

# PUBLICATION

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## DOL Proposes Rulemaking to Amend Definition of "Spouse" for FMLA

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In 2013, the United States Supreme Court held, in *U.S. v. Windsor*, that the Defense of Marriage Act's limitation of "marriage" and "spouse" to heterosexual couples was unconstitutional. Thereafter, President Obama instructed the Attorney General to work with the Cabinet to review federal laws to ensure that the *Windsor* decision was implemented for federal benefit purposes. One law to be reviewed was the Family and Medical Leave Act (FMLA).

The FMLA applies to employers with 50 or more employees within a 75-mile radius. If the employee is eligible (i.e., has worked for the employer for 12 months and worked 1250 hours), the employee may take 12 weeks of unpaid leave in the following circumstances:

- For the birth, adoption or placement for foster care of a child
- For the employee's own serious health condition
- To care for the employee's *spouse*, parent or child with a serious health condition
- For any qualifying exigency arising out of the employee's *spouse*, child or parent being a military member on covered active duty.

An eligible employee may take up to 26 weeks of unpaid leave for military caregiver leave for the employee's *spouse*, child, parent or next of kin who is a covered service member or covered veteran.

The question is then, what is the definition of "spouse" for FMLA purposes? The FMLA defines "spouse" as a "husband or wife, as the case may be" which is a broad definition (and not requiring revision to implement the Supreme Court's intentions in *Windsor*). 29 U.S.C. § 2611(13). However, the current FMLA regulations define "spouse" as "a 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." 29 CFR § 825.105 and 825.122(b). This definition limits the availability of FMLA rights as they pertain to same-sex couples. For example, if a same-sex couple were lawfully married in Maine (which recognizes same-sex marriage), but live in Mississippi (which does not), the couple would not be eligible for FMLA benefits.

To change this, the Department of Labor has issued proposed rulemaking to revise the FMLA regulations. The proposed definition of spouse would be changed to the following:

Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person to whom an individual is married 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.

This revised definition would allow the same-sex couple married in Maine to exercise FMLA rights when living in Mississippi.

The deadline for comments is August 11, 2014. Comments may be made electronically through the Federal eRulemaking Portal (<http://www.regulations.gov>) or by mail to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave. NW, Washington, DC 20210. Comments should include the Regulatory Identification Number (RIN) 1235-AA09.