



DOL Issues Final Rule to Expand FMLA Protections for Same-sex Spouses

Provided by Rose Street Advisors

Quick Facts

- The DOL has issued a final rule that will expand FMLA leave rights for same-sex spouses, regardless of where same-sex couples reside.
- The DOL's new guidance for same-sex spouses takes effect on **March 27, 2015**.
- The final rule adopts a "place of celebration" rule, instead of the "state of residence" rule, for recognizing same-sex marriages.
- The final rule also redefines "spouse" under the FMLA to expressly reference same-sex marriages.

Under the final rule, eligible employees in legal same-sex marriages will be able to take FMLA leave in order to care for their spouses or family members, regardless of where they live.

On Feb. 25, 2015, the Department of Labor (DOL) issued a [final rule](#) that expands protections under the federal Family and Medical Leave Act (FMLA) for same-sex spouses. This final rule revises the definition of "spouse" under the FMLA to:

- Adopt a "**place of celebration**" rule (which is based on where the marriage was entered into), instead of the "state of residence" rule that applied under prior DOL guidance; and
- **Expressly include same-sex marriages** in addition to common law marriages, and encompass same-sex marriages entered into abroad that could have been entered into in at least one state.

Under the final rule, eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouses or family members, regardless of where they live. The DOL's guidance becomes effective on **March 27, 2015**.

This final rule replaces guidance regarding FMLA protections for same-sex spouses that was issued following the U.S. Supreme Court's decision in *United States v. Windsor*. The

Windsor decision, issued on June 26, 2013, invalidated Section 3 of the federal Defense of Marriage Act (DOMA), which barred same-sex couples from being treated as married under federal law.

In connection with the final rule, the DOL also issued a set of [frequently asked questions](#) (FAQs) to help employers and employees understand the changes to the FMLA's definition of "spouse."

To comply with the final rule, employers should review and update their FMLA policies and procedures (as necessary). Employers should also train employees who are involved in the leave management process on the expanded eligibility rules for same-sex spouses under the FMLA.

Background

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The FMLA also includes certain military family leave provisions.

Following the U.S. Supreme Court's ruling on DOMA, the DOL issued [Fact Sheet #28F](#) to clarify the scope of an employer's obligation to

make FMLA available to same-sex spouses. This fact sheet provided that, under the FMLA, the term “spouse” includes a same-sex spouse **if the marriage is recognized under the laws of the state in which the employee resides.**

As a result, employers in states that allow same-sex marriages are currently required to treat employees’ same-sex and opposite-sex spouses equally for purposes of federal employee benefit laws. However, these protections apply only to same-sex marriages that are valid under state law. They do not apply to same-sex couples in civil unions or domestic partnerships, or same-sex couples living in states that do not recognize same-sex marriage.

Overview of the Final Rule

The final rule changes the definition of “spouse” under the FMLA to look to **the law of the jurisdiction in which the marriage was entered into** (including for common law marriages), as opposed to the law of the state in which the employee resides. The final rule’s definition also:

- Expressly references the inclusion of same-sex marriages in addition to common law marriages; and
- Includes same-sex marriages entered into abroad.

Under the final rule, eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouses or family members, regardless of where they live. However, these protections still do not apply to same-sex couples that are not legally married (for example, same-sex couples in civil unions or domestic partnerships).

New Definition of “Spouse”

The final rule defines the term “spouse” under the FMLA as follows:

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition,

husband or wife refers to the other person with whom an individual entered into marriage:

- *As defined or recognized under state law for purposes of marriage in the state in which the marriage was entered into; or*
- *In the case of a marriage entered into outside of any state, if the marriage is valid in the place where entered into and could have been entered into in at least one state.*

This definition includes an individual in a same-sex or common law marriage that either:

1. *Was entered into in a state that recognizes such marriages; or*
2. *If entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state.*

The revised definition makes clear that the terms “husband” and “wife” include all individuals in lawfully recognized marriages. According to the DOL, this definition is intended to cover all spouses in legal marriages as defined in the regulation, regardless of whether they use the terms “husband” or “wife.”

“Place of Celebration” Rule

The final rule moves from a “state of residence” rule to a rule based on the jurisdiction where the marriage was entered into (place of celebration). This rule is intended to ensure that all legally married couples, whether opposite-sex or same-sex, will have consistent FMLA rights, regardless of where they live.

As of Feb. 25, 2015, same-sex marriage has been legalized in 37 states and the District of Columbia (Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Utah, Vermont, Virginia,



Washington, West Virginia, Wisconsin and Wyoming).

Additionally, 18 countries extend the right to marry to same-sex couples (Argentina, Belgium, Brazil, Canada, Denmark, England/Wales/Scotland, Finland, France, Iceland, Luxembourg, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden and Uruguay).

The DOL believes that a “place of celebration” rule will:

- Provide consistent federal family leave rights for all legally married couples, whether opposite-sex or same-sex, regardless of where they live;
- Reduce barriers to the mobility of employees in same-sex marriages in the labor market; and
- Reduce the administrative burden on employers that operate in more than one state or have employees who move between states with different marriage recognition rules.

Impact on FMLA Leave

The definitional change means that eligible employees, regardless of where they live, will be able to:

- Take FMLA leave to care for their same-sex spouse with a serious health condition;
- Take qualifying exigency leave due to their same-sex spouse’s covered military service; or
- Take military caregiver leave for their same-sex spouse.

Additionally, in [Fact Sheet #28B](#), the DOL recognized the eligibility of same-sex partners, whether married or not, to take leave to care for a partner’s child, provided that they meet the *in loco parentis* requirement of providing day-to-day care or financial support for the child. The final rule expands the basis for an

employee to take leave to care for a child of a same-sex spouse. Under the final rule, eligible employees are entitled to take FMLA leave to care for their stepchild (the child of the employee’s same-sex spouse) even if the *in loco parentis* requirement of providing day-to-day care or financial support for the child is not met.

The final rule also entitles an eligible employee to take FMLA leave to care for a stepparent who is the same-sex spouse of the employee’s parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

The final rule does not change the DOL’s current guidance that permits employers to require employees who take leave to care for a family member to provide reasonable documentation of the required family relationship. An employee may satisfy this requirement either by providing documentation (such as a marriage license or a court document) or by providing a simple statement asserting that the necessary family relationship exists. According to the DOL, it is the employee’s choice whether to provide a simple statement or another type of document. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee’s FMLA rights.

Legal Debate on Same-sex Marriage

On Jan. 16, 2015, the U.S. Supreme Court agreed to hear appeals in same-sex marriage cases from Ohio, Tennessee, Michigan and Kentucky. The Supreme Court will take on the issue of whether same-sex couples have a constitutional right to marry or whether states are permitted to ban same-sex marriage.

The Supreme Court’s opinion has the potential to impact the legality of same-sex marriages throughout the United States, either by legalizing gay marriage or by overturning court decisions that have invalidated state bans on same-sex marriage.



The Supreme Court's ruling is expected to be issued in the summer, most likely in late June 2015.

More Information

For more information on the FMLA, please visit the DOL's [FMLA webpage](#).

