A Timely Analysis of Legal Developments

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Same-Sex Married Couples Now Have Equal Rights to FMLA Leave Regardless of Their Residence

By Jean L. Schmidt

The U.S. Department of Labor (DOL) has issued a Final Rule revising the regulatory definition of "spouse" under the Family and Medical Leave Act (FMLA) to ensure that same-sex married couples receive the rights and protections under the FMLA without regard to where they reside. The new definition takes effect on March 27, 2015.

Under the FMLA, an employee may take up to 12 weeks of unpaid, job-protected leave to care for his/her spouse or for a qualifying exigency arising out of the fact that the employee's spouse is a military member on covered active duty. It also affords an employee who is the spouse of a servicemember the ability to take up to 26 weeks of unpaid, job-protected leave to care for a covered servicemember with a serious injury or illness.

Under the existing FMLA regulations, whether or not an employee had a spouse was determined by the law of the state where the employee resided. This was called the "place of residence" rule. Thus, same-sex married employees who resided in a state that did not recognize same-sex marriages, although legally married elsewhere, were not permitted to take FMLA to care for their spouse.

The new regulatory definition utilizes the "place of celebration" rule for the definition of spouse—*i.e.*, the definition looks to the law of the place in which the marriage was entered into, as opposed to the law of the state in which the employee resides. This new regulation allows all couples who were legally married in any state or country, whether to an opposite-sex or same-sex partner or married under common law, to have consistent rights under the FMLA regardless of where they live.

This long-anticipated revision to the FMLA definition of spouse follows the U.S. Supreme Court's decision in *United States v. Windsor*, which struck down the Defense of Marriage Act (DOMA) as unconstitutional, and President Obama's instruction to all federal agencies to review all relevant federal statues to ensure that the "decision, including its implications for Federal benefits and obligations, is implemented swiftly and smoothly." Most federal agencies had already adopted the place of celebration rule unless the relevant statute provides for another test.

In issuing the Final Rule, the Department of Labor stated the "place of celebration rule will give fullest effect to the purpose of the FMLA to permit employees to take unpaid, job-protected leave to care for a spouse for an FMLA-qualifying reason. The need to care for a spouse is the same for all married couples and does not change depending on their state of residence."

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While the change will mean that more employees are entitled to FMLA leave to care for their spouse, it eases the administrative burden the old rule imposed on employers who operate in more than one state because they can now apply the same eligibility standard for married couples nationwide.

Employers should note that by adopting the new definition of "spouse," the DOL did not expand it to include domestic partners. Only employees who are legally married are afforded the right to take leave for their partners under the FMLA.

What Should Employers Do?

- Review your FMLA policy. If it contains a definition of "spouse," be sure it conforms to the new regulation.
- Provide training to benefit managers and human resource professionals, and operational supervisors if applicable, on the rule and its implications.
- Provide notice to your employees of the change in the regulation so that same-sex married employees are aware they now have the right to FMLA leave to care for their spouse.
- If an employee is requesting leave to care for a family member, an employer may still require reasonable documentation to confirm a family relationship. However, an employer should not require documentation for some employees and not others. The new rule did not change the existing regulation on the type of documentation that may be requested. Under that regulation, "documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc."[1]

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1 29 C.F.R. § 825.122(k).