

## FAMILY AND MEDICAL LEAVE ACT: PROPOSED CHANGES REGARDING SAME-SEX SPOUSES

On June 20, 2014, the U.S. Department of Labor (DOL) proposed changes to the regulations implementing the Family and Medical Leave Act (FMLA). When finalized, these changes will expand the availability of family leave to spouses in same-sex marriages, regardless of their state of residence. While this change will have minimal impact for same-sex couples residing in California, employers with locations in other states may need to examine and amend their leave policies when the proposed regulations go into effect.

### **BACKGROUND**

The FMLA entitles eligible employees of qualified employers to take up to 12 workweeks of job-protected leave in a 12 month period for several life events: the birth of the employee's child or placement of a new child in the home for adoption or foster care; to care for the employee's spouse, parent or child with a serious health condition; when the employee is unable to work because of his or her own serious health condition; or for any qualifying exigency arising out of the fact that the employee's spouse, child, or parent is a military member on covered active duty. An eligible employee may also take up to 26 workweeks of FMLA leave during a single 12-month period to care for a covered Service member with a serious injury or illness, when the employee is the spouse, son, daughter, parent or next of kin of the Service member.

Since 1995, FMLA regulations have defined "spouse" for purposes of the FMLA as a "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides." In 1996, with the enactment of the Defense of Marriage Act (DOMA), federal law was prohibited from recognizing same-sex marriages. The effect was to limit the availability of FMLA leave based on a spousal relationship to opposite-sex marriages. On June 26, 2013, the U.S. Supreme Court held in United States v. Windsor, 133 S. Ct. 2675 (2013) that the section of DOMA prohibiting the federal recognition of same-sex marriage was unconstitutional. As a result, the DOL updated its FMLA guidance to remove any references to the restrictions placed by DOMA and to expressly note that the regulatory definition of "spouse" covers same-sex spouses residing in States that recognize those marriages.

The current regulations have meant that the rights of same-sex spouses under the FMLA have depended on where they live. In California, because of the Supreme Court's decision in Hollingsworth v. Perry, 130 S. Ct. 705 (2013) which struck down Proposition 8 and legalized same-sex marriage in California, legally married same-sex spouses have the same rights under the FMLA as opposite-sex spouses. But, as of June 18, 2014, only eighteen other states have extended the right to marry to same-sex couples (Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington).

### **PROPOSED REGULATION**

The DOL has therefore proposed a "place of celebration" rule to allow all legally married couples to have consistent FMLA rights regardless of the State in which they reside. The DOL also notes in its Notice of Proposed Rulemaking that the proposed change is consistent with the Department of Defense's (DOD) policy

of treating all married members of the military equally. Current DOD policy looks to the place of celebration to determine whether a marriage is legally valid.

The proposed rule defines a spouse as “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.” The effects of this rule will be to expand the availability of FMLA leave regardless of the marriage laws of the state of residence for qualified employees in the following circumstances:

- To care for a same-sex spouse who has a serious health condition.
- To care for a same-sex spouse who is a covered Service member with a serious illness or injury.
- For a qualifying exigency related to the covered military service of a same-sex spouse.
- In a situation where the employee’s spouse has a child, to care for a stepchild, regardless of whether the employee stands “in loco parentis” (providing day-to-day care or financial support) to the stepchild.
- To care for the same-sex spouse of the employee’s parent, regardless of whether that spouse stood “in loco parentis” to the employee.

## **EFFECTIVE DATE**

The Notice of Proposed Rulemaking gave a 45-day comment period for the proposed regulation, which will end on August 4, 2014. Once comments are received and analyzed, the DOL will likely announce an effective date and final regulations. We will update you when these regulations become final. In the interim, employers with locations in states that do not recognize same-sex marriage should review their leave policies to ascertain what changes may be necessary once the regulations are finalized.

Should you have any questions, please contact your Keenan HealthCare Representative.

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