

FMLA Update: Protected Leave Available to Same-Sex Spouses

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By Dean L. Silverberg, Susan Gross Sholinsky, and Anna A. Cohen

The U.S. Department of Labor (“DOL”) announced that, as of August 9, 2013, it had updated guidance documents to remove references to the Defense of Marriage Act (“DOMA”) in order to affirm the availability of spousal leave based on same-sex marriages under the Family and Medical Leave Act (“FMLA”). This change is significant because the FMLA entitles eligible employees to take job-protected leave, with continuation of group health insurance coverage, for specified family and medical reasons (including caring for a spouse who has a serious health condition). Upon return from FMLA leave, an employee generally will be returned to the position that he or she had prior to the leave, or to a position with equivalent benefits, pay, and status.

The DOL’s actions are a result of President Obama’s directive to the DOL to coordinate with other federal agencies to implement the U.S. Supreme Court’s recent decision in [*United States v. Windsor*](#), No. 12-307 (U.S. June 26, 2013), which struck down the provisions of DOMA that denied federal benefits to legally married, same-sex couples (see the Epstein Becker Green *Act Now Advisory* entitled “[The Supreme Court Strikes Down DOMA—Benefit Plan Sponsors Have Much to Consider](#)”).

In an August 9, 2013, memorandum to DOL staff, Labor Secretary Thomas E. Perez stated, “I have directed Agency Heads within the Department to look for every opportunity to ensure that we are implementing this decision in a way that provides the maximum protection for workers and their families.” Although Secretary Perez’s memorandum does not specifically address benefits to same-sex spouses in states that do not recognize same-sex marriage, other updated guidance documents make clear that the DOL only intends to expand benefits for same-sex married couples residing in the 13 states that recognize same-sex marriage and the District of Columbia. For example, updated DOL [Fact Sheet # 28F: Qualifying Reasons for Leave under the Family and Medical Leave Act](#) (“Fact Sheet”) defines a “spouse” as “a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employee resides, including ‘common law’ marriage and same-sex marriage.”

It should be noted, however, that the limitation in the Fact Sheet (regarding the employee’s state of residency) is in contrast to the position taken by U.S. Office of Personnel Management (“OPM”), the agency responsible for administering leave policies and programs for federal employees. OPM has made it clear on the Leave Administration section of its [website](#) that benefits, such as FMLA protection, have been extended to federal employees who have legally married a spouse of the same sex, regardless of the employee’s state of residency. Secretary Perez applauded OPM’s expansion of benefits such as unemployment compensation, health insurance, “and

other important benefits to federal employees and their families, regardless of whether they are in same-sex or opposite-sex marriages,” perhaps signaling a future expansion by the DOL of benefits to all spouses, regardless of the definition of “marriage” in the applicable state’s law.

What Employers Should Do Now

- Examine your FMLA policies and accompanying documentation (e.g., leave request forms) to ensure same-sex spouses are included, where applicable.
- Review procedures surrounding leave requests to ensure compliance with the revised definitions discussed above.
- Ensure that managers, human resources personnel, and others who may receive leave requests are aware that FMLA protections may apply to same-sex couples.

For more information about this Advisory or if you have any questions about the scope or application of the FMLA, please contact:

Dean L. Silverberg
New York
212/351-4642
dsilverberg@ebglaw.com

Susan Gross Sholinsky
New York
212/351-4789
sgross@ebglaw.com

Anna A. Cohen
New York
212/351-4922
acohen@ebglaw.com

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