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DOL Publishes New FMLA Regulations That Redefine "Spouse"

The Final Rule takes effect on March 27 and redefines "spouse" under the FMLA to reflect the law in the state where the marriage was performed.

On February 25, the U.S. Department of Labor (DOL) published a final rule (Final Rule) that amends the federal Family and Medical Leave Act (FMLA) regulations to define "spouse" according to the state law where the employee's marriage took place. Previously, the regulations looked to the laws of the state where the employee resided to define "spouse." This change will result in more consistent FMLA coverage for same-sex spouses, regardless of an employee's residence and will allow same-sex couples greater job mobility. Indeed, the DOL viewed the previous definition as too limiting of same-sex couples' ability to move to a state that did not recognize same-sex marriage if the couples wanted to avail themselves of FMLA spousal coverage.

This Final Rule follows the DOL's previous 2013 clarification that same-sex spouses may qualify for coverage under the FMLA as a result of the U.S. Supreme Court's decision in *United States v. Windsor*. In *Windsor*, the Supreme Court found part of the Defense of Marriage Act unconstitutional because it limited the definition of "marriage," and thus "spouse," to the legal union between one man and one woman as husband and wife.

Other Highlights of the Final Rule

In addition to changing the definition of "spouse," the Final Rule also provides that in the case of a marriage entered into outside the United States, if the marriage is valid in the place where it was entered into and could have been entered into in at least one state, it will be recognized for FMLA purposes and the definition of "spouse."

The rule makes clear that both same-sex marriages and common-law marriages may meet these definitions.

The rule has updated language to clarify that the "same employer" limitation is applicable to two spouses who work for the same employer. This limitation provides for a combined 12 weeks of leave for the birth of a child, placement of a child for adoption or foster care, or care of a parent. The limitation also applies to the 26-week-leave entitlement to care for a covered service member.

Given the new definition of "spouse," the DOL notes in explaining the Final Rule that in the case where an individual meets the definition of a "spouse," an employee may have additional rights to care for a stepchild without establishing an *in loco parentis* relationship or to care for a spouse's parent.

The DOL clarified that to confirm a family relationship, a "simple statement" is all that may be required, and an employee has the option to provide a simple statement as opposed to some other form of documentation. The employer can request the statement in writing. The DOL also makes clear that this rule applies to all types of requests for documentation related to family relationships, not simply spouses. Finally, the DOL notes that if documentation of a spousal relationship has already been requested for another purpose, such as health benefits, an employer should not request the documentation again.

Practical Implications

Although many employers already provide leave for same-sex spouses regardless of the law in the place where an employee resides, those that do not should be cognizant of this new standard. Employers should also review how they have defined "spouse" and make sure that their definition meets the current law. Finally, employers should be aware of the documentation level that the law may require to establish a family relationship, including spouses, and employers should be careful to make documentation requests in a nondiscriminatory manner such that all spouses are required to provide documentation, not simply same-sex spouses.

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