

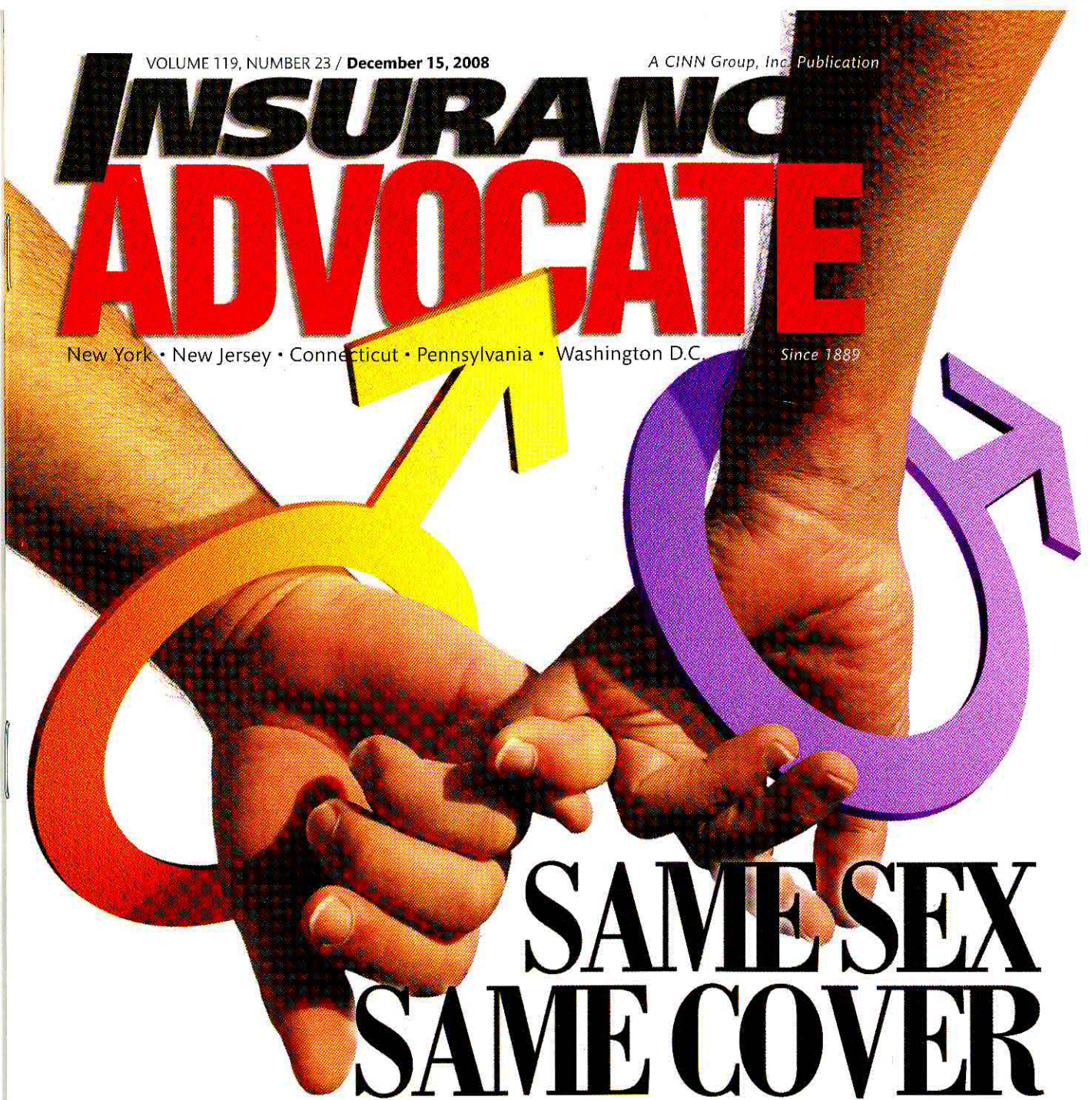
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SAME SEX SAME COVER

Implications of the new regulations
barring discrimination in the
insuring of same sex couples

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The main difference between a marriage and a civil union is that there is no requirement that civil unions be recognized outside of the state.

Same-sex marriage is not legal in New York, but the New York State Insurance Department has made it clear to agents, brokers and insurers: when providing any type of insurance coverage, the term “spouse” includes same-sex spouses legally married outside of New York.

Prior to the Department’s directive, when an employer extended an employees’ health coverage to a spouse, other family member, or dependent, the employer was prohibited from distinguishing between types of spouses in a discriminatory manner – but it was unclear if “spouse” included a same-sex spouse legally married outside of New York.

An overview of the current state of same-sex couples’ rights in the United States will help you and your staff understand what is implied by this law. We explore here the status of the law in New York, leading to the New York State Insurance Department’s directive on the issue and we take a look at Connecticut law on this issue, as Connecticut is the most recent state to legalize same-sex marriage at the time of the writing of this article.

Most important, here’s how the changes in the law affect your role as an insurer, agent or broker.

The Current State of Same-Sex Couples’ Rights in the United States

The ability to be part of your “spouse’s” healthcare plan is a great cost-savings benefit to being legally married in this country. Whereas opposite-sex married couples are guaranteed that their marriages will be recognized in every state, for same-sex couples the state in which they live is a great consideration.

Currently, same-sex marriage is only legal in Massachusetts and Connecticut.

California briefly recognized same-sex marriage until the recent passing of Proposition 8, resulting in a renewed ban on same-sex marriage, at least until the California Supreme Court reviews the issue.

In Massachusetts and Connecticut, married same-sex couples have every legal right as married opposite-sex couples. Therefore it is clear – when soliciting or providing insurance in Massachusetts and Connecticut, the term “spouse” clearly covers same-sex spouses.

Some states – such as New Jersey, Vermont and New Hampshire – have *civil union* laws. Under civil union laws, same-sex couples register with the state and the state is required to grant the same benefits to same-sex couples, including those related to insurance coverage, as married couples.

The main difference between a marriage and a civil union is that there is no requirement that civil unions be recognized outside of the state.

Status of the Law in New York

In February 2008, in the case *Martinez v. County of Monroe*, a New York appellate court held that same-sex spouses legally married outside of New York must be recognized as married in New York.

There, Patricia Martinez, an employee of Monroe Community College, married her same-sex partner in Canada, where same same-sex marriage is legal. Ms. Martinez applied to the College for spousal health care benefits. (The College provided health care benefits for heterosexual spouses of its employees.) The College denied Ms. Martinez’s application for her same-sex spouse.

However, New York’s intermediary

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appellate court held that Ms. Martinez's Canadian marriage to her same-sex partner was entitled to recognition in New York State. Thus, Ms. Martinez's employer was required to provide Ms. Martinez's same-sex spouse the same benefits it provided to spouses of other employees. By refusing to recognize Ms. Martinez's valid Canadian marriage, the College violated Executive Law § 296(1)(a), which forbids an employer from discriminating against an employee "in compensation or in terms, conditions or privileges of employment" because of an employee's sexual orientation.

The State's highest court refused to hear the case on appeal. Therefore, *Martinez* remains the law of the State.

New York Insurance Department on the Issue

Even though the State's highest Court and legislature had yet to speak on the issue, after *Martinez*, on May 14, 2008, Counsel to the Governor directed all counsel of all state agencies to review their laws and regulations to ensure that the terms "spouse," "husband," and "wife" are construed in a manner consistent with the *Martinez* decision. Because *Martinez* was decided by an intermediary court, the Governor was not bound to take this next-step – his initiative was progressive.

In that directive, Counsel noted that in April 2007, the New York State Department of Civil Service extended recognition to same-sex spouses legally married in other jurisdictions for purposes of spousal benefits under the New York Health Insurance Program. That decision was upheld by a New York court.

Thereafter, the New York State Insurance Department Office of General Counsel was presented with the question, "[d]oes the marriage of a same-sex couple legally performed in a jurisdiction outside New York confer the same rights to spousal health insurance coverage in New York as the marriage of an opposite-sex couple?" OGC Op. No. 08-11-05.

The facts presented to the Department were similar to the facts in *Martinez*. The inquirer and her same-sex partner were married in Canada. After her

marriage, the inquirer applied for her spouse to be covered under her health insurance. The insurer rejected her application on the ground that same-sex partners who are married to each other are not "spouses" within the meaning of the Insurance Law.

The Department's November 21, 2008 Opinion began by noting that "[n]othing in any New York statute – either expressly authorizes or expressly prohibits this agency from interpreting the term 'spouse' in the Insurance law to include same-sex parties to marriages legally performed out of the state." OGC Op. No. 08-11-05. The Department relied on the appellate court's decision in *Martinez* in concluding that "[s]ame sex parties to marriages validly performed outside of New York must be treated as 'spouses' for purposes of the New York Insurance Law, including all provisions governing health insurance."

The Department further opined that "the Insurance Department would consider an insurer's refusal to extend health insurance coverage to same-sex and opposite-sex spouses on an equal basis to be an unfair practice under Insurance Law §§ 2402 and 2403, and to be unfair discrimination under Insurance Law § 4224." Section 2402 and 2403 prohibit any person from engaging in any unfair or deceptive act practice. Section 4224(b)(1) prohibits an insurer from making, or permitting any unfair discrimination between individuals of the same class in the amount of premiums, policy fees, or rates charged for any policy of accident and health insurance, or in the benefits payable thereon or in any terms or conditions of such policies.

The same day the Office of General Counsel's Opinion was published, the Deputy Superintendent and General Counsel, Robert H. Easton issued Circular No. 27 (2008), Recognition in New York of Marriages Between Same-Sex Partners Legally Performed in Other Jurisdictions. The Circular directed insurance companies to treat same-sex spouses legally married outside of New York as "spouses" for purpose of the State's Insurance Laws. As a result, "where an employer offers group health insurance to employees and their spouses, the same-sex spouse of a New York employee who enters into a marriage

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legally performed outside the State is entitled to health insurance coverage to the same extent as any opposite-sex spouse.

This position is not limited to health insurance – it applies to *all* types of insurance. Circular No. 27 (2008).

Accordingly, in New York, same-sex couples legally married outside of New York are considered "spouses" whenever the term is used with respect to insurance.

Connecticut Insurance Department

Connecticut is the most recent state to legalize same-sex marriage. On October 28, 2008 the Connecticut Supreme Court ruled that same-sex couples have a constitutional right to marry. The Connecticut Department of Insurance has also provided a Consumer Update in light of its Supreme Court's ruling.

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On November 20, 2008, the Connecticut Department of Insurance declared, "[t]he term 'spouse' as used in insurance policies will now be interpreted to include a same sex spouse, pursuant to a legal marriage entered into in Connecticut or another state which recognizes same sex marriage."

The Connecticut Insurance Department further warned, "[p]roperty and casualty insurers, life and health insurers, and health care centers doing business in Connecticut are now required to treat same sex married partners the same as opposite sex married partners, for insurance purposes. In addition property and casualty insurers, life and health insurers, and health care centers are required to treat parties to a civil union the same as a spouse, for insurance purposes."

Your Role

As an agent, broker or insurance company executive, it is important to be cognizant of the law. The Insurance

Department has directed licensees, to the extent necessary, to file new policy forms or policy form amendments with the Department to ensure compliance with the law. Circular No. 27 (2008).

Further, if you are in New York, you can advise your clients that any benefits conferred by their insurance policies to a "spouse" are available to same-sex spouses of legal marriages performed outside the State.

Moreover, if your client is an employer, he or she should be advised that the same coverage afforded to opposite-sex spouses of employees must be afforded to same-sex spouses legally married outside the state.

However, if your client is a member of a domestic partnership or civil union from outside the State of New York, the client's partner does not count as a "spouse" and is not eligible for the same benefits as those afforded to an opposite-sex married couple.

The laws related to benefits afforded to same-sex couples continue to change. New York is in the forefront of recognizing

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ing same-sex marriages legally performed in other jurisdictions. Because insurance is an important practical benefit of a recognized legal marriage, the New York Insurance Department's directive on this issue has broad implications for New Yorkers, their employers and insurers.

It is important to be aware of the changes surrounding same-sex marriage when coverage is sought. Legal challenges to state laws prohibiting same-sex marriage may continue to change and expand the rights of same-sex couples. [JA]

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