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Proposed FMLA regulations and CMS guidance redefine “spouse”

In 2013, the Supreme Court struck down the section of the Defense of Marriage Act that defined “marriage” for all purposes under federal law as “a legal union between one man and one woman as husband and wife” and the word “spouse” as “a person of the opposite sex who is a husband or a wife.” Since then, federal agencies have issued guidance and updated regulations to ensure that legally married, same-sex couples enjoy the same status under federal law as legally married, opposite-sex couples. The DOL recently proposed revised FMLA regulations, and CMS issued guidance for group health plans under the Medicare Secondary Payer provisions to include the broader definition of spouse. Employers and group health plans affected by these changes will want to ensure that they will be in compliance when the new rules take effect.

Background

Prior to passage of the Defense of Marriage Act (DOMA) in 1996, the federal government relied on the states to define marriage and recognized, for federal law purposes, marriages legally entered into under state law. Section 3 of DOMA changed the legal landscape. By defining the terms “marriage” (a legal union between one man and one woman) and “spouse” (a person of the opposite sex who is a husband or a wife), DOMA precluded recognition of same-sex marriages for purposes of federal law — including the Family and Medical Leave Act and Medicare — regardless of whether a state recognized same-sex marriage.

On June 26, 2013, in *United States v. Windsor*, the Supreme Court found section 3 of DOMA to be unconstitutional, but upheld section 2, which permits a state to refuse to recognize a same-sex marriage legally performed in another state. (See our July 12, 2013 *For Your Information*.) Since then, federal agencies have been issuing guidance to address the many issues requiring clarification in the wake of *Windsor*.

FMLA regulations

The federal Family and Medical Leave Act (FMLA) allows eligible employees to take leave to care for a spouse with a serious health condition, to address issues arising out of a spouse's covered military service, and to provide military caregiver leave for a spouse. In August 2013, the DOL confirmed that existing FMLA regulations do not require employers to make leave available to same-sex spouses who reside in a state that has not yet legalized same-sex marriage. Rather, a spouse — for FMLA purposes — only includes a same-sex spouse if the marriage is recognized under the laws of the state in which the employee resides. (See our August 13, 2013 *For Your Information*.)

On June 27, the DOL issued proposed regulations that would amend the definition of spouse by eliminating the "state of residence" rule and replacing it with a "place of celebration" rule. Thus, all individuals who are legally married under the laws of the state in which the marriage was entered into will be treated as spouses for FMLA purposes, regardless of whether the state in which they currently reside recognizes same-sex marriage. In addition to extending FMLA rights to the spouses in same-sex marriages and common law marriages, the proposal recognizes the validity of same-sex marriages entered into abroad that could have been entered into in at least one state.

> Comment. The proposed change to a place of celebration rule would also have an impact beyond spousal leave. For example, an eligible employee would now be entitled to FMLA leave to care for the child of a same-sex spouse regardless of whether the employee satisfies the *in loco parentis* requirement of providing day-to-day care or financial support for the child. Also, an eligible employee would be entitled to leave to care for his or her parent's same-sex spouse, even though the spouse never stood *in loco parentis* to the employee.

The definition of spouse in the proposed FMLA regulations is consistent with the DOL's earlier guidance for employee benefit plans, which also adopted a place of celebration approach for ERISA purposes. (See our September 19, 2013 *For Your information*.)

MSP Working Aged Policy

The Medicare Secondary Payer (MSP) provisions of the Social Security Act prohibit Medicare from making payment if payment has been made or can reasonably be expected to be made by group health plans (GHPs), workers' compensation plans, liability insurance, or no-fault insurance when certain conditions are satisfied. Under the MSP Working Aged provisions, Medicare benefits are secondary to benefits payable under GHPs for individuals age 65 or over who have GHP coverage as a result of their own or a spouse's employment with an employer that has 20 or more employees.

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act of 2007 (MMSEA Section 111) amended the MSP rules to impose mandatory reporting requirements on GHPs that cover Medicare-eligible individuals. Under MMSEA Section 111, GHP responsible reporting entities (insurers, third-party administrators, and plan administrators or fiduciaries of GHPs that are self-insured and self-administered) must submit GHP coverage/ Medicare entitlement information to the Centers for Medicare & Medicaid Services (CMS) on a quarterly basis. (See our July 30, 2009 *For Your Information*.)

Prior to the *Windsor* decision, a same-sex spouse was not recognized as a spouse for purposes of the Working Aged MSP rules. Therefore, the GHP was not required to pay primary when the same-sex spouse had coverage through the employment of his or her spouse nor was the GHP required to report the individual as a spouse as part of the mandatory reporting process.

However, CMS recently announced a new MSP policy for purposes of determining the proper primary payer and mandatory GHP reporting under MMSEA Section 111. Under that policy, any opposite-sex or same-sex marriage legally entered into in a US or foreign jurisdiction will be recognized. Effective January 1, 2015, CMS will treat the following individuals as spouses for purposes of the MSP Working Aged provisions:

- An individual who is entitled to Medicare as a spouse based on the Social Security Administration's rules (see our April 16, 2014 *For Your Information*)
- Both parties to a marriage that is valid in the jurisdiction where it was performed

CMS also stated that an employer, insurer, third party administrator, GHP, or other plan sponsor that uses a broader definition of spouse for plan purposes may assume primary payment responsibility for the "spouse" but is not required to do so. If the individual is reported as a spouse under MMSEA Section 111, Medicare will pay and pursue recovery as appropriate.

> Comment. Although not clear, it appears that CMS is saying that if an individual is reported as a spouse under MMSEA Section 111, instead of, for example, a domestic partner, Medicare will consider the individual to be a spouse for purposes of the MSP Working Aged provisions.

The expanded rules for defining spouse (including for MMSEA Section 111 reporting) must be used for GHP coverage no later than January 1, 2015. Although entities may choose to use the new definitions or their own broader definition of spouse for MSP purposes prior to that date, they are not required to do so.

In closing

The DOL's proposed regulations would make the same federal family leave rights available to all legally married opposite-sex and same-sex couples couples nationwide. Once revised FMLA regulations are finalized, employers will want to update their existing policies, procedures, forms and notices. Like the DOL, CMS policy changes with respect to the MSP Working Aged provisions will also treat same-sex and opposite-couples consistently. GHPs will want to make certain that they have taken all necessary steps to ensure compliance with the expanded definition of spouse and MMSEA Section 111 reporting rules no later than January 1, 2015.

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