PUBLICATION

Redefining the Term "Spouse" Under the FMLA

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For employers that operate in states that do not recognize same-sex marriage and for those that operate in multiple states, the Family Medical Leave Act's (FMLA) application to same-sex partners of employees has been a constant source of inquiry and frustration since the United States Supreme Court's ruling in *United States v. Windsor* (June 26, 2013), which struck down the Defense of Marriage Act (DOMA) that limited marriage to opposite-sex couples. Employers covered by the FMLA were left to decide what the implication of that decision was to their workforces.

Following the *Windsor* decision, the DOL began reviewing its definition of "spouse" with the intent to bring the regulations that accompany the FMLA into accord with that ruling. On February 25, 2015, the DOL issued its long awaited Final Rule revising the FMLA's definition of a "spouse."

"Spouse" will now (effective March 27, 2015) be defined as follows:

Spouse [as defined by the FMLA] means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into, or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in same-sex or common law marriage that either: (1) was entered into in a State that recognizes such marriages; or (2) if entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

The Final Rule has moved from a "state of residence" rule to a rule based on where the couple entered into their marriage (the "place of celebration"). Those couples (whether same- or opposite-sex) who were legally married in any state will have consistent federal FMLA leave rights no matter where they choose to reside.

For example, under the old definition of spouse, if a couple was married in California, a state that legally recognizes same-sex unions, but the couple relocated to Tennessee, a state that does not recognize same-sex unions, and both worked for companies where FMLA benefits were offered and they otherwise qualified, a same-sex couple under the "State of Residence" rule would not have been entitled to spousal FMLA benefits by virtue of living in Tennessee. Under the revised Final Rule, with its "place of celebration" definition, that same couple will be entitled to spousal benefits under the FMLA, regardless of the fact they reside in Tennessee, because their same-sex union was performed in a state, California, that recognizes the marriage.

The Final Rule clarifies that covered eligible employees in same-sex marriages are already eligible to take FMLA leave for certain FMLA-qualified reasons (for example, for an employee's own serious health condition or to care for the employee's parent's or child's serious health condition). The Final Rule does not, therefore, increase the number of employees eligible for FMLA leave, but does increase the circumstances under which the qualifying FMLA leave can be taken. The Final Rule allows for employees in same-sex marriages to take FMLA leave on the basis of their marriage regardless of their state of residence, in addition to the other qualifying leave reasons for which they were already able to take leave. "As a result of the Final Rule, covered and eligible employees will be entitled to take FMLA leave regardless of their State of residence to care for their same-sex spouse with a serious health condition; to care for a stepchild with a serious health condition to

whom the employee does not stand in loco parentis; to care for their parent's same-sex spouse with a serious health condition who did not stand in loco parentis to the employee when the employee was a child; for qualifying exigency reasons related to the covered active duty of their same-sex spouse; and to care for their same-sex spouse who is a covered service member with a serious injury or illness."

What does all this mean? For employers in states that do not recognize same-sex unions, as of March 27, 2015, all FMLA rights previously only afforded to heterosexual married couples must be afforded to same-sex married couples. For employers that operate in multiple states, the Final Rule brings consistency and definitiveness as to how to treat same-sex employees under the FMLA – exactly the same as heterosexual married couples who celebrated legal marriages.