Insights: Alerts

Department of Labor Broadens Family and Medical Leave Act Protections for Same-Sex Spouses

FEBRUARY 26, 2015 Written by Susan W. Pangborn, Diane L. Prucino

The Family and Medical Leave Act of 1993 ("FMLA") provides eligible employees with a job-protected right to take leaves of absence for certain family- and medical-related reasons, including to care for a spouse with a serious health condition, to care for a spouse who is a service member or veteran with a service-related serious injury or illness, and the occurrence of a "qualifying exigency" relating to a spouse being deployed to a foreign country for military duty. On February 25, 2015, the Department of Labor ("DOL") issued a final regulation redefining the term "spouse" for FMLA purposes to include same-sex couples who have been legally married in any jurisdiction, regardless of whether the state in which they reside or work recognizes their marriage.

Reasons for the Regulatory Change

In enacting the FMLA, Congress defined the term "spouse" simply as "a husband or wife" and gave the DOL the power to issue regulations interpreting the FMLA. Acting on that authority, the DOL issued FMLA regulations in 1995 that defined "spouse" as an employee's husband or wife in a marriage that was legally recognized in the state in which the employee resided. At the time those regulations were issued, no state recognized the legality of a marriage between two men or two women. Since that time, marriage laws have changed in a number of states as a result of state constitutional amendments, statutory enactments, and court decisions finding state laws limiting marriage to a union of one man and one woman unconstitutional under the Equal Protection Clause of the federal constitution. Today, more than three dozen states recognize same-sex marriages.

At first, these changes in state marriage laws had no effect on the FMLA because the federal Defense of Marriage Act ("DOMA"), enacted in 1996, defined "marriage" for federal law purposes as a union between a man and a woman and "spouse" as a person of the opposite sex who is a husband or wife. Although the DOL did not amend its regulatory definition of "spouse" under the FMLA after the enactment of DOMA, it did issue an opinion letter stating that, regardless of state recognition of same-sex marriages, only a marriage as defined by DOMA could be recognized for FMLA spousal leave purposes. In 2013, however, the U.S. Supreme Court struck down DOMA's definitions of "marriage" and "spouse" as unconstitutional. In the wake of that decision, the DOL reverted to its 1995 regulatory definition of "spouse," which looked at whether an employee's marriage was recognized in the employee's state of residence. This meant that an employee who had been legally married to a same-sex spouse in one state but who lived in another state that did not recognize same-sex marriage was not entitled to spousal leave under the FMLA.

The New Regulatory Definition of "Spouse"

With the number of legally married same-sex couples dramatically increasing in recent years, the application of the

existing regulatory definition of “spouse” led to cumbersome results and perceived unfairness with respect to same-sex spouses. The DOL has therefore amended its regulatory definition of “spouse” under the FMLA. Under the new definition, a spouse is the person with whom an employee has entered into a marriage in a jurisdiction that legally recognized the marriage. Thus, the new definition uses a “place of celebration” rule rather than a “place of residence” rule in determining the legality of the marriage. Marriages that were legally entered into outside the United States are included in the definition as long as they could have been entered into in at least one state.

The new definition of “spouse” affects FMLA rights for opposite-sex couples as well as same-sex couples because it encompasses common-law marriages. Previously, an employee who had entered into a common-law marriage in a state that recognized such unions but who resided in a state that did not recognize common-law marriages was not entitled to spousal leave under the FMLA. Under the new regulation, that employee would be entitled to such leaves.

The new regulatory definition of “spouse” under the FMLA goes into effect on March 27, 2015.

Practical Implications

The new regulation establishes that legally married couples are entitled to FMLA spousal leave regardless of the marriage laws of their state of residence. Employers with FMLA policies that define “spouse” in terms of the marriage laws of an employee’s state of residence should amend that definition before the March 27, 2015 effective date of the new regulation. Under the new rule, there may still be instances in which a married couple would not be entitled to spousal leave under the FMLA – for example, a couple that legally married in a foreign country at an age at which no state in the United States would permit a marriage. Such instances are likely to be extremely rare, however. Employers applying the new definition of “spouse” should take care to do so in a uniform manner. For example, although an employer could require proof of an employee’s legal marriage for FMLA leave purposes, to require such proof only from employees in same-sex marriages might expose the employer to claims under a state or local sexual orientation discrimination law.

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