

SEPTEMBER 26, 2013

## SAME-SEX MARRIAGE AND THE FAMILY & MEDICAL LEAVE ACT

Earlier this summer, the U.S. Supreme Court struck down a key section of the Defense of Marriage Act (“DOMA”), which had limited the federal government’s definition of “spouse” to opposite-sex spouses. This decision has far-reaching implications and affects more than one thousand provisions in federal law. The Family and Medical Leave Act (the “FMLA”) is one of the laws affected by the Court’s ruling.

### Background

By way of background, the FMLA statute defines “spouse” to mean “a husband or wife.” Because it is a very generic definition, the FMLA regulations that were issued by the U.S. Department of Labor (“DOL”) in 1993 defined “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.” In 1996, DOMA was enacted and restricted the definition of “spouse” to opposite-sex spouses only, even though same-sex marriage was not legal anywhere in the United States at the time. Therefore, until the recent Supreme Court decision, the FMLA definition of “spouse” was limited by DOMA to opposite-sex spouses.

### New Definition of “Spouse”

In the wake of the Supreme Court decision this summer, all federal agencies have been directed by the Obama administration to review and revise their regulations and practices to take into account that “spouse” cannot be limited to opposite-sex marriages. In August, the DOL issued a revised Fact Sheet #28F ([available here](#)) that includes the following new definition of “spouse” for FMLA purposes: **“Spouse means 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.”** Although the FMLA regulations have not yet been revised, and although it is possible that the regulations may use a broader definition of “spouse” than is used in the Fact Sheet, the revision to the Fact Sheet signals how the DOL currently will apply the Supreme Court decision to the FMLA.

### Impact on Employers

For employers, the immediate impact of the change to the Fact Sheet will depend on the states in which employees reside. Most states do not currently recognize same-sex marriage, so employees residing in those states will not be affected by the new definition. For example, a same-sex couple married in Massachusetts (which recognizes same-sex marriage) but living in Kansas (which does not) will not be treated as married for FMLA purposes.

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Including same-sex spouses in the FMLA definition of “spouse” has several effects on employers and their administration of FMLA leave, including the following:

1. **Leave for Serious Health Condition.** An employee can take FMLA leave to care for the employee’s same-sex spouse with a serious health condition.
2. **Leave for Qualifying Exigency.** A “qualifying exigency” exists when, among other things, an employee’s same-sex spouse is an active military member who has been called to active duty in a foreign country. In such cases, the employee can take FMLA leave for various reasons – everything from childcare to counseling to post-deployment activities.
3. **Military Caregiver Leave.** An employee can take “military caregiver” FMLA leave to care for a same-sex spouse who is a military member (or a recently discharged veteran) who suffered an injury or illness in the line of duty.
4. **Reduced Leave if Spouses Work for the Same Employer.** The FMLA provides that two spouses who work for the same employer may be required to pool their available FMLA leave. For example, if spouses work for the same employer, and their child has a serious health condition, the spouses are limited to a total of 12 weeks of FMLA leave, combined – not 12 weeks apiece. Before the Supreme Court’s DOMA ruling, same-sex spouses were not subject to this provision. Now, however, same-sex spouses who work for the same employer and reside in states that recognize same-sex marriage are subject to the same FMLA leave limitations as are opposite-sex spouses who work for the same employer.
5. **Effect on State-Mandated Leave.** Some states have enacted their own FMLA-style leave laws that extend leave rights to same-sex spouses. Under the old FMLA definition of “spouse,” an employee could take state-level leave to care for his/her same-sex spouse without reducing his/her leave entitlement under the federal FMLA. The new FMLA definition of “spouse” removes this loophole.

If you have questions regarding the new FMLA definition of “spouse” or would like assistance with revising your FMLA policies and procedures, please feel free to contact Jim Spencer at (316) 660-6109 or [jspencer@hinklaw.com](mailto:jspencer@hinklaw.com) or Trinidad Galdean at (316) 660-6135 or [tgaldean@hinklaw.com](mailto:tgaldean@hinklaw.com).