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FMLA LEAVE

Marriage equality and federal benefits

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The U.S. Supreme Court's 2013 decision in United States v. Windsor created a lot of uncertainty in federal employment benefits. Because the federal government's definition of marriage as a union between one man and one woman was deemed unconstitutional, the decision left unanswered the question of when same-sex spouses were eligible for spousal benefits in a variety of contexts. In a move that is sure to simplify things for multistate employers, the U.S. Department of Labor (DOL) is taking steps to clarify that issue under the Family and Medical Leave Act (FMLA).

The FMLA

The FMLA is a federal law that provides unpaid leave to employees who have worked for their employer for (1) at least 12 months and (2) at least 1,250 hours over the 12 months preceding a request for leave. Employees may take leave for a variety of reasons, including to care for a spouse with a

serious health condition. Thus, a key consideration in determining FMLA leave eligibility is whether the person for whom an employee intends to provide care is a "spouse" under applicable law. The word "spouse" used to be defined by the Defense of Marriage Act (DOMA). However, DOMA's definition of marriage was declared unconstitutional under the *Windsor* decision.

Reaction to Windsor

In the wake of the *Windsor* decision, the federal government was forced to come up with a new approach to federal benefits that affect spouses. Different agencies adopted different approaches, and sometimes different standards were applied to different laws administered by the same agency. For the FMLA, the DOL adopted the "state of residence" rule, which stated that if a same-sex couple's marriage was not legal in the state where they lived, they were not entitled to FMLA leave to "care for a spouse." So, for example, same-sex partners who lived in Pennsylvania and came to Delaware to get married in 2003 were not entitled to spousal leave benefits under the FMLA because their marriage was not recognized by the Commonwealth of Pennsylvania. (A federal judge in Pennsylvania struck down the state's ban on same-sex marriage in 2014.)

The state of residence rule imposed a significant administrative burden on employers, which had to research the legality of a couple's marriage in their home state as part of the FMLA eligibility analysis. The problems were particularly taxing on the East Coast, where employees frequently live and work in different states. It also created a problem for businesses with telecommuting employees because HR professionals had to familiarize themselves with the laws of all 50 states.

A new approach

Recognizing the administrative burden imposed on employers, the DOL has revised its approach to FMLA spousal benefits by adopting a "state of celebration" rule. Under the new rule, so long as a marriage is legal in the state in which it is celebrated, the couple will be considered spouses

for purposes of FMLA leave. This approach reduces the administrative burden on employers. Employers can now treat same-sex marriages the same way they treat traditional marriages: by reviewing a copy of the marriage certificate or simply assuming the marriage is valid. The new rule is part of a formal rule-making process and was issued on February 25, 2015. It will take effect March 27, 2015.

Bottom line

The DOL's revised approach to spousal FMLA leave is intended to give employees in same-sex marriages the same access to FMLA leave as other married employees. The new approach has the added benefit of simplifying the administrative process, which is already onerous. Employers that have already voluntarily extended FMLA leave to employees in same-sex marriages will not experience any change and can breathe a sigh of relief.

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