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Labor and Employment Alert: Department of Labor Finalizes Rule on Same-Sex Spouses for FMLA Coverage

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The federal Family and Medical Leave Act (FMLA) provides eligible employees of covered employers with unpaid, job-protected leave for specified family, medical, and military family reasons. On February 25, 2015, the Department of Labor (DOL) issued a Final Rule that revises the FMLA's regulatory definition of "spouse."

Currently, the FMLA's regulations define a "spouse" to include employees in same-sex marriages that were recognized in their "state of residence." A same-sex spouse whose marriage was legal in the state in which they resided (for example, in California or Minnesota) could take FMLA leave to care for a same-sex spouse with a serious health condition. However, an eligible employee could **not** take FMLA leave on the basis of the employee's legal same-sex marriage if the employee lived in a state that did not recognize same-sex marriage.

The DOL's Final Rule changes the employee's "state of residence" rule to the employee's "place of celebration." So now, the FMLA will look to the law of the place where the marriage was entered into instead of the law of the employee's state of residence. If an employee's same-sex marriage was valid in a state or foreign country, that marriage will be valid under the FMLA regardless of whether the state in which the employee resides recognizes same-sex marriages. Eligible employees may take FMLA leave to care for their same-sex spouse, regardless of where they live, when caring for their same-sex spouse with a serious health condition, taking qualifying exigency leave due to their same-sex spouse's covered military service or taking military caregiver leave for their same-sex spouse.

The DOL's change in the definition of "spouse" does not change any other requirements of the FMLA on employee eligibility, qualifying reasons for leave, or notification and certification requirements. For example, employers may still require employees who take leave to care for a family member to provide reasonable documentation for purposes of confirming a family relationship. In response, an employee can provide a marriage license, a court document, or a simple statement asserting that the requisite family relationship exists.

However, employers may not use a request for confirmation of a family relationship to interfere with an employee's exercise of FMLA rights.

The Final Rule will take effect on March 27, 2015, which provides employers time to ensure that their FMLA policies comply with the Final Rule. Contact your Vorys lawyer if you have any questions about the FMLA.