

June 23rd, 2014

Revised Definition of “Spouse” Under the FMLA

A newly released proposed [rule](#) extends the protections of the Family and Medical Leave Act (FMLA) to all eligible employees in legal same-sex marriages, as well as common law marriages, so they will be able to take FMLA leave to care for their spouse, regardless of where they live. The proposal is intended to help ensure that all families have the flexibility to deal with serious medical and family situations without fearing the threat of job loss. The new rule is proposed in light of the Supreme Court’s decision in *United States v. Windsor*, in which the court found Section 3 of the Defense of Marriage Act (DOMA), which generally limited the definitions of “marriage” and “spouse” to opposite-sex marriages and spouses, to be unconstitutional.

FMLA Background. The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

Twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee’s spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job;
- any qualifying exigency arising out of the fact that the employee’s spouse, son, daughter, or parent is a covered military member on “covered active duty;” **or**

Twenty-six workweeks of leave during a single 12-month period to care for a covered service member with a serious injury or illness if the eligible employee is the service member’s spouse, son, daughter, parent, or next of kin (military caregiver leave).

See the [FMLA homepage](#) for more background and links to helpful information.

The New Rule. The rule proposes to change the regulatory definition of spouse to look to the law of the place in which the marriage was entered into (the “place of celebration”), as opposed to the law of the State in which the employee resides (the “state of residence”). A place of celebration rule would allow all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live. The

proposed definition of spouse expressly references the inclusion of same-sex marriages in addition to common law marriages, and will encompass same-sex marriages entered into abroad that could have been entered into in at least one State.

The Impact on FMLA Usage. The proposed definitional change would mean that eligible employees, regardless of where they live, would be able to:

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

If the proposed rule were to be implemented as drafted, below are some examples of the situations in which eligible employees would be able to take FMLA leave.

- An eligible employee could take FMLA spousal leave if:
 - The employee married a same-sex spouse in a foreign country in which same-sex marriage is legal and could have been entered into in at least one State;
 - The employee married a same-sex spouse in a State that recognizes same-sex marriage, but later moved with his or her spouse to a State that does not recognize same-sex marriage;
 - The employee needs to take FMLA leave for a qualifying exigency arising out of the fact that his or her same-sex spouse is a military member on covered active duty
- An eligible employee could take FMLA leave to care for a stepchild with a serious health condition if:
 - The employee, who is in a legal same-sex marriage, needs to take FMLA leave to care for his or her stepchild to whom the employee does not stand in loco parentis (e.g., if the child primarily lives with another parent, and the employee does not meet the *in loco parentis* requirement of providing day-to-day care or financial support for the child).
- An eligible employee could take FMLA leave to care for a stepparent with a serious health condition if:
 - The employee's parent entered into a legal same-sex marriage, even if the employee's stepparent never stood *in loco parentis* for the employee.

Next Steps. Employers may need to update existing FMLA communication materials to reflect the expanded definition of spouse. Employers offering non-FMLA leaves are encouraged to re-examine existing leave policies to determine if changes will be made to other employee leave types based on this determination. Coordination between mandated state leaves (that may have a different definition of spouse) and the federal FMLA may also be necessary.

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