Revised Definition of "Spouse" Under the FMLA Provides Expanded Rights to Same-Sex Couples

Client Advisories

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In a July 2013 Alert, we reported on the United States Supreme Court's landmark case of United States v. Windsor, wherein the Court declared that Section 3 of the Defense of Marriage Act (DOMA) was unconstitutional. The invalidation of DOMA's definitions of "marriage" and "spouse" granted same-sex couples a host of federal benefits that they had been previously denied. However, in the case of the federal Family and Medical Leave Act (FMLA), the effect of DOMA's defeat was not uniform for all same-sex couples. A revision to the FMLA regulations which will be issued today will rectify that situation and bring uniformity across the states with respect to how same-sex marriage is treated under the FMLA.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. At the time of the Windsor decision, the FMLA defined "spouse" as a husband and wife. The Department of Labor (DOL)'s FMLA regulations further clarified that "spouse" meant "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in a State where it is recognized."

With the enactment of DOMA in 1996, it limited the definition of "spouse" to a "person of the opposite sex who is a husband or wife." DOMA had superseded the DOL regulations, and therefore, FMLA benefits were only available to opposite-sex married couples - the benefits were **not** available to same-sex married couples. Since DOMA was overturned by the Supreme Court back in 2013, the DOL regulations were back in effect. Thus, following Windsor, same-sex married couples who **resided** in a state that recognized same-sex marriages were considered married for FMLA purposes. However, because the regulations looked to the individual's state of residence to determine the definition of "spouse," employee's who lived in a state that did not recognize same-sex marriage were not eligible for FMLA leave benefits.

This discrepancy created an issue for many employers because opposite-sex couples only had to show (1) his/her spouse is suffering from serious medical condition or qualifying exigency, and (2) s/he is legally married, while same-sex couples had to show (1) and (2), **but also** (3) that he or she resided in a state that recognized same-sex marriage. This was of great concern for employers who did not want to violate state anti-discrimination laws that prohibit discrimination based on sexual orientation.

Almost immediately following Windsor, the U.S. Office of Personnel Management (OPM) issued guidance that extended FMLA leave rights to spouses of federal employees without regard to the individual's state of residence. However, while the DOL revised its guidance documents to eliminate references to DOMA, it did not immediately revise the definition of "spouse," and therefore, for quite some time, the FMLA did not equally apply to same-sex married couples.

In June of 2014 the DOL announced that it would change the FMLA regulations to extend FMLA coverage to employees of same-sex marriages, even in states where same-sex marriages were not yet legal. And, recently, the DOL announced that it will issue a Final Rule today - February 25, 2015 - revising the regulatory definition of "spouse" under the FMLA. The definition will no longer be based on the employee's "state of residence," but rather, on the employee's "place of celebration" - where s/he got married. Accordingly, all employees who enter into a legal same-sex marriage will now be eligible for FMLA benefits. Additionally, the final rule's definition of "spouse" expressly includes individuals in lawfully recognized same-sex and common law marriages, as well as marriages that were entered into outside the Unites States, if they could be entered into in at least one state.

The effective date for the final rule will be March 27, 2015. Therefore, prior to that date, it would be wise for covered employers to recognize and acknowledge the changes being made to the FMLA, and ensure that: (1) moving forward, eligible employees are not improperly denied FMLA benefits, (2) their FMLA policies, posters and notices are all up to date, and (3) individuals responsible for administering the FMLA are made aware of/trained on this change.

If you have questions or concerns related to this ruling or other labor & employment matters, please contact a member of Archer's Labor and Employment Department in Haddonfield, N.J., at (856) 795-2121, in Flemington, N.J., at (908) 788-9700, in Princeton, N.J., at (609) 580-3700, in Hackensack, N.J., at (201) 342-6000, in Philadelphia, Pa., at (215) 963-3300, or in Wilmington, Del., at (302) 777-4350.

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