

## DOL Extends FMLA Leave to More Same-Sex Couples

February 27, 2015

By Nathaniel M. Glasser

---

On February 23, 2015, the U.S. Department of Labor (“DOL”) published a final rule amending the definition of “spouse” under the Family and Medical Leave Act (“FMLA”) to include all individuals in legal marriages. This new rule will expand the availability of FMLA leave to more employees seeking leave to care for a same-sex spouse because whether a couple is legally married will be determined based on where the couple was married, rather than where the couple currently resides. The new rule is effective March 27, 2015.

The prior regulations followed the “place of residence” rule in defining “spouse” according to the law of the state in which the employee currently resides. The DOL was prompted to change this rule by the U.S. Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013), which struck down as unconstitutional section 3 of the Defense of Marriage Act (“DOMA”). Under DOMA, the definition of “marriage” under federal law was limited to heterosexual marriages, and thus same-sex couples could not take FMLA leave to care for their spouses. After *Windsor*, the DOL announced that an eligible employee could take FMLA leave to care for a same-sex spouse, but only if the employee lived in a state that recognized same-sex marriage.

The new amendment will follow the “place of celebration” rule, under which spousal status for FMLA purposes will be determined by the jurisdiction in which the couple was married. Under 29 C.F.R. §§ 825.102, 825.122(a), an eligible employee may take leave under the FMLA to care for a same-sex or common law spouse:

- 1) if the marriage was “entered into in a State that recognizes such marriages,” or
- 2) if the marriage was entered into outside of the United States and “is valid in the place where entered into and could have been entered into in at least one State.”

In extending FMLA leave to same-sex couples regardless of where they live, the new rule brings the FMLA regulations into line with the Supreme Court’s decision in *Windsor* and, according to the DOL, “will reduce the administrative burden on employers that operate in more than one state, or that have employees who move between states with different marriage recognition rules.”

Not only does the new rule expand leave to more employees seeking to care for a same-sex or common law spouse, it also extends the available leave to care for a stepchild or stepparent related to the employee through a same-sex marriage. Under the prior regulatory scheme, an employee in a same-sex marriage not recognized by his or her state of residence could not take leave to care for a stepchild unless he or she stood *in loco parentis* to the stepchild. Similarly, leave could not be taken to care for a stepparent unless the stepparent stood *in loco parentis* to the employee. With the change to the “place of celebration” rule, an employee in a legal same-sex marriage will be able to take leave to care for a stepchild or stepparent, regardless of the state in which he or she resides and without proof of an *in loco parentis* relationship.

## **What Employers Should Do Now**

Prior March 27, 2015, employers should do the following:

- Review all FMLA policies, procedures, application documents, and other leave-related forms carefully to determine whether they directly or indirectly contradict the new rule. To the extent that they define the terms “spouse,” “marriage,” “parent,” or “child” in a way that does not follow the “place of celebration” rule or otherwise contradicts the new rule, these documents should be amended.
- Meet with human resource managers and supervisors and any other employees responsible for implementing or administering leave policies, and make sure that they are aware of this expansion of FMLA eligibility. These individuals, in particular, should understand that eligible employees in same-sex marriages are entitled to take leave to care for a spouse even if the state in which they reside does not recognize the marriage, and that such employees are eligible to take leave to care for a stepchild or stepparent without proof of an *in loco parentis* relationship.
- Decide whether employees will be required to submit proof that a same-sex or common law marriage is valid. Under 29 C.F.R. § 825.122(k), which remains unchanged, employers may still require employees who take leave to care for a family member to provide reasonable documentation confirming a family relationship. But employers cannot use such a request to interfere with an employee’s exercise of FMLA rights. Therefore, employers must use caution in implementing such requirements and must apply the requirements uniformly.
- To the extent the employer operates in a jurisdiction with a local FMLA-equivalent (mini-FMLA) or other leave laws, review the local law’s definition of “spouse” to see whether it is more or less expansive than the new FMLA definition, and be sure to apply the broader definition where there is overlap in coverage.

\*\*\*\*

For more information about this Advisory, please contact:

**Nathaniel M. Glasser**  
Washington, D.C.  
202-861-1863  
nglasser@ebglaw.com

*This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.*

**About Epstein Becker Green**

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit [www.ebglaw.com](http://www.ebglaw.com).

© 2015 Epstein Becker & Green, P.C.

Attorney Advertising