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New Final Rule Looks to the Place of Celebration To Define "Spouse" Under the FMLA

By Catherine T. Barbieri

The U.S. Department of Labor has issued a final rule that amends what it means to be a "spouse" for purposes of the Family and Medical Leave Act (FMLA), and provides clarity around when same-sex couples are eligible for this status under the FMLA. In adopting a "place of celebration" rule, and moving away from the existing "state of residence" rule, the amendment makes it clear that if the U.S. jurisdiction in which the marriage in question was performed recognizes the marriage, then the couple would be deemed to be spouses for FMLA purposes in every other state.

The definition of "spouse" is significant for employers because the FMLA provides that eligible employees may take leave for a number of reasons related to their spouses. Eligible employees generally may take up to 12 weeks of unpaid leave to care for a spouse with a serious health condition or for a qualifying exigency related to the covered military service of a spouse or up to 26 weeks of unpaid leave to care for a spouse who is a covered service member with a serious injury or illness. In its decision in *United States v. Windsor*, 133 S.Ct. 2675 (2013), the Supreme Court of the United States struck down as unconstitutional Section 3 of the Defense of Marriage Act and the act's definition of spouses as spouses of the opposite sex. Consistent with *Windsor*, the final rule ensures that the term "spouse" recognizes same-sex marriages that are legal in the states in which they were celebrated. Under the final rule, even if an employee lives or works in a state that does not recognize same-sex marriage, the marriage will be recognized for FMLA purposes so long as the employee was married in a state that permits same-sex marriage. Common law marriages are also subject to the place of celebration rule and will be recognized provided that the state where the marriage occurred permits common law marriage.

The final rule provides further guidance about whether couples who are married outside of the United States are deemed spouses within the meaning of the FMLA. If the marriage is valid in the place where it was entered into and could have been entered into in at least one state in the United States, then the couple will be deemed to be spouses for FMLA purposes.

The new regulatory definition of "spouse" goes into effect on March 27, 2015. While the final rule would not require employers to modify their already compliant FMLA policies, unless those policies define the term "spouse" using the former residency rule, employers should ensure that in administering the FMLA they utilize the appropriate standard in evaluating whether an employee is requesting leave in connection with a covered spouse.

For more information, or to have your FMLA policy reviewed, please contact Catherine Barbieri at 215.299.2839 or cbarbieri@foxrothschild.com or any other member of the firm's Labor & Employment Department.