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FMLA Protections for Same-Sex Spouses

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Employment

Under a Final Rule recently adopted by the Department of Labor ("DOL"), legally married same-sex couples will be included in the definition of "spouse" under the Family and Medical Leave Act ("FMLA") and will be eligible to use FMLA leave to care for their spouse or family member, regardless of whether their marriage would be recognized in the state where they live. The Rule is effective March 27, 2015, although at least one state Attorney General has filed an action seeking to enjoin implementation of the Rule.

Following the Supreme Court's 2013 ruling in *United States v. Windsor* that section 3 of the Defense of Marriage Act was unconstitutional, DOL announced that eligible employees residing in a state that recognizes same-sex marriage could use FMLA leave to care for a same-sex spouse (known as the "state of residence" rule). The Final Rule replaces the "state of residence" rule with a "place of celebration" rule to govern the definition of "spouse" in 29 CFR §§ 825.102 and 825.122(b).

Under the FMLA's "state of residence" rule, which had been in place since the 1990s, employees were not subject to FMLA protections if they entered into a legal same-sex marriage in one state but moved to or resided in another state that did not recognize the marriage. The new "place of celebration" rule determines eligibility by looking instead to whether the marriage was valid in the state where a couple was married, regardless of where the couple currently resides.

According to DOL, the Final Rule's definition of "spouse" "expressly includes individuals in lawfully recognized same-sex and common law marriages and marriages that were validly entered into outside of the United States if they could have been entered into in at least one state."

On March 18, 2015, Texas Attorney General Ken Paxton commenced a lawsuit against the U.S. Department of Labor, seeking a temporary and permanent injunction to block the Final Rule. In its complaint, Texas argues that *United States v. Windsor* allows states to decide whether to recognize out-of-state same-sex marriages, and that the Final Rule invalidly attempts to abrogate the States' sovereign immunity and thus "flies in the face" of the Supreme Court's decision. As of the date of this article's publication, there have been no further proceedings in this litigation.

Assuming the Final Rule goes into effect, eligible employees will be able to take FMLA leave to care for a same-sex spouse with a serious health condition, and take military caregiver leave or qualifying exigency leave when a spouse is on covered active duty. DOL's amendment does not change the fact that domestic partnerships and civil unions are not considered marriages under the FMLA.

In addition, employees in a same-sex marriage will be able to take FMLA leave to care for their stepchild; before the change, FMLA leave could not be used by employees in same-sex marriages to care for stepchildren unless the employee stood *in loco parentis* to the stepchild, meaning that they had day-to-day responsibilities to care for and financially support the child. Likewise, employees will be able to take FMLA leave to care for a stepparent who is the employee's parent's same-sex spouse, even if the stepparent never stood *in loco parentis* to the employee.

Recommended Next Steps for Employers

- Review FMLA policies and employee handbooks to ensure that any definition of "spouse" is consistent with the new regulation.
- Update practices, procedures, and training programs to ensure that employees in same-sex marriages can take advantage of FMLA leave to the same extent as their co-workers in opposite-sex marriages.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our employment practice group:

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