

DOL Extends FMLA Rights to Same-Sex Spouses

In 2014, the DOL proposed a revised definition of “spouse” under the federal Family and Medical Leave Act to ensure that legally married, same-sex couples enjoy the same status under federal law as legally married, opposite-sex couples. On February 25, the DOL issued a final rule that includes the broader definition of spouse. Employers affected by this change will want to update existing leave policies to ensure that they are in compliance when the new rules take effect on March 27.

Background

Prior to the federal Defense of Marriage Act (DOMA), the states defined marriage and federal law recognized marriages legally entered into under state law. DOMA changed the legal landscape by defining “marriage” as a legal union between one man and one woman and “spouse” as a person of the opposite sex who is a husband or a wife. Thus, DOMA precluded recognition of same-sex marriages for federal purposes — including the Family and Medical Leave Act (FMLA) — 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. While the *Windsor* decision extended FMLA rights to many same-sex married couples, it also allowed a state to refuse to recognize a same-sex marriage legally performed in another state. (See our [July 12, 2013 For Your Information](#).) Shortly thereafter, the DOL confirmed that existing regulations did not require employers to make FMLA leave available to same-sex spouses who resided in a state that had not yet legalized same-sex marriage. Because the term “spouse” did not include a same-sex spouse unless the marriage was recognized under the laws of the state where the employee lived (“state of residence” rule), many same-sex married couples were still not entitled to take FMLA leave to care for one another. (See our [August 13, 2013 FYI Alert](#).)



A Revised Definition of Spouse

The FMLA allows eligible employees of covered employers to take job-protected 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

Consistent with Prior DOL and IRS Guidance

The definition of spouse in the final FMLA regulations is consistent with earlier DOL guidance for employee benefit plans and IRS guidance on federal tax issues, both of which adopted a place of celebration rule. (See our [August 30, 2013](#) and [September 19, 2013](#) *For Your Information* publications.)

military caregiver leave for a spouse. Covered employers generally include private sector employers with 50 or more employees, public sector employers (including local, state, and federal government agencies) regardless of size, and public or private elementary or secondary schools regardless of the number of employees they employ.

Following the *Windsor* decision, the DOL issued proposed regulations in 2014 to amend the definition of spouse by replacing the state of residence rule with a “place of celebration” rule. (See our [July 14, 2014](#) *For Your Information*.) Under the proposed federal rule, spousal status is determined by the laws of the state where the employee was married. Thus, individuals who are legally married under the laws of the state in which the marriage was entered into would be treated as spouses for FMLA purposes, regardless of whether the state in which they live recognizes same-sex marriage. In addition to extending FMLA rights to spouses in same-sex and common law marriages, the proposal also recognized the validity of certain same-sex marriages entered into abroad.

Comment. When the DOL proposed the rule change last summer, 19 states and the District of Columbia allowed same-sex marriage. Now, more than 30 states allow it.

On February 25, 2015, the DOL issued a [final rule](#), which adopts the definition of spouse proposed last summer. As previously proposed, the DOL adopts a place of celebration rule, determining spousal status by the laws of the state in which the marriage was entered into. The final rule’s expanded definition of spouse expressly includes individuals in a same-sex or common law marriage that either was entered into in a state that recognizes those marriages or, if not, is valid where entered into and could have been entered into in at least one state.

Comment. The change to a place of celebration rule has implications beyond spousal leave. For example, an eligible employee would 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. An eligible employee would also be entitled to leave to care for a parent’s same-sex spouse, whether or not the stepparent ever stood *in loco parentis* to the employee.

State Leave Laws

The FMLA does not protect civil unions or domestic partnerships. Because state leave laws may provide different leave rights, employers should make certain that their policies comply with all applicable federal, state, or local laws.

In Closing

When the new rule takes effect, employees in legal, same-sex marriages — regardless of where they live — will have the same federal family and medical leave rights that opposite-sex married couples now enjoy nationwide. Employers will want to train their leave administrators and managers on the new rule, and update existing policies, procedures, forms, notices, and benefit plans to ensure compliance with the expanded definition of spouse no later than March 27, 2015.

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