

ANOTHER SAME-SEX MARRIAGE BAN FALLS: FMLA IMPLICATIONS

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On June 6th, a Wisconsin federal district court held that state laws prohibiting same-sex marriage are unconstitutional in the matter of *Wolf v. Walker*. This decision is the latest in a series of rulings in favor of same-sex marriage since the Supreme Court overturned section three of the Defense of Marriage Act in *United States v. Windsor*, nearly one year ago. Since *Windsor*, judges in eight states (AR, ID, MI, OK, TX, UT, VA, and WI) have overturned same-sex marriage bans, and judges in four other states (IN, KY, OH, and TN) have issued more limited rulings in favor of same-sex marriage. On June 13th, the district court judge issued an injunction against enforcement of the ban, but stayed the order pending the outcome of the defendant's appeal to the Seventh Circuit Court of Appeals.

For the employee benefits community, this decision will have an impact on the eligibility of Wisconsin employees to take job-protected leave to care for their seriously ill spouse under the Family Medical Leave Act (FMLA). Current FMLA guidance from the Department of Labor applies a "place of residence" rule that does not require employers to permit employee leave to care for a same-sex spouse if the employee resides in a state that does not recognize same-sex marriage. If upheld on appeal, the decision would mean that an employee who resides in Wisconsin and was legally married in another state would be eligible for FMLA leave to care for her same-sex spouse.



For employers with Wisconsin employees, documents such as HR manuals, policies, procedures, and payroll systems should be earmarked where a change to reflect similar treatment of both opposite-sex and same-sex married couples may be necessary. While reviewing their FMLA policy, employers should pay attention to their plan's definition of "son or daughter" for purposes of FMLA leave to ensure that definition applies equally to children of the same-sex spouse of an employee. With similar cases pending in the 4th, 5th, 6th, 7th, 9th, and 10th Circuit Courts of Appeals, expect more updates in the coming months as these appeals are decided.

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