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Time for Employers to Review Their Family Medical Leave Act Policies Following the Supreme Court's Decision to Strike Down DOMA

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Employers in the District of Columbia, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, and Washington[1] should review their Family Medical Leave Act (FMLA) policies to ensure they are providing benefits to employees with same-sex spouses. Following the Supreme Court's decision in *U.S. v. Windsor*,[2] each state's definition of "spouse" will be honored under the federal law.

The FMLA provides a total of 12 work weeks of leave for eligible employees during a 12-month period to, among other situations, care for a spouse with a serious health condition. If the spouse qualifies under military exigency leave or military caregiver leave, the coverage rises to 26 work weeks. If an employee who would otherwise qualify for FMLA benefits is married to a same-sex partner, and if that employee lives in one of the above states, the employer must provide FMLA benefits to that employee when the "spousal" aspects of the FMLA are implicated.

The *Windsor* decision sends a strong message, calling DOMA a law that "violates basic due process and equal protection," and reminding Congress that its "'bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group."[3] The *Windsor* Court acknowledged that while the case before it dealt with estate tax, over 1,000 statutes and federal regulations (including the FMLA, although the court did not mention it by name) were impacted by DOMA's definition of marriage and spouse. In striking down Section 3 of DOMA as an unconstitutional deprivation of the liberties guaranteed by the Fifth Amendment, *Windsor* removed the federal barrier to FMLA protection for same-sex spouses.

The avowed purpose of the FMLA is "to balance the demands of the workplace with the needs of families" by "entitl[ing] employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition."[4] FMLA regulations defer to state law in defining "spouse," recognizing common law marriage in states where it is recognized. So too, will the FMLA now recognize same-sex spouses as entitled to benefits in the above-mentioned 13 states and the District of Columbia. Of course, if a state recognizes same-sex partner leave benefits under *state* law, employers in those states must continue to honor state leave laws.

By way of example, a Connecticut case that immediately preceded *Windsor* was ahead of its time in finding that DOMA violated the equal protection principles of the Fifth Amendment.[5] Vermont plaintiffs Raquel Ardin and Lynda DeForge were validly married in Vermont in 2009. DeForge was a United States Postal Service employee who qualified for FMLA benefits. DeForge needed to take leave to attend medical treatments with her wife one day every three months. But, DeForge was denied FMLA benefits and was forced to use vacation time to care for her wife during the treatments and following two surgeries. The court held that, because Section 3 of DOMA was unconstitutional, DeForge should have been provided with FMLA leave.

The *Windsor* development continues the trend of expanding FMLA rights for same-sex couples. In 2010, the Department of Labor issued an administrative interpretation letter that clarified the rights of people standing "in loco parentis" for a child.[6] This interpretation was a step forward for same-sex partners who assumed financial or care-taking responsibilities for a child. Now, same-sex spouses will be entitled to full FMLA benefits in the

aforementioned states. There are expectations and pressure for the Department of Labor to further clarify FMLA benefits following the *Windsor* decision. As the law continues to develop, we will keep you updated on ways to remain compliant.

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[1] Laws permitting same-sex marriage went into effect on August 1, 2013 in Minnesota and Rhode Island.

[2] *U.S. v. Windsor*, 133 S. Ct. 2675 (June 26, 2013).

[3] *Id*. at 2693 (citing *Department of Agriculture v. Moreno*, 413 U.S. 528, 534–535, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973)).

[4] *Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294, 300 (D.Conn. 2012) (citing 29 U.S.C. § 2601(b)(1), (2)).

[5] *Pedersen v. Office of Personnel Management*, 881 F.Supp.2d 294.

[6] http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm