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DESIGNATING LEAVE TO CARE FOR A SAME-SEX SPOUSE AS FMLA LEAVE CAN CREATE UNINTENDED CONSEQUENCES

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Generally, benefits and employment attorneys emphasize the need for consistency in how employees are treated, whether such treatment relates to benefits, policies, or work rules.

But sometimes, "consistency" may not be the best answer.

Take, for example, the question of whether to designate leave taken by an employee to care for a same-sex spouse as leave under the Family and Medical Leave Act ("FMLA").

Currently, some states recognize same-sex marriage, while others do not. Under the FMLA regulations, the "place of residence" rule determines whether a same-sex spouse meets the definition of "spouse" under the FMLA. Thus, an employee is entitled to take FMLA leave to care for the employee's same-sex spouse *only when* the state in which the employee resides recognizes same-sex marriage.

Despite the current FMLA definition, some employers, desiring to treat employees consistently – most times either out of a concern for fairness or for purposes of easing administration – choose to define "spouse" in their employment policies to include same-sex spouses. Such employers then permit employees to take what they call "FMLA leave" to care for a same-sex spouse, even if the individual is not recognized as a "spouse" under applicable state law.

The potential problem with this approach is that only leave that fits within the circumstances that qualify for FMLA leave is permitted to be designated by an employer as FMLA leave and counted against an employee's FMLA entitlement. Counting FMLA leave incorrectly can result in FMLA interference claims.

For example, an employee who is granted FMLA leave to care for his same-sex spouse despite residing in a state that does not recognize same-sex marriage, and who is later denied additional FMLA leave for his own serious health condition on the grounds that he has used up his FMLA entitlement for the applicable 12-month period, could pursue an FMLA claim against the company. His argument would be that the previous leave to care for his same-sex spouse should not have

been counted as FMLA leave, and therefore the incorrect notices from his employer and the subsequent denial of his request for additional FMLA leave interfered with his rights under the FMLA.

Instead of designating leave to care for a same-sex spouse as FMLA leave with respect to an employee who does not reside in a state where same-sex marriage is recognized, an employer who wishes to provide leave in this situation should consider having a separate, non-FMLA policy for this purpose and understand that this leave will not count against the employee's FMLA leave entitlement.

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