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Same-Sex Marriages and Employee Leave Entitlement After *Windsor*

By Jean Schmidt

In *Windsor v. United States*, No. 12-307 (June 26, 2013), the Supreme Court ruled that the section of the Defense of Marriage Act (DOMA) that required federal laws to ignore same-sex marriages that are legally entered into under an applicable state law is unconstitutional. The *Windsor* decision will significantly affect employee leave entitlement under state and federal law.

The Family and Medical Leave Act (FMLA) provides eligible employees up to 12 weeks of unpaid, job-protected leave per year for the employee to care for a spouse with a serious health condition. If the spouse is an eligible military servicemember with a serious injury or illness, the employee is eligible for 26 weeks of leave.

The FMLA defines "spouse" as a husband or wife. (29 U.S.C. § 2611 (13).) The FMLA regulations issued by the Department of Labor clarify that spouse means "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." (29 C.F.R. § 825.122) When DOMA was enacted in 1996, its limited definition of spouse as "a person of the opposite sex who is a husband or wife" superseded the DOL regulations, so that same-sex married couples were not entitled to FMLA leave to care for their spouse.

Now that DOMA has been overturned, the definition of spouse in the DOL regulations is once again in effect. Accordingly, same-sex married couples who live in a state that recognizes same-sex marriages, or that gives validity to same-sex marriages legal in other states, will be considered married for FMLA purposes and will be entitled to FMLA leave to care for their spouse.

What Does this Mean For Employers?

Employers whose employees reside in the District of Columbia and the 13 states where same-sex marriages are recognized must allow FMLA leave for same-sex married employees to care for their spouse with a serious health condition.[1] Generally, this will require no major changes to the employer's policies and procedures, unless such policies and procedures had different or special rules for employees in same-sex relationships or marriages.

1 California, Connecticut, Delaware (effective July 1, 2013), Iowa, Maine, Maryland, Massachusetts, Minnesota (effective August 1, 2013); New Hampshire, New York, Rhode Island (effective August 1, 2013), Vermont, and Washington.

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Same-sex married employees residing in New Mexico also may be entitled to FMLA spousal leave. Although same-sex marriages are not licensed in New Mexico, New Mexico recognizes the validity of marriages legally performed in other states and does not exempt same-sex marriage from that recognition.[2] Moreover, New Mexico has no statute prohibiting same-sex marriages, and the attorney general issued an opinion in June 2011 stating that, in his view, a same-sex marriage that is valid under the laws of the country or state where it was consummated would likewise be found valid in New Mexico.

Paradoxically, following the *Windsor* decision, same-sex married couples in states recognizing same-sex marriage may qualify for a lesser amount of FMLA leave as a combined total than they had before. First, under the FMLA, an employee can take up to 12 weeks of unpaid, job-protected leave for the birth, adoption, or foster care of the employee's child (Bonding Leave) or to care for a parent with a serious health condition (Family Care Leave). However, if spouses work for the same employer, the spouses are limited to a total of 12 workweeks of leave between them if the purpose of the leave is Bonding Leave or Family Care Leave for a parent. Under DOMA, same-sex married couples who worked for the same employer were not "spouses," so each one could take 12 weeks to bond with a new child or to care for their parent. Following *Windsor*, same-sex spouses will be required to aggregate FMLA leave for these purposes as "opposite sex" spouses do.

Second, before *Windsor*, same-sex married employees in states which recognized same-sex marriages and which had state leave laws were entitled to take leave to care for their spouse under the state law, even if they were not entitled to leave under the FMLA.[3] Thus, employees could take leave to care for their spouse under the state leave law, without using any of their 12 weeks of FMLA leave entitlement. As an example, in Vermont, employees could take 12 weeks of leave to care for a same-sex spouse under Vermont's leave law and another 12 weeks for their own illness or to care for their child or parent under the FMLA. Now that same-sex married employees in those states are entitled to spousal leave under the FMLA, any leave taken to care for their spouse will count as time taken under both the FMLA and the state law. Thus, instead of up to 24 weeks of leave in any 12-month period to care for a spouse and then care for family members, a Vermont same-sex married employee now has a maximum of 12 weeks or 26 weeks of FMLA military exigency or military caregiver leave if the spouse is a covered military servicemember.

Some states which do not recognize same-sex marriage have enacted legislation that recognizes civil unions or domestic partnerships for same-sex couples. Employees in those relationships have not been entitled to spousal leave under the FMLA and that is not likely to change. Even before DOMA, the DOL took the position that employers did not have to provide FMLA leave to an employee to care for a domestic partner. In addition, because the FMLA regulations define "spouse" in terms of the state of residence's definition of "marriage," it seems likely that (absent a change in the regulations) spousal standing under the FMLA will apply only to marriages that are recognized by the state as marriages, and not to civil unions.

What's Ahead for the FMLA Regulations

Because the DOL regulations look to the employee's state of residence to determine whether a person is a spouse, employees who live in one of the states that do not recognize same-sex marriage (with the possible exception of New Mexico, which may recognize same-sex marriages from other states) will not be able to take FMLA leave to care for their spouse even though they are legally married. For example, a couple married in New York who lives in Alabama would not be considered "spouses" for FMLA purposes.

To ensure that same-sex married couples are entitled to full FMLA protection no matter where they reside, the DOL could amend the regulation to provide that spousal status is based on the laws of the state where the employee married rather than the laws of the state where the employee resides. Whether that will happen and when it might happen is unclear. Various advocacy groups have indicated that they will be working to ensure that such changes are made so that same-sex married couples are treated the same under federal law regardless of their residence.

2 N.M. Stat. § 40-1-4.

3 States that recognize same-sex marriage and also have state leave laws: Connecticut – 16 weeks of leave in 24 months; Maine – 10 weeks of leave in 2 years; Rhode Island – 13 consecutive weeks of leave in 2 years; Vermont – 12 weeks of leave in 12 months; Washington – 12 weeks of leave in 12 months; District of Columbia – 16 weeks of leave in 24 months. California, which now recognizes same-sex marriage, also has a state leave law – 12 weeks of leave in 12 months.

Even if the DOL regulations are not changed, employers with employees in multiple states—some recognizing same-sex marriage and some not—may wish to consider permitting all same-sex married employees to take spousal leave to ensure equal treatment. However, before implementing changes to leave policies, the employer should consult legal counsel to determine the impact (intended and unintended) of the possible changes. For example, if an employee is not legally entitled to use FMLA leave for a same-sex spouse due to the law of the employee's state of residence, but the employer approves leave to care for the employee's spouse, the approved leave will not count against the employee's FMLA entitlement, and the employee will have an (untapped) 12 weeks of FMLA leave still available.

State Leave Laws That Provide Leave for Same-Sex Couples

Seven states have state leave laws that provide leave for employees in civil unions or domestic partnerships to care for their same-sex partner.[4] Three of those states—California, Maine and Vermont—also recognize same-sex marriage. The other four—Hawaii, New Jersey, Oregon and Wisconsin—do not recognize same-sex marriage. However, while same-sex marriages will not be recognized as valid marriages in Hawaii, New Jersey, Oregon or Wisconsin, the relationship is recognized as a civil union/domestic partnership under those states' laws. Thus, same-sex couples in Hawaii, New Jersey, Oregon and Wisconsin are entitled to spousal leave (covered as a civil union or domestic partnership) under state law.

Employers with employees in these seven states must comply with state leave laws pertaining to civil unions and domestic partnerships regardless of whether FMLA leave is now required for same-sex married couples. Note that in Hawaii, New Jersey, Oregon and Wisconsin, same-sex married employees can take leave under the state law to care for their spouse and it will not reduce the amount of leave they have under the FMLA because these states do not recognize same-sex marriages. In contrast, in California, Maine and Vermont, employees in same-sex marriages are entitled to spousal leave under the state law and under the FMLA because these states do recognize same-sex marriages. Thus, when employees in these three states take leave to care for their spouse under state law, it will count against their FMLA leave, and vice versa.

Employees in same-sex marriages who reside in Colorado are not entitled to spousal leave under the FMLA because Colorado does not recognize same-sex marriage. However, the recently enacted Colorado Family Care Act (FCA) requires that federal FMLA-covered employers provide FMLA leave to an FMLA-eligible employee to care for a person with a serious health condition who is the employee's partner in a civil union or the employee's domestic partner.[5] Colorado recognizes same-sex marriages that are legal in another state as a civil union under its newly enacted civil union law.[6] Under the FCA, same-sex married employees residing in Colorado are entitled to up to 12 weeks of leave in a 12-month period to care for their spouse.

While seemingly straightforward, the Colorado FCA creates issues for employers. The FCA states that such leave "runs concurrently with leave taken under the FMLA." The FCA also states that leave permitted under the Act does not increase the total leave allowance under the FMLA in a 12 month period. However, a state law cannot deny an employee rights under the FMLA. The FMLA regulations provide that leave taken under state law for something not covered by FMLA cannot run concurrently with FMLA leave. Thus, because leave for civil union partners is not covered by FMLA, the FMLA entitles a Colorado employee to 12 weeks of leave for an authorized purpose irrespective of leave time granted by the employer to care for a same-sex partner under FCA. As a result, Colorado same-sex married employees may take up to 12 weeks of leave to care for their same-sex spouse under the FCA and still have their 12 weeks of FMLA leave available to use for their own health condition or other permissible FMLA purposes.

Recommendations for Employers

Employers with employees in states where same-sex marriages are recognized should review their FMLA policies and procedures to ensure they provide leave for an employee in a same-sex marriage to care for the employee's spouse.

4 California, Maine, Oregon and Wisconsin provide leave for employees in domestic partnerships and Vermont, Hawaii and New Jersey provide leave for employees in civil unions.
5 Colo. Rev. Stat. § 8-13.3-203. The CFA takes effect on August 7, 2013 unless a referendum petition is filed before that date, in which case the law goes on the November 2014 general ballot. A domestic partner must be either registered with the municipality where the employee resides or recognized by the employee's employer.
6 Colo. Rev. Stat. § 14-15-116.

Employers with employees in states with state leave laws should review their policies, forms and procedures to ensure that employees, managers and administrative personal understand leave entitlements for an employee in a same-sex marriage, civil union, domestic partnership or other relationship, and ensure that that employee's right to FMLA leave is properly coordinated with his or her right to leave under the state's leave law.

Further, to avoid confusion and to ensure compliance with FMLA, leave under state law should be denominated as such, rather than generically as "FMLA leave." In states like Colorado, employers should not count state law-authorized leave that is available to employees in civil unions and/or domestic partnerships against an employee's FMLA leave entitlement.

Jean Schmidt is a Shareholder in Littler Mendelson's New York City office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com or Ms. Schmidt at jschmidt@littler.com.