

New “Place of Celebration” DOL Final Rule Increases the Availability of FMLA Leave for Same-Sex Spouses

Labor & Employment Law Update

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On February 25, 2015, the U.S. Department of Labor issued a final rule modifying the definition of “spouse” under the federal Family and Medical Leave Act.

This final rule, which will take effect on March 27, 2015, is a shift from the current language of 29 C.F.R. §§ 825.102 and 825.122(b), which defines “spouse” to mean “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 in States where it is recognized.”

As of March 27, the definition of “spouse” under the FMLA regulations will no longer depend on an employee’s state of residence. Instead, whether someone is an according-to-the-FMLA spouse will be determined by the law of the state where the employee’s marriage occurred—the “place of celebration.” Specifically, the new definition will be:

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

- (1) Was entered into in a State that recognizes such marriages; or
- (2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

Employers will note that this change still does not put parties to a civil union or domestic partnership on equal footing with married couples.

In light of the fact that not all states currently recognize same-sex marriage (or common-law marriage for that matter), this rule change may require employers may to take extra steps to determine where an employee's marriage occurred.

As employers must now make such an inquiry, it is critically important that employers request documentation to establish the existence of a FMLA-defined marriage in a non-discriminatory matter. Additionally, FMLA forms will need to be reviewed and updated, and those employees who administer FMLA programs or otherwise receive FMLA requests (which could mean virtually any supervisory or managerial employee), must be trained to understand that determining a spouse's FMLA eligibility may be more complex than it has been in the past.

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