FMLA Recognizes Same-Sex Marriages

The U.S. Department of Labor (DOL) has revised the definition of "spouse" under the Family and Medical Leave Act (FMLA) to include marriages legally entered into by same-sex couples. This revision expands the FMLA's reach and ensures that same-sex couples are provided with the same benefits, rights and privileges as opposite-sex couples, such as taking unpaid leave to care for their "spouse", stepchild or stepparent. The DOL's Final Rule was issued on February 25, 2015 and is effective on March 27, 2015. Employers should review and revise their FMLA policy to ensure compliance with the new rule.

Until recently, there has been a confusing and somewhat unmanageable split of opinion between state and federal law on the ability of same-sex couples to enjoy the benefits of laws like the FMLA, which allows eligible employees to take unpaid leaves of absence for various reasons, including to care for family members with serious health conditions. Presently there are 37 states that allow same-sex marriage and would thus recognize a same-sex spouse's right to all of the benefits and privileges enjoyed by married couples under state law. Conversely, because the federal Defense of Marriage Act (DOMA) refused to recognize same-sex marriages, same-sex married employees did not enjoy all of the benefits of the FMLA. Caught in the middle were employers trying to fairly apply both state and federal law while offering their employees an equal set of benefits. The "problem" was addressed in 2013 when the Supreme Court in the case of *United States v. Windsor* decided that the applicable portion of DOMA was unconstitutional. As a result, the DOL revised the definition of "spouse" under the FMLA by Final Rule issued on February 25, 2015. The Final Rule revises the regulatory definition of "spouse" under the FMLA to allow for eligible employees in legal same-sex marriages to be able to take FMLA leave to care for their spouse or family member, regardless of where they live. The Final Rule is effective on March 27, 2015.

The interesting back and forth over the past 18 months has been with respect to what it means to be "legally married". Originally, the DOL focused on the employees' state or residence, with only employees residing in states that allowed same-sex marriages to qualify. But the DOL revised the so-called "state of residence" rule to a "place of celebration" rule for the definition of spouse under the final regulations. The Final Rule 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. The "place of celebration" rule allows 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 Final Rule's definition includes everyone in lawfully recognized same-sex marriages and even includes marriages validly entered into outside of the United States as long as they could have been entered into in at least one state. The other impact of the Final Rule is that eligible employees may now always take FMLA leave to care for their stepchild (their same-sex spouse's child), whereas under prior rule this was only possible if the employee stood *in loco parentis* to the child (by providing day-to-day care or financial support). Similarly, the Final Rule would allow the employee to care for a stepparent regardless of whether the stepparent ever stood *in loco parentis* to the employee.

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