

# Department of Labor Revises Definition of "Spouse" Under the Family and Medical Leave Act to Expand Rights to All Same-Sex Couples

## The Contours of the New Definition of Spouse

The Department of Labor (DOL) has issued a Final Rule updating the FMLA regulatory definition of "spouse" in keeping with the 2013 U.S. Supreme Court decision in *United States v. Windsor*. The *Windsor* decision held that the provision in the Defense of Marriage Act that defined spouse as a person of the opposite sex was unconstitutional. Following *Windsor*, President Obama directed that all federal statutes be reviewed to implement the *Windsor* decision. The DOL determined that its then-current definition of spouse allowed eligible employees to take FMLA leave to care for a same-sex spouse, but only if the employee resided in a state that recognized same-sex marriage.

According to the DOL, "[i]n order to provide FMLA rights to all legally married same-sex couples consistent with the *Windsor* decision and the President's directive, the Department subsequently issued a Final Rule on February 25, 2015, revising the regulatory definition of spouse under the FMLA." The Final Rule amends the definition of "spouse" by focusing on the employee's "place of celebration" of the marriage rather than the status of the marriage in the state where the employee resides. The Final Rule also expressly includes individuals in lawfully recognized common law marriage or a marriage entered into outside of the United States if the marriage could have been lawfully entered into in a least one U.S. state.

The revised definition will allow eligible employees (in legal same-sex marriages) to:

- Take leave to care for their same-sex spouse with a serious health condition;
- Take qualifying exigency leave due to their same-sex spouse's covered military service;
- Take military caregiver leave for their same-sex spouse;
- Take leave to care for their stepchild (a child of the employee's same-sex spouse) without establishing an *in loco parentis* relationship; and

### POSTED:

Apr 12, 2015

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- Take leave to care for a stepparent (parent of the employee's same-sex spouse) without establishing an *in loco parentis* relationship.

The Final Rule and the updated definition of "spouse" took effect on March 27, 2015.

## Actions Employers Should Take

The updated definition of "spouse" will impact how employers administer FMLA leave. Here are some specific best practices to keep in mind:

- Make sure that both leave administrators and supervisors are trained on the new Final Rule and how it impacts eligible employee rights.
- The training should clarify that, although the Final Rule recognizes legal same-sex marriages, common law marriages and marriages entered outside the United States, it does not include civil unions or domestic partnerships.
- Review and update your FMLA policy, forms and notices to ensure that they reflect the new definition of "spouse."
- Finally, the Final Rule does not make changes to the documentation requirements to prove a spousal relationship. An employee may satisfy the documentation requirements by providing a simple statement asserting the existence of the requisite relationship or by providing documentation such as a marriage license or court document. Employers cannot enforce the documentation requirements in a manner that would interfere with an employee's exercise or attempt to exercise his/her FMLA rights. Employers should institute a consistently applied, nondiscriminatory policy if requiring documentation to establish the requisite family relationship. Employers should also consider whether the employee has already provided proof of marriage for some other purpose, such as seeking health care benefits for a spouse, as this previously provided proof is sufficient under the FMLA.

If you have any questions about the topics covered in this e-alert, please contact your Reinhart attorney or any member of Reinhart's [Labor and Employment Practice](#).

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