

FMLA Proposed Rules To Recognize Same Sex Regardless of Residency



Issued date: 07/07/14

Proposed FMLA Definition of “Spouse”

The DOL is proposing to amend the regulatory definition of “spouse” under the Family and Medical Leave Act (“FMLA”) so that “spouse” for purposes of FMLA rights would include a same-sex spouse, regardless of where the employee and spouse live. This means the “place of celebration” will determine whether an individual is a spouse under FMLA, rather than the current rule which uses the “state of residence,” which recognizes a spouse under the law of the state in which the couple resides.

Supreme Court Decision

In June 2013, in *United States v. Windsor*, the Supreme Court struck down the federal definition of “marriage” and “spouse” under Section 3 of the Defense of Marriage Act (“DOMA”), holding that same-sex marriages valid under state law are recognized at the federal level. The Supreme Court’s decision affects more than 1,100 sections of federal law that have a provision based on marriage, including the FMLA. As of June 23, 2014, nineteen states and the District of Columbia extend the right to marry to same-sex couples.

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California	Minnesota
Connecticut	New Hampshire
Delaware	New Jersey
District of Columbia	New Mexico
Hawaii	New York
Illinois	Oregon
Iowa	Pennsylvania
Maine	Rhode Island
Maryland	Vermont
Massachusetts	Washington

FMLA Basics

In a nutshell, FMLA requires certain employers to permit eligible employees to take up to 12 weeks (26 weeks in the case of caring for an injured service member) of unpaid, job-protected leave each year because of a new baby, to care for an immediate family member who has a serious health condition, or because of their own serious health condition, or because of an emergency when a family member is called to active military duty. A covered employer is required to maintain group health plan benefits for an employee on FMLA leave on the same terms and conditions as if the employee had continued to work. When the employee returns from FMLA leave, the employer must restore the all the employee's benefits.

Following Windsor, the DOL's FMLA guidance, revised in August 2013, required employers subject to FMLA to extend FMLA rights to an eligible employee in connection with his or her same-sex spouse only when the employee and spouse reside in a state that recognizes same-sex marriage; FMLA rights related to a same-sex spouse currently do not apply to an employee residing in a state that does not recognize same-sex marriage.

The Proposed Change

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, the regulations would have "husband or wife" refer 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 a 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 proposed change would mean that an eligible employee, regardless of where he or she lives, would be able to:

- take FMLA leave to care for his or her same-sex spouse with a serious health condition;
- take qualifying exigency leave due to his or her same-sex spouse's covered military service; or
- take military caregiver leave for his or her same-sex spouse.

The proposed change would entitle eligible employees to take FMLA leave to care for their stepchildren (children of the employee's same-sex spouse) even if the in loco parentis requirement of providing day-to-day care or financial support for the child is not met.

The proposed change would also entitle eligible employees to take FMLA leave to care for their stepparents (same-sex spouses of the employee's parents), even though the stepparents never stood in loco parentis to the employee.