

**Rae Anne Beaudry**

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**From:** Larry Grudzien, Attorney at Law <larry@larrygrudzien.com>  
**Sent:** Friday, July 18, 2014 7:46 AM  
**To:** Rae Anne Beaudry  
**Subject:** FAQs Released About FMLA Leave and Same-Sex Spouses

**From the Desk of**

**Larry Grudzien**  
ATTORNEY-AT-LAW



## **FAQs Released About FMLA Leave and Same-Sex Spouses**

**July 18, 2014**

### **1. Q. What regulatory change is the Department proposing?**

**A. The Department is proposing to revise the definition of spouse under the FMLA in light of the United States Supreme Court's June 2013 decision in *United States v. Windsor*. The Windsor decision found Section 3 of the Defense of Marriage Act (DOMA), which generally limited the definitions of "marriage" and "spouse" to opposite-sex marriages and spouses, to be unconstitutional.**

**The Department is proposing this definitional change so that eligible employees in legal same-sex marriages, as well as common law marriages, will be able to take FMLA leave to care for their spouse, regardless of where they live.**

### **2. Q. What is Section 3 of the Defense of Marriage Act (DOMA), and how did it affect the FMLA prior to the Supreme Court's June 2013 Windsor decision?**

**A. Section 3 of DOMA limited the definitions of "marriage" and "spouse" to marriages of opposite-sex couples for purposes of administering and interpreting federal laws and regulations. The DOMA definitions of**

"marriage" and "spouse" applied to the FMLA, and therefore FMLA leave for a spouse could only be taken to care for a spouse of the opposite sex.

**3. Q. How does the June 2013 Windsor decision apply to the FMLA today, regardless of the proposed rule?**

A. The Windsor decision's repeal of DOMA Section 3 means that the FMLA's regulatory definition of spouse is no longer limited only to opposite-sex spouses.

The current FMLA regulatory definition of spouse is "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."

Under this current definition of spouse, eligible employees may take FMLA leave to care for a same-sex spouse only if they reside in a State that recognizes same-sex marriages.

**4. Q. Why is the Department proposing to change the FMLA's regulatory definition of spouse when FMLA leave can now be taken to care for an eligible employee's same-sex spouse?**

A. Under the FMLA's current regulatory definition of spouse, eligible employees can take FMLA leave to care for a same-sex spouse only if they reside in a State that recognizes same-sex marriages. The current definition does not allow an eligible employee to take FMLA leave on the basis of the employee's legal same-sex marriage if the employee lives in a State that does not currently recognize same-sex marriage.

The Department is proposing to move from a state of residence rule to a rule based on where the marriage was entered into (place of celebration). A place of celebration rule would allow 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.

**5. Q. How does the proposed regulation differ from the Department's August 2013 guidance issued in response to the Windsor decision?**

A. As a result of the June 2013 Windsor decision, WHD updated its public guidance in August 2013 to remove any references to the restrictions imposed by DOMA, and to expressly note that the FMLA's definition of spouse covers same-sex spouses residing in States that recognize such marriages.

The proposed regulation seeks to revise the FMLA's definition of spouse to treat all FMLA-eligible employees in legal marriages equally - that is, to allow eligible employees in valid same-sex marriages to take FMLA leave, regardless of where they live.

**6. Q. How would an employee's entitlement under the FMLA be changed by this proposed rule?**

A. The proposed definitional change does not substantively alter the FMLA or change the availability of FMLA leave, but instead makes it available to all eligible employees who are legally married.

**7. Q. How would the proposed rule affect FMLA spousal leave for a same-sex spouse?**

A. The proposed rule would provide eligible employees the opportunity to take FMLA leave to care for their same-sex spouse, regardless of where they live, in these situations:

- 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.

With respect to the FMLA's military family leave provisions, the proposed place of celebration rule is consistent with the Department of Defense's (DOD) policy of treating all married members of the military equally. In administering its policy, DOD looks to the place of celebration to determine if a military member is in a valid marriage. The Department believes it is appropriate wherever possible to align the availability of FMLA military leave with the availability of other marriage-based benefits provided by DOD.

**8. Q. How does the FMLA apply today to eligible employees who use FMLA leave to care for a child (regardless of the proposed rule)?**

A. The Department has consistently recognized the eligibility of employees to take leave to care for their own child or the child of the employee's partner (whether married or not) provided that the employee meets the in loco parentis requirement of providing day-to-day care or financial support for the child. (For more information on FMLA leave on the basis of an in loco parentis relationship, see Fact Sheet #28B at <http://www.dol.gov/whd/regs/compliance/whdfs28B.htm>.)

This means that, currently, an eligible employee in a legal same-sex marriage can take FMLA leave to care for his or her stepchild (i.e., the child of the employee's same-sex spouse), provided that the employee stands in loco parentis to the child.

**9. Q. How would the proposed rule affect FMLA leave that is taken to care for a child?**

**A. Under the proposed rule, an eligible employee in a legal same-sex marriage could take FMLA leave to care for his or her stepchild to whom the employee does not stand in loco parentis.**

For example, consider the situation of an employee whose same-sex spouse has a child who lives with a parent in another State. If that employee's stepchild came to visit the employee and the employee's same-sex spouse, and developed a serious health condition, the employee might need to take leave from work in order to provide care.

As long as the employee is eligible for FMLA leave, he or she may take FMLA leave to care for the stepchild, even though the employee does not stand in loco parentis to the child.

**10. Q. How would the proposed rule affect FMLA leave that is taken to care for a parent?**

**A. Under the proposed rule, when eligible employees have a parent with a same-sex spouse, such employees would be able to take FMLA leave to care for their stepparent (the employee's parent's same-sex spouse), even if the stepparent never stood in loco parentis to the employee.**

For more information on FMLA leave on the basis of an in loco parentis relationship, see Fact Sheet #28B at <http://www.dol.gov/whd/regs/compliance/whdfs28B.htm>.

**11. Q. How would the proposed rule affect FMLA spousal leave for an employee who entered into a same-sex marriage in a foreign country?**

**A. The Department's proposed regulatory definition of spouse encompasses a same-sex marriage entered into abroad as long as the marriage is valid in the place where it was entered into, and could have been entered into in at least one State of the United States. (i.e., in a State that authorizes same-sex marriages).**

**12. Q. How would the proposed rule affect FMLA spousal leave for an employee who is in a common law marriage?**

**A. The Department's proposed definition of spouse encompasses a husband or wife in a common law marriage as long as the common law marriage became valid in a State that recognizes such common law marriage.**

**13. Q. Can employers request a marriage license or other documentation to verify that the same-sex marriage is valid?**

**A. Under the relevant current regulation, which would remain unchanged under the NPRM, an employer may require that an employee provide**

reasonable documentation or statement of family relationship for purposes of confirming a family relationship. An employer must apply any such requirement in a non-discriminatory manner.

**14. Q. If an employee does not meet the FMLA's eligibility requirements, would his or her FMLA eligibility status change if he or she married a same-sex spouse?**

A. No - this rule does not change the fact that FMLA leave is only available to employees who are eligible for FMLA leave. Marrying a same-sex spouse does not make a previously ineligible employee eligible for purposes of the FMLA.

**15. Q. Would the proposed rule mean that eligible employees in same-sex civil unions would be able to take FMLA leave on the basis of their same-sex civil union?**

A. The Department is proposing to amend the FMLA's regulatory definition of spouse so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse, regardless of where they live. Civil unions are not considered marriages under the FMLA. Eligible employees in same-sex civil unions, as well as opposite-sex civil unions, could still take FMLA leave for their own serious health condition, or to care for their child or parent, but they would not be eligible to take spousal leave, since a civil union is not considered a legal marriage.

**16. Q. How would the proposed rule benefit employers?**

A. The Department believes that the proposed rule's definitional change would reduce the administrative burden on employers that operate in more than one State, or that have employees who move between States with different marriage recognition rules. Such employers would not have to consider the laws of the employee's State of residence in determining the employee's eligibility for FMLA leave.

**17. Q. I am a covered employer who has eligible employees in several different States and regularly administer FMLA. Some of the States allow same-sex marriage and some do not. Do I now have to have different rules for each State?**

A. Under the proposed "place of celebration" rule, the employer must provide FMLA leave for all eligible employees in marriages that were valid in the place in which they were entered into, whether those marriages are same-sex, opposite-sex, or common law. Under the current FMLA regulations, the definition of spouse depends on the State of residence, but under the proposed rule, all legally married couples, whether opposite-sex or same-sex, would have consistent federal family leave rights regardless of where they live.

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## **Examples**

**If the proposed rule were to be implemented as drafted, below are some examples of the situations in which eligible employees would be able to take FMLA leave.**

### **An Eligible Employee Could Take FMLA Spousal Leave if...**

- **The employee married a same-sex spouse in a foreign country in which same-sex marriage is legal and could have been entered into in at least one State;**
- **The employee married a same-sex spouse in a State that recognizes same-sex marriage, but later moved with his or her spouse to a State that does not recognize same-sex marriage;**
- **The employee needs to take FMLA leave for a qualifying exigency arising out of the fact that his or her same-sex spouse is a military member on covered active duty.**

### **An Eligible Employee Could Take FMLA Leave to Care for a Stepchild With a Serious Health Condition if...**

- **The employee, who is in a legal same-sex marriage, needs to take FMLA leave to care for his or her stepchild to whom the employee does not stand in loco parentis (e.g., if the child primarily lives with another parent, and the employee does not meet the in loco parentis requirement of providing day-to-day care or financial support for the child).**

### **An Eligible Employee Could Take FMLA Leave to Care for a Stepparent with a Serious Health Condition if...**

- **The employee's parent entered into a legal same-sex marriage, even if the employee's stepparent never stood in loco parentis for the employee.**

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#### **For More Information:**

**If you have any comments or questions regarding any of above information, please do not hesitate to call me at (708) 717-9638 or e-mail me at [larry@larrygrudzien.com](mailto:larry@larrygrudzien.com)**

**Thank-You,**

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