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Practice Group:**Labor, Employment
and Workplace Safety**

DOL Seeks to Extend FMLA Rights Relating to Same-Sex Spouses

By Amy Groff

The U.S. Department of Labor (DOL) published a notice of proposed rulemaking on June 27, 2014, announcing a proposal that would expand the definition of “spouse” under the Family and Medical Leave Act (FMLA) to include all legally married, same-sex spouses. This proposal was made in light of the U.S. Supreme Court’s decision last summer in *United States v. Windsor*,¹ which invalidated a portion of the Defense of Marriage Act (DOMA) on constitutional grounds.

When DOMA was enacted in 1996, it restricted the definitions of marriage and spouse for purposes of federal laws, regulations and administrative interpretations. Specifically, section 3 of DOMA provided that the word “marriage” was to mean only a legal union between one man and one woman, and the word “spouse” was to refer only to a person of the opposite sex who is a husband or wife.

At the time DOMA was enacted and to the present, the FMLA regulations provided that an employee’s same-sex spouse would be a “spouse” for purposes of the FMLA only if the state in which the employee currently resides recognizes same-sex marriage.² Following the enactment of DOMA, DOL did not change the definition of “spouse” in the FMLA regulations, but DOL did issue an opinion letter in 1998 setting forth its interpretation that only the federal definition of spouse under DOMA could be recognized for FMLA purposes.³ In June of 2013, the Supreme Court held, in *United States v. Windsor*, that section 3 of DOMA was unconstitutional.⁴ No longer constrained by DOMA’s definition of “spouse,” DOL now seeks to further extend FMLA rights offered to same-sex spouses.

DOL’s proposed rule would change the definition of “spouse” in the current FMLA regulations, which is based on whether the marriage is recognized in the employee’s state of residence, to a definition that looks to the law of the state or other place in which the couple lawfully entered into the marriage.⁵

¹ 133 S. Ct. 2675 (2013).

² See 29 C.F.R. §§ 825.102 and 825.122(b) (defining a “spouse” under the FMLA as “a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.”).

³ See Opinion Letter FMLA-98 (Nov. 18, 1998).

⁴ 133 S. Ct. at 2695-96.

⁵ Currently, nineteen states and sixteen countries extend rights of marriage to same-sex couples.

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Specifically, DOL proposes to define “spouse” for purposes of the FMLA as follows:

Spouse, as defined in the statute, 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 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.⁶

This definition, sometimes referred to as the “place of celebration” rule, as compared to the current “state of residence” rule, would allow all married couples, whether same-sex or opposite-sex (or married under common law) to have consistent FMLA rights in any state in which they might live. It could also decrease some of the administrative burden placed on multi-state employers that must make these determinations on a state-by-state basis and whose employees could be subject to different FMLA leave rights if they move to another state.

With respect to FMLA leave involving a spouse, the FMLA allows eligible employees of a covered employer to take leave to care for a spouse with a serious health condition, to care for a spouse with a serious injury or illness incurred as a servicemember in the line of duty, or to address qualifying exigencies relating to the military deployment of a spouse. In addition to expanding these rights for leave involving care for an employee’s spouse, the proposed rule would also allow an eligible same-sex spouse to use FMLA leave to care for a stepparent (*i.e.*, the same-sex spouse of the eligible employee’s parent) or the stepchild (*i.e.*, the child of the eligible employee’s same-sex spouse) even when the *in loco parentis* requirements of day-to-day care or financial support have not been established.

The deadline for submitting comments relating to this proposed rule change is August 11, 2014.

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⁶ See 79 FR 36445 (June 27, 2014).

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