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LABOR & EMPLOYMENT LAW WATCH

DOL Updates FMLA Definition of “Spouse”

The U.S. Department of Labor (DOL) Wage and Hour division has released a Final Rule revising the definition of spouse under the FMLA, which will take effect on March 27, 2015.

The change was prompted by the U.S. Supreme Court July 2013 ruling in *United States v. Windsor*, which struck down the federal Defense of Marriage Act (DOMA) provision that defined “spouse” under federal law as a person of the opposite sex. Before the *Windsor* ruling, in accordance with DOMA, the FMLA did not entitle an employee to take leave to care for a same-sex spouse with a serious health condition.

After the *Windsor* decision, the DOL updated its guidance to remove any references to DOMA and expressly stated that the regulatory definition of spouse under the FMLA included “same-sex spouses residing in States that recognize such marriages.”

The 2015 Final Rule codifies this coverage for same-sex spouses – and now also defines spouse based on the place where the marriage was entered into (“place of celebration”), rather than the state where the employee resides. So if an employee enters into marriage (including common law marriage, but not domestic partnerships or civil unions) in any of the U.S. states or foreign countries where same-sex marriage is legally permitted – the employee is entitled to FMLA leave to care for his/her spouse with a serious health condition, regardless of where the employee resides. The rule also will allow eligible employees in legal same-sex marriages to take FMLA leave to care for his/her stepchild, even

where the employee does not stand *in loco parentis* to the child (i.e., where the employee has not assumed day-to-day responsibility to care for or financially support the child). The rule also applies in situations where the employee’s parent has a same-sex spouse who is a step-parent – allowing the employee to take FMLA leave to care for the step-parent, even where the step-parent never stood *in loco parentis* to the employee.

Employers may require documentation to support entitlement to leave – and the DOL has not changed the requirements for such documentation. Employees may still choose whether to provide either a “simple statement” asserting that the marriage exists or a marriage certificate or court document. Note that if an employee has already submitted documentation in order to obtain other benefits, such as health care coverage, that documentation is sufficient to establish the family relationship element of FMLA leave entitlement.

The DOL has indicated that it anticipates this new rule will benefit employers by reducing the administrative burden on employers operating in more than one state, and/or employers with employees who move between locations in states with different same-sex marriage laws – since employers will no longer need to consider the laws of the employee’s state of residence when making eligibility determinations.

Employers should review their policies, and to the extent necessary, ensure that any references to spouse, step-child or step-parent comply with the Final Rule and authorize leave for employees in legal same-sex marriages and/or with parents in legal same-sex marriages. HR staff and managers should also be advised of the new rule and instructed on proper review of requests for leave as well as permissible forms of documentation – with particular care taken to avoid conducting more stringent reviews or requiring additional documentation in cases where same-sex marriage is a basis for the application for FMLA leave.



We hope you find this issue of KKAL's Labor and Employment Law Watch helpful and informative. Please understand that the Law Watch is designed to provide information about current developments and required actions. If you have any questions regarding any labor and employment law matter, including the issues discussed in this newsletter, please do not hesitate to contact us at 717-392-1100, or email us at the following addresses:

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