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FMLA Policy Changes Employers Should Make in Light of Windsor and the DOL's New Guidance

August 18, 2013
By Nonnie L. Shivers

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The U.S. Department of Labor (DOL) made its first official post-*Windsor* announcement regarding the Family and Medical Leave Act (FMLA) on Friday, August 9. In an internal email to all DOL employees, Labor Secretary Thomas E. Perez announced that the DOL updated multiple guidance documents to remove references to DOMA and "affirm the availability of spousal leave based on same-sex marriages" under the FMLA. Secretary Perez noted that the amendment of the guidance documents was just one of many steps that the DOL would take over the coming months to implement the *Windsor* decision in a way that "provides the maximum protection for workers and their families."

The most notable change made by the DOL is a revision to a DOL "Fact Sheet" removing references to DOMA and defining spouse to include same-sex spouses where recognized by state law. Per the revised Fact Sheet, a "spouse" is 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." This definition is consistent with the FMLA regulations, which define "spouse" based on the legal definition of marriage in the state in which the employee resides. The Fact Sheet also linked to previously issued DOL materials affirming FMLA eligibility for employees with an *in loco parentis* relationship with a child, regardless of the recognition of one's same-sex marriage. In light of the *Windsor* ruling and the DOL's incremental forward movement,

employers must carefully consider what changes they need to make to their FMLA policies and procedures compliant with quickly evolving but murky law in this area. The questions and answers below provide employers practical guidance on how to assess their obligations and determine what, if any, policies they must change or may simply consider changing in light of these developments.

Q: If my company has employees residing in any of the 13 states that recognize same-sex marriage or the District of Columbia, does the company need to change any of its FMLA policies or procedures?
A: Yes. Employees are entitled to take FMLA leave to care for same-sex spouses who have a serious health condition (or for qualifying military leave)—presuming all other eligibility factors are met (e.g., minimum hours, certification, etc.)—if:

- The employees are domiciled (*e.g.*, their state of primary residence) in California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, or the District of Columbia.
- The employees are married to a same-sex spouse recognized by their home state. It is not a requirement that the marriage be performed in that state.

Marriage recognized by the state in which the employee lives dictates FMLA eligibility.

Q: If my company does not have any employees residing in the 13 states that recognize same-sex marriage or the District of Columbia, does the company need to change any of its FMLA policies or procedures?
A: If you do not have any employees currently residing in a jurisdiction that recognizes same-sex marriage, you are not required to change any of your policies/procedures for same-sex couples in order to comply with *Windsor* or the new DOL guidance. Because the FMLA looks to the employee's "place of domicile" to determine whether a person is a spouse for purposes of the FMLA, employees in same-sex marriages living outside of the 13 states or the District of Columbia are not currently considered "spouses" under the FMLA. Even if an employee was married in a state that recognizes same-sex marriage or previously resided in a state that recognizes same-sex marriage, FMLA eligibility is determined based on the state of residence's recognition of a "spouse."

The one state where this issue is currently in limbo is New Mexico. New Mexico is the only state that does not explicitly either ban or permit same-sex marriage. The New Mexico Attorney General believes that same-sex marriages performed in other states should be recognized in New Mexico. As of August 26, 2013, two New Mexico courts have ordered various New Mexico county clerks to issue marriage licenses to same sex couples. While New Mexico does not have a state law that requires New Mexico employers to recognize same-sex marriages, in light of the guidance and court rulings, it seems wise for employers to recognize same-sex marriages for employees residing in New Mexico.

Q: Is an employee FMLA-eligible if he or she works for our company in a state that recognizes same-sex marriage but lives in a state that does not recognize same-sex marriage?

A: No. Unless the employee lives in a state that recognizes the employee's same-sex marriage, he or she is not FMLA eligible. Simply working in a state that recognizes same-sex marriage does not make him or her FMLA eligible because the FMLA currently looks to whether the state of primary residence recognizes the marriage as valid.

Q: Is an employee FMLA eligible if he or she travels to another state or country to enter into a valid same-sex marriage but resides in a state that does not recognize same-sex marriage?
A: No. An employee is eligible for the FMLA only if he or she is domiciled in a state that authorizes same-sex marriage and/or recognizes same-sex marriages performed elsewhere. This issue commonly arises because only 37 percent of same-sex couples live in a state where same-sex marriage is recognized according to 2010 U.S. Census Bureau data. This issue will persist because *Windsor* does not prevent any state from denying recognition of same-sex marriages performed in other states or jurisdictions. Given the incongruities this may cause, the DOL may resolve the issue in the future by revising FMLA regulations to address situations in which one's legal spousal status is not recognized under state law. The DOL could recognize a "place of celebration" rule, in which spousal status is determined based on the law of the state or country where the employee got married, rather than the state of residence. Fifteen countries around the world, including Canada, currently permit same-sex marriage.

Q: Can our company choose to offer FMLA leave to employees in same-sex marriages even if they do not live in a state that recognizes same-sex marriage?
A: Even before the *Windsor* ruling, many employers elected to create an FMLA-like leave (without calling it "FMLA leave") for a far broader group of employees than required by the FMLA. *Windsor* does not change employers' ability to offer additional protections or leave. However, if an employee in a same-sex marriage does not live in a state that recognizes his or her same-sex marriage, that employee is not FMLA eligible and leave to care for his or her spouse cannot be charged against that employee's FMLA bank for leave since the employee's and spouse's state of residence does not recognize them as spouses for FMLA purposes.

Q: What about overlap between state family leave laws and the FMLA?
A: Many states have enacted their own family leave laws encompassing same-sex partners or spouses—further complicating employers' leave obligations. Employers should revisit the potential overlap of state and federal coverage and leave awards, especially to determine if state and federal leaves can both be given and whether state leave now counts as FMLA leave. If you have employees in Hawaii, New Jersey, Oregon, or Wisconsin, where same-sex marriage is not recognized, same-sex married couples can take leave under state leave laws, but the leave cannot be charged against the employees' FMLA bank. If you have employees in California, Maine, or Vermont, where same-sex marriage is recognized, employees in same-sex marriages are eligible for leave under both the FMLA and state law, so leave will count against the employee's FMLA bank. This may result in the incongruous result that employees in same-sex marriages living in states where those marriages are recognized may receive less total leave by being FMLA eligible. Be sure to keep abreast of any changes in state law that could impact an employee's rights or an employer's obligations. For instance, Colorado employers should be aware of the recently enacted Family Care Act, which allows a same-sex

employee to take up to 12 weeks of leave to care for his or her same-sex spouse. A Colorado employee would also be eligible for 12 weeks of FMLA leave to care for his or her own serious health condition or other permissible FMLA leave on top of the Family Care Act leave. Employers should also be prepared for requests to designate leave taken within the past year as FMLA leave for newly eligible employees in light of the rulings.

Q: If an employee is in a recognized civil union or has a registered domestic partner, is he or she considered a "spouse" for purposes of the FMLA?
A: No. Per the newly revised Fact Sheet, a "spouse" is 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*." (emphasis added) The DOL's definition of spouse specifically references same-sex marriage, not domestic partners or civil unions. Based on current state definitions of common law marriage, it seems highly unlikely that same-sex partners could be considered common law spouses without amending state law.

Q: Can a company ask same-sex employees for proof of a valid marriage even if opposite-sex couples are not asked for any documentation?
A: FMLA regulations permit an employer to obtain confirmation of a family relationship: (1) where an employee requests leave to care for a covered service member; and (2) in order for an employer to determine if an absence is potentially FMLA-qualifying. Employers can ask an employee for confirmation that he or she resides in a state that recognizes same-sex marriage. Because being a "spouse" under the FMLA depends on where the employee resides, employers need to know that a same-sex marriage exists, as well as in which state the employee resides, in order to determine FMLA eligibility. As a result, nearly every FMLA leave request can potentially become a bit of an investigation for employers. If your company does not ask heterosexual employees for marriage certificates or other documentation, or if your company simply asks for verbal confirmation of a valid marriage, be extremely cautious about subjecting employees in same-sex marriages to heightened requirements, especially in light of state and local protections against sexual orientation discrimination. Consider whether the company needs to update databases and other systems (such as human resources databases), plan administration, and payroll systems to reflect the marital status of same-sex couples in order to determine and track eligibility.

Q: How do recent events impact same-sex parents taking FMLA leave?
A: Prior to *Windsor,* the FMLA already extended protections to same-sex couples raising children. Same-sex partners have always been deemed parents of their same-sex partners' children under the FMLA. To the extent that employers were not granting same-sex partners *in loco parentis* status before, the DOL issued guidance in 2010 clarifying the issue. Under the FMLA, same-sex partners have always been able to take leave to care for or bond with children they intend to or are helping raise, regardless of state recognition of their union. However, in states where their same-sex union is recognized, same-sex couples will now have to share bonding leave, military caregiver leave, or leave to care for parents if they are employed by the same employer.

Q: Does my company need to take any affirmative steps to alert employees about these FMLA changes?
A: While there is no requirement, it may be wise to alert employees to these changes from an employee-relations and leave-administration perspective. Some companies are opting to proactively reach out to employees known to be in same-sex relationships, recognized domestic partnerships, and civil unions to alert them to the changes in FMLA policies and eligibility, as well as other benefits and taxation-related issues. At a minimum, all employers should update their forms and alert their managers and leave administrators about any legal or policy changes and new entitlements.

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