Common-law marriage raises issues for employer benefits

By Mercer's Catherine Stamm, Brian Kearney and Katharine Marshall
March 3, 2020

In this article

Last July, South Carolina became the latest state to disallow common-law marriages when the state supreme court abolished the institution, finding its "foundations have eroded with the passage of time, and the outcomes it produces are unpredictable and often convoluted" (*Stone v. Thompson*, 833 S.E.2d 266 (2019)). However, eight states and the District of Columbia continue to allow couples to establish common-law marriages — that is, valid marriages created by the couple's mutual agreement and public behavior, without an official license and solemnization. Misconceptions and complications related to common-law marriage often leave employers bewildered about employee benefits for common-law spouses. To properly administer employee benefit plans, employers need to be clear on the rights and responsibilities of common-law spouses.

What is a common-law marriage?

Properly established common-law marriages are lawful marriages under state and federal law. Common-law marriage typically isn't based on a state statute or regulation but instead resides in the "common law" — predominantly in judicial precedent involving spousal rights or divorce. Common-law marriage doesn't require a marriage license or an exchange of vows before an individual authorized by the state to perform marriages. Instead, a common-law marriage is created by the acts of the spouses.

No single factor determines that a common-law marriage exists, and the requirements for establishing a common-law marriage vary by state (see chart). However, states that allow common-law marriage generally require that both spouses:

- Demonstrate mutual intent to be married
- Have the legal capacity to be married
- Are over age 18
- Are not already married to someone else
- Are cohabiting

A couple also must hold itself out to the world as married. For example, a couple who files income taxes as "married," names each other as spouse on official forms, and is known to family, friends and acquaintances as spouses is holding itself out as a married couple.

The "full faith and credit" clause of the US Constitution requires all states to accept the validity of marriages established in another state, including common-law marriages. Common-law spouses are also recognized as married under federal tax rules.

Common-law marriage vs. domestic partnership or civil union

A common-law marriage is sometimes confused with a domestic partnership or a civil union. However, the institutions have very different legal significance. Common-law marriage is a legal marriage for all state and federal purposes; domestic partnerships and civil unions are not. Some states confer significant spousal-type rights and benefits on registered domestic partners and civil union partners. Outside of those states, however, couples in domestic partnerships or civil unions do not have the rights enjoyed by spouses (including common-law spouses) under federal law and the laws of all other states.

Divorce

Although the act of living together as a married couple may establish a common-law marriage in certain states, living apart from each other once married doesn't give rise to a divorce. As with any legal marriage, the dissolution of a common-law marriage requires a divorce decree. Parties to a common-law marriage can't remarry (including to another common-law spouse) until the divorce is final. Once divorced, the former common-law spouse has certain COBRA rights to continue health coverage under ERISA plans and non-federal government health plans subject to the Public Health Service Act.

Health and welfare benefits

Employers sponsoring health and welfare plans, including insured and self-insured plans, should have clear plan terms so participants and eligible employees understand what common-law marriage means in relation to spousal benefits.

Insured plans

Employers that sponsor insured health and welfare plans generally cannot exclude common-law spouses from those plans. Insurers are subject to state regulation and must adhere to the definition of "spouse" established and accepted by the state. Because all states recognize a valid common-law marriage, where the insurance contract or policy is written or issued doesn't matter. Nor does it matter where the plan sponsor is located, or where the employee and common-law spouse reside. The deciding factor in recognizing a common-law marriage for enrollment in health and welfare plans is the state in which the common-law marriage was established.

Self-insured plans

A self-insured plan may choose to exclude parties to a common-law marriage from its definition of spouse. All communications, including enrollment materials, plan documents and SPDs, must be clear that the plan's definition of spouse doesn't include common-law marriage, even if recognized under state law.

Employers that choose to exclude common-law spouses from benefit plans may run the risk that an employee will challenge the exclusion as a violation of the state constitution and laws. Although ERISA preempts state laws that relate to, have a connection with or refer to employee benefit plans, the Supreme Court has recognized a general presumption against preemption in traditional areas of state regulation like family law (*Boggs v. Boggs*, 520 U.S. 833 (1997)). In addition, ERISA does not preempt state laws that have only an incidental effect on ERISA plans (*Cal. Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997)).

On the other hand, state laws that interfere with a multistate employer's ability to have nationally uniform plan administration are preempted. For example, the Supreme Court found the federal law preempts state beneficiary designation laws that interfere with ERISA life insurance policies and pension plans (*Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)). Employers contemplating an exclusion should discuss the risks with legal counsel.

Given the unsettled law and risks inherent in a blanket exclusion of common-law spouses, self-insured plans may instead choose to exclude common-law spouses only if the participant cannot substantiate the common-law marriage consistent with applicable state law. For more on this approach, see Verifying common-law marriage below.

HIPAA and COBRA

Under the Health Insurance Portability and Accountability Act (HIPAA), an employee has the right to enroll a new spouse and new dependent children for health coverage. Under COBRA, an enrolled spouse and any dependents may qualify to continue health coverage after divorce, the employee's death or enrollment in Medicare, or a child's loss of dependent status. An enrolled spouse and dependents also can continue health coverage if the employee is terminated or loses coverage due to reduced work hours.

These rights extend equally to common-law spouses. As noted earlier, however, the dissolution of a common-law marriage requires a divorce decree from a court or legal separation under state law. In this respect, the requirements to demonstrate divorce or separation as a COBRA-qualifying event are identical for common-law and statutory marriages.

Problems arising in group health plans

Issues involving common-law spouses typically arise in employer-sponsored group health plans when an employee seeks special enrollment for a new spouse, particularly when the health plan premium is deducted from the employee's pay on a pretax basis. Some employees may think that moving in with a significant other creates a common-law marriage, giving rise to a HIPAA special enrollment right. However, cohabiting isn't the only requirement for a common-law marriage, as discussed earlier. Intentional misrepresentation of another person as a common-law spouse could rise to the level of fraud.

In addition, an employee may not realize other implications of enrolling a common-law spouse in the health plan. For example, signing an affidavit of common-law marriage to establish plan eligibility for a spouse carries the full legal consequences of marriage (including rights and obligations under federal and state tax, estate and property laws, among others).

> *Example.* Judy resides in Colorado, a state that permits common-law marriages. She approaches her employer during the plan year and asks to enroll her new common-law spouse, Bob, in the group health plan. The employer allows Bob's special enrollment and begins pretax deductions at the "employee plus one" premium rate.
>
> Two months later, Judy approaches her employer and reports that she and Bob have split up, and she wants to drop him from the plan. But Judy cannot drop Bob from the plan until open enrollment for the next plan year begins or the common-law marriage is formally dissolved through a divorce decree (or in some states, a legal separation). If Judy and Bob presented as married only to gain group health plan coverage, they have potentially committed fraud. Both employer and Judy are liable for taxes related to Bob's coverage costs and possibly the value of any benefits he received.

Leave benefits

The Family and Medical Leave Act (FMLA) requires employers of a certain size to provide up to 12 weeks of unpaid leave for qualifying reasons. These reasons can include the need to care for the employee's spouse who has a serious health condition or handle a qualifying exigency arising out of a spouse's covered active military duty. The FMLA also provides up to 26 workweeks of military caregiver leave during a single 12-month period to care for a spouse with a serious injury or illness arising from military service. FMLA rules (29 CFR § 825.122) specifically define "spouse" to include a spouse as defined or recognized under state law for purposes of marriage, including common-law marriage.

Retirement plans

ERISA provides a plan participant's spouse with significant rights related to retirement benefits. Defined benefit and money purchase plans must pay a married participant's benefit as a joint and survivor annuity, unless the spouse consents to a different form of payment. Spouses are also entitled to a pre-retirement survivor annuity from a pension plan if the participant dies before retirement. Defined contribution plans other than money purchase plans aren't subject to the annuity rules if they pay the participant's vested account balance to the participant's surviving spouse. A married participant may name a beneficiary other than a spouse, but only with the spouse's consent.

Who's a spouse under federal law?

ERISA does not define "spouse." In the past, the lack of an ERISA definition left uncertainty whether retirement plans had to determine a participant's spouse according to state law or could apply a more limited definition — for example, to include only spouses in a civil marriage. However, employers now have clarity after the US Supreme Court's decision in *US v. Windsor*, 570 US 744 (2013). That decision struck down a section of the Defense of Marriage Act (DOMA) that had barred federal recognition of same-sex marriage. IRS and the Department of Labor (DOL) have since issued guidance implementing the *Windsor* decision (IRS Rev. Rul. 2013-17 and DOL Technical Release No. 2013-04). Couples that are legally wed under state law are recognized as spouses under the Internal Revenue Code and ERISA (and more than 1,000 other federal laws and programs).

Problems arising in employee retirement benefits

For purposes of joint and survivor annuity rules and other spousal protections, a plan administrator may face challenges in determining whether a common-law marriage exists. For some retirement plans, administrators also need to know *when* a common-law marriage was established. Plans don't have to extend ERISA's spousal rights if the participant and spouse have been married for less than a year. If a plan incorporates this rule — more commonly found in defined benefit plans — the plan administrator will need procedures for determining the date on which a common-law marriage was established.

Verifying common-law marriages

Employers may require an employee in a common-law marriage to provide some sort of verification that the employee is legally married. Under the post-*Windsor* IRS and DOL guidance, the request should focus on the state where the employee established the marriage (i.e., the state of celebration), which might not be the state where the employee lives.

Employers may request an affidavit signed by the employee, a copy of the couple's joint tax filing or other documentation. Montana and Texas have specific forms that employers may use for verification. In any case, employer requirements to substantiate a common-law marriage should not go beyond the applicable state-law requirements (see chart in next section). The plan administrator should also consider the plan's past practice and consult with benefits counsel if uncertain how to proceed.

Health and welfare plans. Employers asked to add a common-law spouse to a health and welfare plan should request some validation or certification showing the employee is married for all purposes, including tax filings, social security benefits and retirement benefits. If an employee drops a common-law spouse during open enrollment and later requests to enroll a "new" spouse, the employer should request a copy of the divorce decree for the prior marriage before enrolling the new spouse. This step confirms that a divorce occurred and may require sending a COBRA notice to the former spouse if he or she was dropped from coverage in anticipation of divorce.

Retirement plans. For retirement plans, the need to verify a common-law marriage is most likely to arise when a participant retires or dies, and a common-law spouse claims benefits. In addition, money purchase plan sponsors should be cognizant of common-law marriage rules for plan loans, since a spouse must give consent for a married participant to receive a loan from a money purchase plan.

The verification process works both ways: A retirement plan is excused from ERISA's spousal protections only if the plan verifies that a participant is not married, and a plan is potentially liable to a common-law spouse who did not receive ERISA-protected benefits. For example, if a participant in a defined benefit plan waives the joint and survivor annuity without his or her common-law spouse's consent, the plan could be liable to the common-law spouse for the value of that annuity benefit. Employers might consider ensuring their benefit election and spousal consent forms specify that marriage includes both civil and common-law marriage.

States allowing new common-law marriages

Nine jurisdictions currently allow new common-law marriages, but states have some variations in the parameters required to establish a common-law marriage. The following table lists current common-law marriage states and their requirements for validity.

State	Requirements for common-law marriage
Colorado	• Cohabitation • Reputation of being married
Iowa	• Continuous cohabitation • Intent and agreement to be married • Public declarations that the parties are husband and wife
Kansas	• Mental capacity to marry • Agreement to be married at the present time • Representation to the public that the couple is married
Montana	• Cohabitation • Capacity to consent to the marriage • Agreement to be married • Reputation of being married
Oklahoma	• Cohabitation • Competence • Agreement to enter into a marriage relationship
Rhode Island	• Serious intent to be married • Conduct that leads to a reasonable belief in the community that the man and woman are married
Texas	• Both parties' signatures on a form provided by county clerk • Cohabitation • Agreement to be married • Representing to others that the couple is married
Utah	• Cohabitation • Capable of giving consent and getting married • Reputation of being husband and wife
Washington, DC	• Cohabitation • Express, present intent to be married

* New Hampshire recognizes common-law marriage only after the death of one partner if the couple have cohabited for three or more years.

States not allowing new common-law marriages

Thirteen states no longer allow common-law marriages to be created, but each state still recognizes common-law marriages created within its borders before a specified date, as indicated in the next table. In addition, even states that have abolished common-law marriage within their borders must recognize those lawfully established in another state.

State	Common-law marriage recognized if established before	Legal source
Alabama	Jan. 1, 2017	Ala. Code § 30-1-20
Florida	Jan. 1, 1968	Fla. Stat. § 741.211
Georgia	Jan. 1, 1997	Ga. Code § 19-3-1.1
Idaho	Jan. 1, 1996	Idaho Code § 32-201
Indiana	Jan. 2, 1958	Ind. Code § 31-11-8-5
Michigan	Jan. 1, 1957	Mich. Comp. Laws § 551-2
Mississippi	April 5, 1956	Miss. Code § 93-1-15
Nevada	March 29, 1943	Nev. Rev. Stat. § 122.010
Ohio	Oct. 10, 1991	Ohio Rev. Code § 3105.12
Pennsylvania	Jan. 1, 2005	23 Pa. Cons. Stat. § 1103
South Carolina	July 24, 2019	*Stone v. Thompson*, 833 S.E.2d 266 (2019)
South Dakota	July 1, 1959	S.D. Codified Laws § 25-1-29

Related resources

- *Stone v. Thompson*, 833 S.E.2d 266 (2019)
- Rev. Rul. 2013-17 (IRS, Aug. 29. 2013)
- Technical Release No. 2013-04 (DOL, Sept. 18, 2013)
- *United States v. Windsor*, 570 U.S. 744 (2013)
- *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)

- 29 CFR § 825.122, Definitions of spouse and other family members under the FMLA
- 26 CFR § 301.7701–18, Definitions of spouse, husband, wife and marriage for federal tax purposes

Note: Mercer is not engaged in the practice of law, accounting or medicine. Any commentary in this article does not constitute and is not a substitute for legal, tax or medical advice. Readers of this article should consult a legal, tax or medical expert for advice on those matters.