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Churches and the FMLA's New Definition of "Spouse"

By Zack R. Gardner and Michael R. Crowder

The Family Medical Leave Act (FMLA) Generally

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are generally entitled to twelve workweeks of leave in a 12-month period for:

- the birth of a child and to care for the newborn child within one year of birth;
- the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;
- to care for the employee's spouse, child, or parent who has a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job; or
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty."

The FMLA and Same-Sex Marriages

Before the Supreme Court case *U.S. v. Windsor* abolished certain portions of the Defense of Marriage Act (DOMA), the FMLA did not require private employers to grant employees FMLA leave to care for a same-sex spouse, because DOMA did not recognize the relationship. After the *Windsor* decision, federal law permitted eligible employees to take FMLA leave to care for a same-sex spouse only if they resided in a state in which same-sex marriage is legal.

However, on March 27, 2015, a new rule took effect providing that the definition of "spouse" under the FMLA will be determined by the state in which a marriage is entered (i.e., the "state of celebration"). This means that for FMLA purposes, "spouse" will include any married couple – same-sex or otherwise – so long as the marriage was entered into in a jurisdiction where such marriage is recognized.

How it Affects Religious Organizations

Employers covered by FMLA include: (1) private sector employers with more than 50 employees 20 or more workweeks in the current or preceding calendar year, (2) all public agencies including local, state, and Federal government agencies, and (3) all public and private elementary and secondary schools. 29 CFR § 825.104.

Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, and have worked at least 1,250 hours during the 12 months preceding the start of leave. There is nothing in the legislation to suggest that religious organizations are excluded from this definition.

Practically speaking, this means that regardless of whether a state, such as Tennessee, does or does not recognize same-sex marriages, since March 27, 2015, all covered employers, including religious organizations, must apply the new definition in determining whether an employee is eligible for FMLA leave. In other words, covered employers, including religious organizations, will need to allow eligible employees to take FMLA leave to care for their same-sex spouse, stepchild (including a child of the employee's same-sex spouse), or stepparent (including a parent of the employee's same-sex spouse).

Although there is no blanket exemption for religious organizations under the FMLA, it is possible that the "ministerial exception" could apply to the FMLA. In such a case, certain religious institutions with doctrinal objections to same-sex marriage may have an affirmative defense which would prevent employee-ministers, or those whose duties are functionally equivalent to those of a minister, from bringing an FMLA claim against the employer-church where the FMLA claim arises out of the employer-church's denial of FMLA leave related to caring for the employee-minister's same-sex spouse, stepchild (i.e. child of the employee's same-sex spouse), or stepparent (i.e. parent of the employee's same-sex spouse). *See, e.g., Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005).

As one final update, religious organizations should also note that on March 26, 2015, a federal judge in the northern district of Texas granted an injunction that has stopped the Department of Labor's ("DOL") enforcement of the FMLA's new definition of spouse in the states of Texas, Arkansas, Louisiana and Nebraska. The federal judge reasoned that, "[a]bsent clear direction to the contrary by the Supreme Court or Fifth Circuit Court of Appeals, the Court concludes that … this action exceeds the authority Congress delegated to the [DOL] … Congress could not have delegated to the Department the power to define marriage in a way as to override the laws of states prohibiting same-sex marriages." *State of Texas, et al. v. U.S.*, No. 7:15-cv-0056-O (N.D. Tex. Mar. 26, 2015).

Although this injunction only impacts the four states listed above, it is possible that the DOL may refrain from enforcing the new rule in all states until a definitive ruling comes from the Fifth Circuit Court of Appeals or the Supreme Court. It is also possible that district courts in other circuits may uphold the new rule. We await official word from the DOL on how it will administer the new FMLA rule in light of this ruling.

If you have any questions, please don't hesitate to call Rob Quillin, Bill Mason, Zack Gardner, or Michael Crowder at (865) 546-7311 or email us at quillinr@kmfpc.com, wemason@kmfpc.com, zgardner@kmfpc.com, or mcrowder@kmfpc.com.

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