

## FMLA "Spouse" Definition Now Includes Same-Sex Spouses and Common-Law Spouses

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Practice Area: Labor and Employment

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On February 23, 2015, the Department of Labor ("DOL") issued a revised definition of "spouse", as that term is used in the federal Family and Medical Leave Act ("FMLA"). The revised "spouse" definition now extends leave rights and job protections to eligible employees in same-sex marriages and common-law marriages entered into in a state where those statuses are legally recognized, regardless of the state in which the employee currently works or resides. Previously, the FMLA definition of "spouse" did not include same-sex spouses or common law spouses if the employee resided in a state that did not recognize the employee's same-sex marriage and did not provide for a common-law marriage. As most employers know, the FMLA requires covered employers to provide eligible employees with unpaid, job-protected leave for qualified medical and family reasons, including personal or family illness, family military leave, pregnancy, adoption, or foster care placement.

In *United States v. Windsor*, the U.S. Supreme Court struck down as unconstitutional the portion of the Defense of Marriage Act that defined "spouse" as a person of the opposite sex. Following *Windsor*, the DOL interpreted its definition of "spouse" to be limited to the eligible employees in same-sex marriages recognized in their state of residence. Under the revised definition, a spouse is determined by looking to the law of the place where the marriage was entered into—the "place of celebration". Thus, an employee who gets married in a state recognizing same-sex marriage, who subsequently moves to a state that does not recognize same-sex marriage, retains his or her FMLA rights despite the law of the state of residence. Similarly, an eligible employee who enters into a legal same-sex marriage in a foreign country is eligible for FMLA leave and job protection upon returning to a state that does not recognize same-sex marriage. .

The revised definition also addresses opposite-sex couples in state-recognized common law marriages. Employees entering into legal common-law marriages retain their FMLA rights when moving to a state that does not recognize common-law marriage. However, the DOL has stated that it does not consider civil unions to be marriages for purposes of the FMLA's definition of "spouse". Therefore, employees in same-sex or opposite-sex civil unions are not eligible for FMLA leave or job protection.

### **What Does This Change Mean?**

Under the revised definition of "spouse", eligible employees, regardless of their state of residence, may:

- Take FMLA leave to care for their lawfully married same-sex spouse or common law spouse with a serious health condition;
- Take qualified exigency leave related to the lawfully married same-sex spouse's or common law spouse's covered military service;
- Take military caregiver leave for their lawfully married same-sex spouse or common law spouse;
- Take FMLA leave to care for their stepchild that is the child of their same-sex or common law spouse, regardless of whether they provide day-to-day care or financial support for the child; and
- Take FMLA leave to care for the same-sex spouse of the employee's parent, regardless of the ailing individual's parental status or whether he/she provided day-to-day care or financial support for the employee as a child.

### **How Should Employers Prepare?**

Under the Wisconsin FMLA, Wisconsin employers already are required to provide a certain amount of leave to employees in same-sex marriages, as well as registered or unregistered domestic partnerships. With this revision to the federal FMLA definition of "spouse", employers now must provide leave and job protection rights available under the federal FMLA to all employees in same-sex and common-law marriages—regardless of whether the employee's state of residence permits same-sex or common-law marriage. Additionally, employers should update their policies, leave forms, and notice forms to comply with this change no later than March 27, 2015, which is the effective date of the revised definition.

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