

U.S. Department of Labor Proposes to Change Rule Regarding Who Is a Same-Sex Spouse under the FMLA

June 26, 2014

On Friday, June 20, 2014, the U.S. Department of Labor (“DOL”) announced its intention to change the regulatory definition of who is a “spouse” for purposes of the Family Medical Leave Act (“FMLA”). The impetus for the proposed rule is the U.S. Supreme Court’s decision in *United States v. Windsor*. The Court struck down Section 3 of the Defense of Marriage Act, which had defined marriage for purposes of federal law as the union of a man and a woman.

Among other provisions, the FMLA permits eligible employees to take up to 12 weeks of job-protected, unpaid leave to care for a spouse with a serious health condition. The law also allows eligible employees to take military caregiver leave or qualifying exigency leave because of their spouse’s covered military service. Under existing FMLA regulations, an employee is entitled to FMLA leave relating to a same-sex spouse only if they reside in a state that recognizes same-sex marriage. This is known as the “state of residence” rule. The DOL’s proposed rule, on the other hand, would determine whether an individual qualified as a “spouse” using the “place of celebration” rule. Under this approach, if the employee and the same-sex spouse were married in a place in the U.S. or abroad that recognizes same-sex marriage, then the employee will be entitled to FMLA leave even if he or she lives in a state that does not recognize same-sex marriage.

The proposed rule has been approved by the Office of Management and Budget but has not been published in the Federal Register. When the rule is published, the public will have 45 days to comment. While many employers have been providing FMLA-like benefits to same-sex spouses even if not covered under the existing rule, some employers with operations in states that do not recognize same-sex marriage may need to change their FMLA practices if and when the proposed rule becomes final. For example, the place of celebration rule may require an employer to inquire into where a same-sex couple’s marriage occurred in order to ensure that leave is appropriately designated as FMLA leave. Similarly, all employers may need to ensure that their written FMLA policies are up to date once the rule goes into effect.

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