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Final FMLA Rules Regarding Same-Sex Spouses

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The DOL amended the regulatory definition of "spouse" under the Family and Medical Leave Act ("FMLA") so that "spouse" for purposes of FMLA rights includes 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. This change is effective March 27, 2015. Current FMLA regulations use a "state of residence rule," recognizing a spouse under the law of the state in which the couple resides.

Background

In June 2013, the Supreme Court, in United States v. Windsor, 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 decision affects over 1,100 sections of federal law that have a provision based on marriage, including the FMLA.

In a nutshell, the 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 the 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 Change

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, as proposed in June 2014, final regulations now 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 rule means that an eligible employee, regardless of where s/he lives, is able to:

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

The change entitles 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 change also entitles 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.