Publications

Labor and Employment Alert: U.S. Supreme Court Strikes DOMA's Definition of "Spouse", Expanding FMLA Coverage for Employees in Legally Recognized Same-Sex Marriages

Related Professionals

Allen S. Kinzer

Natalie M. McLaughlin

Related Services

Labor and Employment

CLIENT ALERT | 7.8.2013

The United States Supreme Court recently issued its long-awaited decision in *United States v. Windsor*, No. 12-307, ruling 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. This decision will impact over 1,000 federal laws, including the Family Medical Leave Act (FMLA).

The FMLA allows eligible employees to take up to 12 weeks of unpaid, job-protected leave during any 12-month period for various specified reasons. Those reasons include: to care for the employee's spouse who has a serious health condition; and, for qualifying exigencies arising because the employee's spouse is on covered active duty or called to covered active duty status as a member of the National Guard, Reserves, or Regular Armed Forces. In addition, an eligible employee is entitled to take up to 26 weeks of unpaid leave during any 12-month period to care for a covered servicemember with a serious injury or illness incurred in the line of duty if the eligible employee is the servicemember's spouse, son, daughter, parent or next of kin.

The FMLA defines "spouse" as meaning "husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." However, the Department of Labor interpreted DOMA's definition of "spouse" as applying to the FMLA. DOMA provided that for purposes of federal law, "marriage" was defined as a legal union between one man and one woman as husband and wife, and "spouse" referred only to a person of the opposite sex who is a husband or wife. Therefore, because DOMA had limited the application of federal laws to include only a spouse of the opposite sex, employees were not entitled to FMLA leave to care for same-sex spouses, even if same-sex marriage was recognized by state law.

In striking down a significant part of DOMA, the Supreme Court held that the definition of "spouse" will now be decided solely by state law. Therefore, if an employee is married to a same-sex partner and resides

in a state that legally recognizes same-sex marriage – currently California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington and Washington D.C. - the employee will be entitled to take FMLA leave to care for his or her spouse or for qualifying exigencies arising out of the spouse's active duty.

As the FMLA regulations look to where an employee resides to determine benefits, this means that an employee who resides in a state that recognizes same sex marriage, such as Minnesota, but is employed in a state that does not recognize same sex marriage, such as Wisconsin, will be entitled to FMLA benefits related to a same-sex spouse. On the other hand, if the employee marries a same-sex partner in Minnesota, but resides in Wisconsin, regardless of whether the employee works in Wisconsin or Minnesota, as the state of residence does not legally recognize the out of state marriage, the employee is likely not entitled to FMLA benefits related to a same-sex spouse.

Another impact of striking the definition of "spouse" from DOMA is that if both spouses in a legally recognized same-sex marriage work for the same employer, the employer can now limit the employees to a combined total of 12 weeks of leave in a 12-month period for certain reasons under the FMLA. Specifically, the employer can limit them to 12 weeks of leave to care for an employee's parent with a serious health condition, for the birth of an employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with an employee for adoption or foster care or to care for the child after placement.

In light of the *Windsor* decision, some employers may be considering whether to grant leave benefits to same-sex partners residing in states that do not recognize same-sex marriages if the individuals were legally married in another state that recognizes such marriages. There is a risk to this approach under the FMLA because the leave cannot be designated as FMLA leave if the partner does not qualify as a "spouse" under the laws of the state where the employee resides. Therefore, if an employer grants leave to an employee to care for a same-sex partner, that leave cannot count against an employee's FMLA leave entitlement. This can result in the employee taking double leave in the same 12-month period if an FMLA qualifying reason arises, such as care of a child.

There are numerous issues that will arise for employers with "spouse" now being defined solely under state law for the FMLA. Existing policy language should be reviewed and evaluated to determine whether policies should be revised to avoid confusion or inconsistencies. Policies which include a definition of "spouse" should be revised to ensure same-sex spouses are appropriately addressed. Employers who operate in multiple states must ensure they are implementing their policies to comply with the various state marriage laws and the FMLA. Employers should carefully consider how to implement and communicate the potential disparity in handling FMLA leave based on an employee's residence. This will present particularly difficult challenges for employers with facilities close to the borders of a state that recognizes same-sex marriage and a state that does not. Where an employee resides will be key, not where the individual is actually employed. Therefore, employers will need to ensure they have current and accurate marital status and residence information to determine an employee's eligibility for FMLA leave.

For additional information regarding this or any employment-related issue, please contact your Vorys attorney or a member of the Vorys labor and employment group by calling 614.464.6400.