

## New FMLA Regulations Expand Definition of Spouse and Include Same-Sex Spouses

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The U.S. Department of Labor has issued regulations expanding the Department's definition of "spouse" under the Family and Medical Leave Act of 1993 (FMLA) so as to entitle eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or covered family member, regardless of where they live. The [new regulations](#) are effective March 27, 2015.

[Click Here for a Quick Reference Guide on the DOL's Final Rule Changing the Definition of a "Spouse" Under FMLA](#)

The DOL regulatory action follows the U.S. Supreme Court's 2013 decision in *United States v. Windsor*, which held that Section 3 of the Defense of Marriage Act (defining "spouse" as only a person of the opposite sex who is a husband or a wife) was unconstitutional.

### Major Features

The new regulations have two major features. First, establishing a spousal relationship for FMLA purposes now depends on the law of the place in which the marriage was entered into ("place of celebration"), as opposed to the law of the state in which the employee resides ("place of residence"). Unlike the previous "place of residence" rule, where establishing a spousal relationship depended on whether same-sex marriage was recognized by the state in which the employee *resided*, the new "place of celebration" rule allows all legally married couples, whether opposite-sex or same-sex, or married under common law, to have consistent federal family leave rights regardless of where they live. The "place of celebration" rule is consistent with the interpretation adopted by other federal agencies, such as the Department of the Defense and the Internal Revenue Service.

Second, the new regulations' definition of "spouse" expressly includes individuals in lawfully recognized same-sex and common law marriages and all marriages that were validly entered into outside of the United States if they could have been entered into lawfully in at least one U.S. state.

### Impact of the Change

This change in the definition of "spouse" under the FMLA means that eligible employees, regardless of where they live, will be able to take:

- leave to care for their lawfully married same-sex spouse with a serious health condition;
- qualifying exigency leave due to their lawfully married same-sex spouse's covered military service;
- military caregiver leave for their lawfully married same-sex spouse;
- leave to care for a stepchild (child of the employee's same-sex spouse), regardless of whether the in loco parentis requirement of providing day-to-day care or financial support for the child is met; and
- leave to care for a stepparent who is a same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood in loco parentis to the employee.

### What this Means for Employers

For employers with multi-state operations, the new regulations create greater uniformity in administering FMLA leave for same-sex spouses. If employers generally seek documentation confirming covered family relationships, they may want to consider requiring documentation to confirm same-sex spousal relationships. Employers will need to know or research the same-sex marriage laws, including the standards for common law marriage, of specific states or countries when employees request FMLA leave to care for a spouse, child or parent and the basis of the family relationship is a same-sex marriage. Employers similarly will need to understand whether an employee or parent is in a same-sex marriage or a

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civil union. Civil unions are not considered marriages under the FMLA.

## Steps Employers Should Consider Taking

In light of the new regulations, employers should consider the following:



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## Practices

Disability, Leave and Health  
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- Reviewing and revising FMLA policies to ensure the definition of “spouse” reflects the new regulatory definition.
- Revising or developing template forms to confirm family relationships consistent with the new regulatory definition.
- Identifying resources that may assist them in finding same-sex marriage laws, including the standards for common law marriage, in other states and countries when such situations arise.

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“While many have anticipated and welcomed the DOL’s new regulations expanding the spousal relationship, employers now must make changes to policies and practices and ensure managers know the expanded circumstances where FMLA may be granted. Longer term, this may simplify FMLA administration, but employers must begin taking steps immediately to address the increasing burden of administering FMLA leave,” said Jackson Lewis Shareholder Joseph J. Lynett.

If you have questions regarding the new FMLA regulations, please contact a member of our [Disability, Leave and Health Management](#) Practice or the Jackson Lewis attorney with whom you regularly work.

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