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FMLA RIGHTS FOR (SOME) SAME-SEX SPOUSES

Aug 29, 2013

On August 9, 2013, the Department of Labor (DOL) took its first action in response to the Supreme Court decision in United States v. Windsor, which struck down those provisions of the Defense of Marriage Act (DOMA) prohibiting the treatment of same-sex couples who were legally married under applicable state law as spouses for purposes of federal law. In an e-mail to DOL staff, Secretary of Labor Thomas Perez announced that several guidance documents had been updated to remove references to DOMA and provide that employees residing in states in which same sex marriage is legal would be entitled to leave under the Family and Medical Leave Act (FMLA) to care for a same-sex spouse with a serious health condition. Specifically, a DOL Fact Sheet which describes the qualifying reasons for FMLA leave was revised to provide that 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…same-sex marriage."

While significant as an explicit statement of policy, the DOL's action in effect simply confirms the general approach previously taken in the regulations under FMLA, which have always provided that an employee's spouse is determined under the law of the state of residence. Without the overlay of DOMA, that regulation leaves the determination of who is a spouse for purposes of FMLA with the state where the employee resides. Accordingly, whether this is a signal of how same-sex marriages will be recognized for purposes of rights under federal law, or whether a different approach might ultimately be taken (e.g., based on the state of celebration of the marriage, rather than the state where the employee resides), remains to be seen. In case there was any doubt, further developments can be expected in the near future, as Secretary Perez indicated that this is only "one of many steps the Department will be taking over the coming months to implement the Supreme Court's decision."

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