

Proposed Amendment to FMLA Regulations Extends Rights to Legally Married Same-Sex Couples, Regardless of State of Residence

On June 27, 2014, the U.S. Department of Labor (DOL) published a Notice of Proposed Rulemaking in the Federal Register. The DOL seeks to amend the federal Family and Medical Leave Act (FMLA) by broadening protections for legally married same-sex couples. The proposed rule would amend the definition of "spouse" for purposes of the FMLA, extending FMLA rights to legally married same-sex couples, even if they live in a state that does not recognize same-sex marriage. This amendment stems from the U.S. Supreme Court's decision in *United States v. Windsor*, in which the Court struck down the section of the Defense of Marriage Act that had defined marriage as being between a man and a woman for federal law purposes.

Currently, legally married same-sex couples satisfy the FMLA's definition of "spouse" if the state in which they reside recognizes same-sex marriage. The proposed rule would change the "place of residence" rule to a "place of celebration" rule, which would offer FMLA rights to same-sex couples who were married in a state that recognizes same-sex marriages, regardless of their place of residence. FMLA rights would also be offered to same-sex couples married outside of the United States, provided the marriage was valid where it was entered into and could have been entered into in at least one U.S. state.

If the proposed rule is adopted, eligible employees in a qualifying same-sex marriage will be able to take FMLA leave to care for their spouse with a serious health condition. Further, legally married same-sex couples will also be able to take advantage of the FMLA's military leave benefits.

While certain "domestic partners" have leave rights under the Wisconsin Family and Medical Leave Act, legally married same-sex couples in Wisconsin do not currently satisfy the definition of "spouse" under the federal FMLA because Wisconsin does not recognize same-sex marriage (although this issue is currently being litigated). Consequently, if the DOL's proposal is adopted, covered Wisconsin employers will be required to offer federal FMLA benefits to same-sex couples who were legally married in another state or abroad.

Employers should be prepared to review and revise their FMLA policies and

POSTED:

Jul 21, 2014

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practices in the event that the proposed definitional change is adopted.

If you have any questions regarding the FMLA, please contact your Reinhart attorney or any member of Reinhart's Labor and Employment group.

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