THOMPSON COBURN LLP

Thompson Coburn LLP |One US Bank Plaza | St. Louis, MO 63101

U.S. Department of Labor Updates FMLA Guidance About Who Is A "Spouse" Following Supreme Court Ruling

The U.S. Supreme Court's decision in *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013) is causing various federal agencies to clarify existing regulations and guidance, including the U.S. Department of Labor (DOL). In *Windsor*, the U.S. Supreme Court declared the provision in the Defense of Marriage Act (DOMA) that denied federal benefits to legally married, same-sex spouses unconstitutional.

The DOL has issued updated guidance under the Family and Medical Leave Act (FMLA) to acknowledge that spousal leave for same-sex spouses may be available under the FMLA. The FMLA provides unpaid job-protected leave and continuation of group health insurance benefits to eligible employees who need to take leave for specified family and medical reasons (including caring for a spouse with a serious health condition or for activities related to a spouse's military deployment).

According to the DOL's updated guidance the definition of "spouse" means "a husband or wife as defined or recognized under state law for purposes of marriage in a state where the employee resides, including 'common law' marriage and same-sex marriage." Based on the DOL's definition of spouse, the extension of FMLA protected leave to same-sex spouses is limited to lawfully married same-sex couples who reside in a state that recognizes same-sex marriages. Employers are not required to make FMLA protected leave available to same-sex spouses who reside in a state that does not recognize same-sex marriage.

The DOL may soon address this inconsistency by revising the regulations to extend FMLA rights to all legally married same-sex spouses regardless of their state of residence. In an August 9, 2013 memorandum to DOL staff, Labor Secretary Thomas Perez signaled additional revisions may be underway: "I have directed Agency Heads within the Department to look for every opportunity to ensure that we are implementing this decision in a way that provides the maximum protection for workers and their families."

The *Windsor* decision does not impact the current view by the DOL that same-sex partners (and also unmarried opposite-sex couples) can take FMLA leave for the care of children because of the "in loco parentis" standard that allows a person who "stands in the place of the parent" to take leave for that child. It will, however, potentially limit the amount of combined time that can be taken by the recognized same-sex spouses, if both work for the same company and want to take care of their child. Spouses that both work for the company are limited to 12 weeks to care for a child (and 26 weeks for military caregiver leave).

Take Aways

To ensure compliance, employers should:

- Revise and update their FMLA policies and documentation to include same-sex spouses, where applicable.
- Review and update procedures for leave requests as needed.
- Advise managers and human resources personnel of the updated definition of spouse and the extension of FMLA rights to same-sex spouses, where applicable.

Thompson Coburn will continue to keep you advised of any developments. If you have questions regarding the above-reference decision, or other labor or employment issues, please contact a member of Thompson Coburn's Labor and Employment Group.

Hope K. Abramov	314-552-6496	habramov@thompsoncoburn.com
Michael W. Duffee	312-580-2218	mduffee@thompsoncoburn.com
Clifford A. Godiner	314-552-6433	cgodiner@thompsoncoburn.com
Laura M. Jordan	314-552-6469	ljordan@thompsoncoburn.com
Susan M. Lorenc	312-580-2324	slorenc@thompsoncoburn.com
Krissa P. Lubben	314-552-6389	klubben@thompsoncoburn.com
Charles M. Poplstein	314-552-6095	cpoplstein@thompsoncoburn.com
Joyce M. Pratt	314-552-6319	jpratt@thompsoncoburn.com
Timothy J. Sarsfield	314-552-6432	tsarsfield@thompsoncoburn.com
Arthur B. Sternberg	312-580-2235	asternberg@thompsoncoburn.com

Thompson Coburn LLP

Chicago | St. Louis | Southern Illinois | Washington, D.C.

www.thompsoncoburn.com