Gay and Lesbian Task Force, Services & Advocacy for GLBT Elders (SAGE), Lambda Legal, National Center for Lesbian Rights, and National Center for Transgender Equality.
http://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf
- *Opening Doors: An Investigation of Barriers to Senior Housing for Same Sex Couples*. Collaboration between the Equal Rights Center and SAGE, published in 2014.
http://www.equalrightscenter.org/site/DocServer/Senior_Housing_Report.pdf?docID=2361
- *The Aging and Health Report: Disparities and Resilience among Lesbian, Gay, Bisexual, and Transgender Older Adults*, written by Karen I. Fredricksen-Goldsen, PhD, Institute for Multigenerational Health, University of Washington, published in 2011.
<http://depts.washington.edu/agepride/wordpress/wp-content/uploads/2012/10/Full-report10-25-12.pdf>
- *Healthcare Equality Index 2013: Promoting Equitable and Inclusive Care for Lesbian, Gay, Bisexual, and Transgender Patients and Their Families*. Human Rights Campaign Foundation Health and Aging Program (HAP). HAP provides in-person LGBT health and education to hospitals, clinics, health schools, and other organizations throughout the nation. Written to address the need for equitable, knowledgeable, sensitive and welcoming healthcare, free from discrimination based on LGBT status. Rating of hospitals and healthcare organizations based on established criteria.
- Fact Sheets on post-DOMA Issues covering bankruptcy, ERISA, estate planning, federal employees, financial aid, FMLA, immigration, Medicaid, Medicare, military, Social Security, TANF, taxes, and veterans' benefits. <http://www.lambdalegal.org/publications/after-doma>
- Lexis blog on same-sex marriage issues: <http://www.lxbn.com/tag/same-sex-marriage/>.
- Blog for employers: <http://www.jdsupra.com/topics/same-sex-marriage/doma/us-v-windsor/>

This report is the product of *Caring and Aging with Pride*, the first national federally-funded project to examine LGBT aging and health. It contrasts significant health disparities between the LGBT community and the heterosexual population with indications of resilience. Contrary to the popular belief that LGBT older adults would not participate in research, 2,560 diverse LGBT older adults ranging in age from 50 to 95 from across the country joined the project.

PARTICIPANTS:

- **Gender:** 37% women, 63% men. 7% of the group is transgender.
- **Age:** 10% are 80-95, 46% are 65-79, 44% are 50-64.
- **Race:** 87% are Non-Hispanic white, 4% Hispanic, 3% African American, 2% Asian/Pacific Islander, 2% Native American/Alaskan Native, 2% other.
- **Income:** 27% are below 200% of federal poverty level.
- **Education:** 14% have high school education or less.
- **Historical context:** Many participants came of age during a time when homosexuality and gender variance were criminalized or severely stigmatized.

DISPARITIES:

- **Disability:**
 - Higher rates of disability, obesity, and HIV compared with heterosexuals with similar demographic characteristics using state-level population-based information (BRFSS-WA).
 - 44% reported limitation of physical activities due to physical, mental, or emotional problems.
 - Transgender adults most likely to have disability.
- **Mental distress:**
 - Although LGBT participants overall reported positive mental health, they reported higher rates of mental distress than heterosexual counterparts.
 - 31% reported depression, 24% reported anxiety diagnosed by a doctor, 39% have considered suicide during their life with 39% of those reporting it was related to sexual orientation or gender identity.
- **Social Risk:**
 - LGBT less likely to be partnered or married than heterosexual (less than 50% of participants).
 - Contrary to trend in heterosexual population of elder women being more likely than men to live alone (26% of women, 15% of men), elder gay and bisexual men are more likely to live alone than lesbians or bisexual women (29% of women, 38% of men).
- **Health Habits:**
 - LGBT more likely to smoke and engage in excessive drinking than heterosexuals.
- **Disease Prevalence:**
 - Lesbians and bisexual older women report higher rate of cardiovascular disease and obesity than heterosexual women.
 - 9% of participants living with HIV. By 2015, half of those living with HIV in US will be over age 50.

SOURCES OF HEALTH DISPARITIES:

- **Victimization:**
 - 82% of LGBT elders have been victimized at least once because of perceived sexual orientation or gender identity, 64% have been victimized 3 or more times.
 - Defined as verbal assaults (68%), threats of physical violence (43%), hassled by police (27%), objects thrown at them (23%), property damage or destruction (20%), physical assault (19%), threatened with a weapon (14%), sexual assault (11%), outing (23%).
 - Transgender have highest rate of victimization (91% at least once, 77% 3 or more times).
 - Racial and ethnic minority LGBT elders experience heightened and cumulative risks, as do those with incomes below 200% of the federal poverty level and those with high school education or less.
- **Discrimination:**
 - Defined as not being hired (22%), not being promoted (21%), being fired (14%), being prevented from living in desired neighborhood (5%).
 - Housing and employment discrimination impact economic security.
 - Experiences of discrimination correlate with poor health outcomes.
- **Internalized Stigma:**
 - Bisexual and transgender report higher levels of internalized stigma than lesbians or gay men.
 - Those 80 and older have highest rates of internalized stigma and lowest rates of victimization.
 - Men report higher rates of victimization and internalized stigma than women.
- **Verbal and physical abuse:**
 - 7% report verbal abuse, 3% report physical abuse by partner, family, or close friend in past year.
 - Transgender have highest rates of verbal and physical abuse.
- **Access to Health Services:**
 - 13% report having been denied healthcare or received inferior care.
 - 15% fear accessing healthcare outside the LGBT community.
 - 8% fear accessing healthcare inside the LGBT community.
 - 21% of LGBT elders have not revealed their sexual orientation or gender identity to their primary physician, with bisexual men and women less likely to disclose than gay men or lesbians. Failure to disclose can lead to failure to diagnose serious medical problems.

RESILIENCE FACTORS

- **Coming Out and Community Belonging:** Participants' experiences range from those who came out in the 1930's to those who first did so in their 90's. Some have arranged for their identity to be known only upon their death or not at all, but nonetheless wanted to participate in this research.
 - Nearly 90% feel good about belonging to their communities
 - Being 'out' has been shown to be a positive protective factor for mental health, but those who come out risk rejection by friends, family, and others, and fear losing their job and housing.
 - Women are more likely than men to openly disclose their sexual orientation or gender identity, and are more likely to feel good about belonging to the LGBT community.

- **Wellness:**

- 91% engage in regular wellness activities.
- 82% engage in regular moderate physical activity.
- 38% attend spiritual or religious activities at least once per month.

CAREGIVING:

- In heterosexual population, majority of caregiving is by family members related by blood or marriage. In contrast, LGBT elders rely heavily on partners and friends of similar age. There may be limits in the ability of friends to provide care over the long-term, especially if decision-making is required.
- Same sex partners may not have access to FMLA, Medicaid spend downs, Social Security benefits, bereavement leave, or automatic inheritance of jointly owned property. This now may depend on where someone lives and what the legal status of the relationship is.

LGBT Older Adults in Long-Term Care Facilities: Stories from the Field.

Notes

2009-2010 survey by the National Senior Citizens Law Center, National Gay and Lesbian Task Force, Services & Advocacy for GLBT Elders (SAGE), Lambda Legal, National Center for Lesbian Rights, and National Center for Transgender Equality.

http://www.lgbtagingcenter.org/resources/pdfs/NSCLC_LGBT_report.pdf

- Participants were asked whether LGBT elders could be open with nursing facility staff: 22% yes.
- 247 out of 289 service providers felt LGBT elders would not be safe coming out at nursing home, assisted living facility, or other long-term care facility.
- Many facilities think there are no LGBT residents in their facilities.

Expectations of respondents:

- 89% predicted that staff would discriminate.
- 81% thought that other residents would discriminate against ‘out’ LGBT resident.
- 77% thought that other residents would isolate.
- 53% predicted that staff would abuse or neglect an ‘out’ LGBT resident.

Experiences of respondents: Out of 328 respondents, 43% reported 853 instances of mistreatment.

- | | |
|---|------------------------|
| • Verbal or physical harassment by other residents | 23% of total instances |
| • Refused admission or readmission, attempted or abrupt discharge | 20% |
| • Verbal or physical harassment from staff | 14% |
| • Staff refused to accept medical POA from resident’s spouse or partner | 11% |
| • Restriction of visitors | 11% |
| • Staff refusal to refer to transgender resident by preferred name or pronoun | 9% |
| • Staff refused to provide basic services or care | 6% |
| • Staff denied medical treatment | 6% |

Report recommendations include raising staff awareness, conducting self-assessments of facility’s culture and quality of care, using ombudsman programs, conducting more in-depth research of resident experiences, and mandating cultural competency training.

Legal Rights of Facility Residents under Nursing Home Reform Act: The Act makes no explicit mention of sexual orientation and gender identity. However the following provisions may provide a remedy for discrimination or mistreatment:

- Provide services and activities to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. For LGBT residents, acceptance is a critical component of reaching the highest level of functioning.
- Right to be treated with dignity and respect, to be free from physical or mental abuse or involuntary seclusion, and to make personal decisions such as what to wear.
- Promote care in a manner and in an environment that maintains or enhances each resident’s dignity and respect in full recognition of his or her individuality.
- Limits on facility’s ability to evict a resident.

Collaboration between the Equal Rights Center and SAGE, published in 2014.

http://www.equalrightscenter.org/site/DocServer/Senior_Housing_Report.pdf?docID=2361

This study involved matched-pair testing: 200 senior same-sex couples paired with heterosexual couples with otherwise similar demographic characteristics. Each inquired about housing availability to the same providers, with the following results:

- 48% of LGB testers experienced at least one type of adverse differential treatment. 12% experienced more than one form.
- Today housing discrimination rarely occurs as a blatant refusal or rejection by a housing provider. Forms of differential treatment encountered ranged from differences in availability, pricing, fees and costs, incentives to rent, amenities available and application requirements, including duplicative fees and requiring couples to apply separately as individuals.
 - Housing providers gave LGB testers fewer options in terms of units available for rent.
 - Housing providers quoted higher fees, rental price, and/or more extensive application requirements to LGB testers.
 - Housing providers provided heterosexual testers but not LBG testers with information regarding financial incentives, including promotions for visiting the facility.
 - When testers inquired about 1-bedroom units, LGB testers were only given information about 2-bedroom apartments, while heterosexual tester received information about 1-bedroom.

Breakdown by state: % of LGB testers receiving differential adverse treatment:

80% Arizona

70% Georgia

50% Colorado

45% Florida

45% Missouri

45% Ohio

40% New Jersey

40% Pennsylvania

35% Michigan

30% Washington

History of Legal Recognition for Same Sex Couples in Washington State

Committed intimate relationship doctrine (meretricious): Common law doctrine applied to division of property on dissolution of some unmarried relationships including some same-sex relationships.

Registered Domestic Partnership: WA enacted several versions of RDP statute beginning in 2007:

- **2007:** The first version made domestic partnership available to same sex couples, or to any couple where one partner was 62 or older. It granted specific rights related to health care and inheritance.
- **2008:** The law was amended to include additional rights and responsibilities related to dissolution, property, and taxes, including application of community property law.
- **2009:** Voters passed Referendum 71 making registered domestic partnership “everything but marriage” for all purposes to the extent not in conflict with federal law.

Marriage Equality:

- **2012:** WA Legislature passed marriage equality, but delayed enactment until after the November election when Washington voters defeated Referendum 74, the voter initiative to overturn it. LGBT couples began marrying in December.
- **2014:** Automatic conversion of RDPs on 6/30/2014 unless one or both partner is age 62 or over.

Other states:

- **1993:** Hawaii state court ruled in *Baehr v. Miike* that state’s prohibition on same sex marriage violated its equal protection clause. However during its appeal, Hawaiian voters passed a “mini-DOMA” in the form of a constitutional amendment defining marriage as between one man and one woman.
- **By 1997,** 25 states passed mini-DOMA’s banning same-sex marriage.
- **2003:** Massachusetts was first to legalize same-sex marriage. Connecticut was second 5 years later.
- **2014:** As of June 27, 44% of Americans live in 19 states plus DC with full marriage equality.

Reciprocity between States

- Same-sex couples legally married elsewhere will now be recognized in Washington.
- Registered domestic partnerships or civil unions from other states will be recognized as Washington state domestic partnerships for one year after permanent relocation to Washington, at which point they will no longer be recognized.
- Whether the marriage of a couple legally married in Washington will be recognized in another state for state law purposes will depend on the law of that state in effect at the time.

History of Federal Recognition:

- **Criminality:** Less than 30 years ago, homosexual conduct could be considered a crime. In 1986, *Bowers v. Hardwick* upheld constitutionality of Georgia’s anti-sodomy law. It was not overruled until 2003 by *Lawrence v. Texas* which struck down Texas’s anti-sodomy law.
- **Marriage:**
 - **1996:** In reaction to Hawaii’s initial state court ruling, U.S. Congress passed the Defense of Marriage Act (DOMA), defining marriage for federal purposes as between one man and one woman.
 - **2013:** Ruling in *U.S. v. Windsor*, an estate tax case, struck down Section 3 of DOMA.
 - Federal agencies were instructed to each interpret and apply the *Windsor* ruling. This involved making agency-specific decisions about whether a ‘place of domicile’ of ‘place of celebration’ standard should apply, as well as retroactivity and applicability to domestic partnership and civil unions.

POST-DOMA ROLLOUT OF FEDERAL AGENCY POLICIES

On June 20, 2014, Attorney General Eric Holder released a 17-page **'Memorandum to the President'** regarding implementation of the *Windsor* decision. It summarizes all the policy decisions rolled out by federal agencies regarding recognition of same-sex marriages to date. He notes that most agencies have decided to adopt a 'place of celebration' standard regardless of where a couple lives, with the exception of the Social Security Administration and the Department of Veterans Affairs which are required by law to confer certain benefits based on law of the state of a couple's domicile. He further advocates that the Administration should continue to support legislative action to adopt a uniform place of celebration rule.

Copy of memo here:

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCgQFjAB&url=http%3A%2F%2Fwww.justice.gov%2Fiso%2Fopa%2Fresources%2F9722014620103930904785.pdf&ei=UFG0U6-MCtGdyATr0YGQDA&usq=AFQjCNG5Jf5zVwvxMb8KNc65Flg6oGCl0g&sig2=qF03Pm3YjnBKulxVgV3S9g&bv m=bv.70138588,d.dGl>

The memo includes updates from the Departments of Agriculture, Defense, Education, Health and Human Services, Homeland Security, Justice, Labor, State, and Veterans Affairs. It also includes updates from the Federal Election Commission, Federal Retirement Thrift Investment Board, General Services Agency, Internal Revenue Service, Office of Government Ethics, Office of Personnel Management, Peace Corps, Pension Benefit Guaranty Corporation, Social Security Administration.

These are some highlights (from Holder's memo and other sources):

Immigration:

On July 1, 2013, DHS announced that immigration visa petitions for same-sex spouses would be reviewed in the same manner as those for opposite-sex spouses, applying a state of celebration standard. USCIS is also reopening previously submitted petitions denied solely because of DOMA.

<http://www.uscis.gov/family/same-sex-marriages>

Military:

On September 3, 2013, DOD announced same-sex spouses will receive full military benefits under state of celebration standard. DOD will not provide benefits to same-sex domestic partners as had been previously planned. If a couple is not in a jurisdiction that permits same-sex marriage, they may be allowed non-chargeable leave to travel to another jurisdiction to get married. Entitlements such as housing and family separation allowances are retroactive to June 26, 2013. Spousal and family benefits, including ID cards and TRICARE enrollment were available as of Sept. 3, 2013.

<http://militarypartners.org/wp-content/uploads/2013/08/DOMA-SSB-Briefing-Card-FINAL.pdf>

IRS:

On August 29, 2013, IRS issued revenue **Ruling 2013-17**, stating that for all federal tax purposes, it will recognize same sex marriages based on place of celebration standard. This does not extend to registered domestic partnerships or other civil unions. <http://www.irs.gov/pub/irs-drop/rr-13-17.pdf>

- **Spousal Benefits:** On September 24, 2013, IRS issued **Notice 2013-61** providing administrative procedures for employers and employees to make claims for refund or adjustment of tax withholding of imputed income for spousal benefits under group health plans, cafeteria plans, health reimbursement accounts, and dependent care programs for a disabled spouse. <http://www.irs.gov/pub/irs-drop/n-13-61.pdf>
- **Employee Benefit Plans:** On December 16, 2013, IRS released **Notice 2014-1** providing additional guidance on administration of employee benefit plans. www.irs.gov/pub/irs-drop/n-14-01.pdf
- **Retirement Plans:** On April 4, 2014, IRS released **Notice 2014-19** addressing how qualified retirement plans should treat same-sex marriages where marital status is relevant to payment of benefits. <http://www.irs.gov/pub/irs-drop/n-14-19.pdf>
- **Extension of Time to Elect Portability:** IRS issued **Procedure 2014-8** providing an automatic extension until December 31, 2014 to elect portability of a deceased spouse's unused transfer tax exclusion for estates of decedents who died between 2011 and 2013. www.irs.gov/pub/irs-drop/rp-14-18.pdf

Social Security Administration:

See separate summary of POMS released by SSA on June 20, 2014.

- **Proposed legislative fix for standard:** The Social Security and Marriage Equality Act (SAME) of 2014 was introduced on May 15, 2014. This legislation would amend the *Social Security Act* to apply a state of celebration standard to recognition of same-sex spouses for Social Security purposes.
- **Skilled Nursing Facility Coverage:** On Aug. 29, 2013, it was announced that Medicare Advantage organizations and private companies who contract with Medicare must cover SNF or nursing home services for same-sex married couples to the same extent they would to opposite-sex couples, including the right to receive care in a nursing home where a person's spouse resides. https://www.cms.gov/Medicare/Health-Plans/HealthPlansGenInfo/Downloads/HPMS_Memo_US_vs_Windsor_Aug13.pdf

Veterans Affairs:

- **VA Home Loans:** On September 26, 2013, VA released **Circular 26-13-18** regarding spousal income qualifications for VA home loans in jurisdictions that recognize same-sex marriages, stating that the VA will review home loan applications for same-sex married couples in a manner consistent with opposite-sex married couples. Previously, if a Veteran obtained a loan with anyone other than his or her opposite-sex spouse, VA could only guarantee the Veteran's portion of the loan. http://www.benefits.va.gov/homeloans/documents/circulars/26_13_18.pdf
- **Spousal Benefits:**
 - On September 4, 2013, President Obama ordered the Executive Branch to cease enforcement of provisions in USC Title 38 to the extent they preclude recognition of legally valid same-sex marriages while the VA is working to develop guidance for processing same-sex spousal benefits. <http://www.benefits.va.gov/PERSONA/lgb.asp>
 - On June 20, 2014, the VA announced it is adopting a **domicile rule** for recognition of same-sex marriages, but extends it to the place of residence of either spouse at the time of the marriage or at the time the claimant became eligible for benefits.
 - **Retroactivity:** Open claims on review can be approved retroactively to September 4, 2013, the date of the President's non-enforcement directive. New or reopened claims within one year may receive an effective date of September 4, 2013, if it would benefit claimant.

- **Burial Rights:** The National Cemetery Administration will apply a domicile rule to burial benefits for same-sex married couples. However the Acting Secretary of Veterans Affairs issued a memo that he would exercise discretionary authority to allow burial in a national cemetery on a case-by-case basis, when there is evidence of a “committed relationship” between a Veteran and an otherwise ineligible individual.
- **Proposed Rule:** VA has issued a proposed rule to amend its fiduciary activity regulations to include a new definition of “spouse” to include common law marriages and same-sex marriages.

ERISA:

- **FMLA:**
 - **August, 2013:** DOL adopted a state of domicile rule for FMLA prior to the IRS and EBSA adopting a state of celebration rule. <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm>
 - **June 20, 2014:** DOL issued a notice of proposed rulemaking to apply a state of celebration standard.
- **ERISA Plans:** On September 18, 2013, DOL issued EBSA **Technical Release No. 2013-04** announcing state of celebration standard for ERISA-covered plans. <http://www.dol.gov/ebsa/newsroom/tr13-04.html>
- **Self-funded plans:** On May 1, 2014, a New York District Court ruled in *Roe and Doe v. Empire Blue Cross Shield and St. Joseph Medical Center*, that a same-sex married couple in New York was not entitled to spousal coverage under employer’s self-insured health plan because ERISA did not govern, and because ERISA does not require plans to cover same-sex spouses.

Additional Department of Labor Rulings: June 20, 2014 memo included new ruling regarding worker’s compensation, EEOICPA, longshore compensation, unemployment tax, and ETA workforce grants.

CMS: Medicaid and CHIP

On September 27, 2013, CMS released a memo stating that where financial eligibility is determined by MAGI, CMS will recognize same-sex spouses under a state of celebration standard, consistent with the IRS, but will permit a state to apply its own choice-of-law rules in deciding whether a couple is lawfully married. In situations where financial eligibility is not determined by SSA’s SSI methodologies, CMS will issue additional guidance after SSA announces its post-Windsor SSI policy. <http://medicaid.gov/Federal-Policy-Guidance/Downloads/SHO-13-006.pdf>

Federal employees:

On July 17, 2013, OPM newsletter stated that all legal same-sex marriages predating the *Windsor* decision would be treated as new marriages, and employees were given 60 days from June 26, 2013 to enroll their same-sex spouses in the Federal Employees Health Benefits Program, using a state of celebration standard. Civil unions and domestic partnerships are not eligible, except that the Federal Long Term Care Insurance Program regulations allow individuals who satisfy the domestic partnership standard to be treated as qualifying relatives for federal postal employees and annuitants. Changes to family member eligibility were effective immediately as of June 26, 2013. Carriers were cautioned against imposing any additional new rules that could create barriers to enrollment for same-sex spouses. If two federal employees were married and newly eligible as spouses, they could consolidate their benefits enrollments into one. <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>

- **FMLA:** On October 21, 2013, OPM announced that federal employees with same-sex spouses have the same FMLA entitlements as those with opposite-sex spouses.
<http://www.opm.gov/FAQs/QA.aspx?fid=3f64bd3d-1107-44e7-9962-c8b652848f14&pid=a3d1b0dc-d927-471c-b652-31bde70eff06>
- **Railway Employees:** On December 3, 2013, two legally married same-sex couples in Washington State filed federal suit to obtain spouse health insurance coverage from BNSF in *Michael Hall, et al. v. BNSF Railway Company*. The next day America's largest freight rail carriers announced they will provide health care benefits to same-gender spouses starting January 1, 2014.
<http://dockets.justia.com/docket/washington/wawdce/2:2013cv02160/197487>

Financial Aid:

On December 13, 2013, a state of celebration standard was announced which applies both to independent students seeking aid as well as parents of dependent students, effective immediately. Financial aid forms will reflect the changes on January 1, 2014. <http://ifap.ed.gov/dpccletters/attachments/GEN1325.pdf>

Federal Matters:

On February 10, 2014, AG Holder issued memo recognizing same-sex marriages under place of celebration standard in all federal matters including bankruptcy, prison visitation, survivor benefits, and spousal immunity. <http://www.justice.gov/iso/opa/resources/9201421014257314255.pdf>

Administration for Community Living:

On May 8, 2014, ACL issued guidance recognizing same-sex marriages under state of celebration standard. This affects definitions of family members for programs under the Administration on Intellectual and Developmental Disabilities, Administration on Aging, and the Older Americans Act.

http://www.acl.gov/Funding_Opportunities/Grantee_Info/docs/Community_Living_Guidance.pdf

SOCIAL SECURITY POMS Subchapter 210: Windsor Same-Sex Marriage Claims

- As updated on 6/20/2014

210.001 Introduction: All claims filed or that were pending final determination on or after June 26, 2013 will be subject to these Windsor instructions. SSA will post policies on a flow basis.

210.01 Determining Marital Status for Title II and Medicare Benefits

- For old-age, survivor, SSDI, and Medicare, a same-sex marriage must meet validity and duration of marriage requirements.
- **Domicile Rule:** NH must be domiciled in a recognition state at the time of application or while claim is pending final determination.
- **Duration:** Determine if married during period that laws of the state of domicile recognized same-sex marriage according to chart in **GN 00210.003**.
- **RDP:** may count as marriage. To determine, see **GN 00210.004**.
- **Legal opinion will be required if applicant:**
 - had prior civil union to an individual other than current spouse,
 - marriage celebrated outside of the U.S., or
 - common-law marriage.

210.03 Dates States Permitted or Recognized Same-Sex Marriage

- Consult chart in **GN 00210.003** for recognition states, dates when states first recognized same-sex marriages, and which states recognize out-of-state same-sex marriages.
- In Washington, same-sex marriages were first permitted and out-of-state marriages were first recognized on **December 12, 2012**.

210.04 Non-Marital Relationships (Such as Civil Unions and Domestic Partnerships):

*RDP may be treated like marriage for benefit eligibility if it meets the following requirements:

- ***Domicile Rule:** SSA will determine whether a non-marital legal relationship qualifies as a marital relationship by applying the intestacy laws of the state of NH's domicile. It will qualify *if the state of the claimant domicile would allow the claimant to inherit a spouse's share of the NH's personal property if the claimant died without leaving a will.*
- **Eligible Relationships:** Consult chart in this rule.
 - Was the relationship established in a state listed in the chart?
 - Is the type of relationship listed for the state in which it was established?
 - Was the relationship established within the period shown in "Effective Date" column?
 - *In **Washington**, RDP qualifies under this rule, but only dating back to **December 3, 2009**. (RDP was first enacted in 2007 but with more limited rights at that time.)
- **Duration Requirement:**
 - Spousal retirement benefits have a one-year duration-of-marriage requirement, and NH must be living in the same state where the non-marital legal relationship was established.
 - Surviving spouse death benefits have a 9-month duration-of-marriage requirement, and NH must have lived in the state where the non-marital legal relationship was established at time of death.

- **Legal opinion required for combined legal statuses:** If relationship began as RDP and converted to a marriage, claimant had more than one non-marital legal relationship with NH or combination of non-marital legal relationships and marriages to NH, which in total meet the duration requirement.

210.05 Holding Certain Claims, Appeals, Post-Eligibility Actions, and Post-Entitlement Action

SSA will not process claims, appeals, or post-entitlement actions in situations for which instructions have not yet been issued. Processors should establish the type of relationship, develop other factors of entitlement, and check in 60 days to determine whether instructions are available yet.

210.06 Same-Sex Marriages Celebrated in Foreign Jurisdictions

Legal opinion required if claimant alleges a foreign, same-sex non-marital legal relationship, or NH is domiciled in a non-recognition state.

- If NH is living in a state, laws of that state regarding validity of foreign same-sex marriage will apply.
- If NH has foreign domicile, laws of the District of Columbia regarding validity of foreign same-sex marriage will apply.

210.100 Benefits for Aged Spouses

If marriage is recognized per **GN 210.002** and claimant meets the one-year duration requirement, the month of entitlement is based on date of filing the application, not date of the *Windsor* decision.

210.400 Benefits for Surviving Spouses

Marriage must be recognized per **GN 210.002**, claimant must meet the 9-month duration-of-marriage requirement, and claimant must not have remarried since NH's death.

210.600 Lump Sum Death Payment

Hold claim if marriage is recognized per **GN 210.002** and claimant was living in the same household as NH, but claimant filed more than 2 years after NH's death because the law did not recognize the marriage prior to *Windsor*.

210.700 Medicare SEP

- Same-sex marriages are treated the same as opposite-sex marriages for SEP purposes. Gender, domicile and date of marriage are not factors. Entitlement is **based on month of filing**.
- Individuals in **RDPs** at the time of the SEP request are **not** considered spouses for SEP purposes, but disabled individuals in RDPs may be considered family members for purposes of SEP eligibility.
- Processing instructions based on date of filing and effective date:
 - Approve all requests filed after May 2013.
 - Approve all requests filed prior to June 2013, if the SEP did not end before June 2013.
 - Deny all SEP requests when the SEP for the individual ended before June 2013.
- **Equitable relief** is available in limited situations for individuals with previous denials based on same-sex marriage who:
 - filed SEP requests and were denied prior to *Windsor* and did not know that they could re-submit the request after *Windsor*,
 - filed requests after SEP ended, if the request for SMI was filed after October 2012, SEP ended between June 2013 and April 2014, and second SEP request was received prior to June 2014.

- did not enroll during the 2014 General Enrollment Period (GEP) because they were waiting for the SEP decision. Due to SEP processing delays, certain GEP enrollments requests may be processed as timely. This option ended on May 31, 2014.

210.701 Premium surcharge rollback

Gender, domicile and date of marriage are not factors in determining eligibility. **RDPs** at the time of the request are **not** considered spouses.

210.705 Medicare ESRD: Individual may be insured on earnings record of a current or prior spouse, if:

- Marriage is recognized under **GN 00210.100** (which refers back to 210.002).
 - Hold claim if NH lives in a non-recognition state.
- **Domicile Rule:** NH lives in a recognition state at the time of application, while the claim is pending final determination, or lived at the time of death. Legal opinion is required if deceased NH resided outside the United States at the time of death.
- **Duration of Marriage:**
 - **Currently married:** There is no duration or dependency requirement for currently married spouses. Insured status begins as of the first day of the month of marriage.
 - **Divorced:** Divorced spouses must have been married to NH for at least 10 years.

210.706 HI premium reduction: Individuals who are not fully insured under Title II or Medicare may be eligible for a premium reduction based on a current or former spouse's quarters of coverage if:

- Marriage is recognized under **GN 00210.100** (which refers back to 210.002).
 - Legal opinion is required for common-law marriage, deemed marriage, or if claimant has another legal same-sex relationship,
- **State of Celebration Rule:** NH was legally married in a recognition state. Domicile is not a factor. ??
- **Duration requirement:** NOTE: Requirement differs for premium reduction and Title II purposes.
 - Claimant must be:
 - married for at least 1 year to NH; or
 - was married to a deceased NH for at least 1 year prior to NH's death; or
 - is divorced after at least 10 years of marriage from NH.
 - Use actual date of marriage, not date of *Windsor* decision to calculate duration.
- **RDPs:** Hold claims.

210.800 SSI

- **Will** recognize marriage where claimant *lives with* spouse in a recognition state.
- **Will not** recognize same-sex marriage based on *SSDI eligibility* as same-sex spouses, *civil union/domestic partnership*, or *holding oneself out* to the community as married.
- Do not use this rule if marriage involves transgender person and should be processed as an opposite sex marriage.
- Wait for additional instructions where a child's eligibility depends on the relationship of parent and parent's same-sex spouse.
- **Date of Eligibility:**
 - For new claims, month of eligibility will be based on month of application.
 - For post-eligibility actions, SSA will recognize a same-sex marriage *as of June 26, 2013*.

- **Determining marital status:** See chart in GN 00210.003
 - Does chart list state where claimant makes permanent home?
 - Did claimant marry spouse during a period when laws of the state where the marriage took place permitted same-sex marriage?
 - Did claimant make his or her permanent home in a state during a period when the laws of the state recognized same-sex marriage?
 - For every month of eligibility, determine if the claimant's permanent home was in a state the recognized same-sex marriage.
 - **Washington** is on the chart, and first permitted same sex marriage on December 6, 2012 and first recognized out-of-state marriages at that time.
- **Post-eligibility actions:**
 - *Includes marital-status change when claimant moves to a state the treats same-sex marriage differently than the state where claimant and spouse previously made their permanent home.*
 - *Claimant may be considered married for SSDI purposes and unmarried for SSI purposes if they now live in a non-recognition state.

305.005 **Validity of Marriage** (includes transgender)

Transgender is defined for SSA purposes as a person whose gender identity is different from his or her sex assigned at birth and identified in an original birth certificate.

Decision-making Tree:

- **Regardless of whether transition occurred before or after marriage,** determine state of domicile at time of application, pending determination, or death. Certain jurisdictions will require legal opinion, but Washington does not.
- **If marriage not celebrated in a same-sex marriage recognition state:** Assume opposite-sex marriage was entered into which continues to be valid post-transition.
- **If marriage celebrated in recognition state:** Ask couple whether they entered into a same-sex or opposite-sex marriage. Accept claimant's statement.
 - **Same-sex:** Process according to Windsor instructions.
 - **Opposite-sex:** Process under existing opposite-sex instructions.