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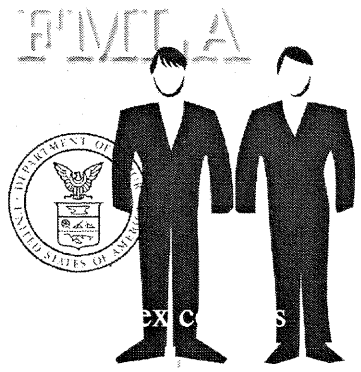
FMLA Rights Expanded to Same-Sex Couples

By Patricia F. Weisberg

The United States Department of Labor (DOL) issued a Final Rule, which became effective on March 27, 2015. The Rule revises the definition of a "spouse" under the Family and Medical Leave Act (FMLA), which extended the FMLA's protections to married, same-sex couples. The rule is designed to implement changes required as a result of the United States Supreme Court decision in *United States v. Windsor*. In that case, the court struck down the Federal Defense of Marriage Act provision that restricted the definitions of "marriage" and "spouse" to opposite-sex marriages for purposes of federal law.

The new regulation allows legally married couples, opposite-sex and same-sex, to enjoy the rights provided by the FMLA regardless of the laws in the state in which the employee currently resides. Accordingly, as long as the employee is legally married in a location that allows for same-sex or common law marriages, the employee is married for purposes of the FMLA, even if the state in which the employee resides does not recognize same-sex marriages. The Final Rule also includes employees in lawfully recognized same-sex and common law marriages that were entered into outside of the United States, as long as they could have been entered into in at least one state. The FMLA still does not apply to civil unions or domestic partnerships.



On March 26, 2015, the U.S. District Court for the Northern District of Texas preliminarily enjoined (prohibited) the FMLA's same-sex spouse rule in deciding a lawsuit filed by Texas, Arkansas, Louisiana and Nebraska. These states argued that the DOL exceeded its jurisdiction by forcing employers to look to the law in the state in which the marriage took place, rather than the law of the state in which the employee seeking FMLA leave lives. The court decided that the requirement that Texas agencies recognize out-of-state same-sex marriages violates state law. For now, the court's

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Update Your 401(k) Plan Now

By Richard A. Naegele

Every six years, the Internal Revenue Service requires that all pre-approved volume submitter and prototype retirement plan documents be updated and restated to comply with changes in law and regulations since the prior restatement cycle. The last restatement cycle (referred to as the EGTRRA restatement cycle) for defined contribution plans (such as 401(k) plans) began May 1, 2008 and ended April 30, 2010. This means that all pre-approved defined contribution plans were required to adopt restated plan documents during that time period.

The current restatement cycle is required for compliance with the Pension Protection Act of 2006 (PPA) and is referred to as the PPA restatement cycle. The PPA restatement cycle began May 1, 2014 and ends April 30, 2016. All pre-approved defined contribution plans must be restated during this period. Failure to restate a retirement plan during the PPA restatement period can result in the loss of the plan's tax-qualified status.

The restatement period for pre-approved (volume submitter or prototype) defined benefit pension plans is on a different

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ruling prevents employees in same-sex marriages from receiving the benefits afforded heterosexual married couples under the FMLA in these four states. However, employers in other states must comply with the Rule, unless or until a court in their jurisdiction decides to rule as the Texas court did. The DOL has asked the Texas court to reconsider its decision, with oral arguments scheduled for April 13. The DOL may wait to enforce this rule in other states until the issue is resolved by the courts.

Although this new rule is currently in flux, employers should update their FMLA policies or at least notify decision-makers regarding this change. The new regulations not only impact a spouse's right to take care of his/her spouse, but a spouse's right to take care of a child or stepchild.

Employers may request reasonable documentation of the marriage, which can be a statement from the employee or documentation from a court, but any such request should not interfere with an employee's exercise of his or her FMLA rights.

Generally, employers will already have such information in the personnel file (i.e., employee's emergency contact, healthcare benefit information or other information related to employee benefit plans). Employers should, however, be consistent in requesting documentation for same-sex and opposite-sex marriages.

Ohio employers should:

- Revise FMLA policies and FMLA forms to reflect that leave for legal, same-sex spouses is covered under the FMLA.
- Ensure that those administering FMLA leave are aware of and understand the change in the law.
- Understand how the new definition may impact other benefit plans related to FMLA leave.
- Stay abreast of court decisions that may affect FMLA policies.

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six-year cycle. The EGTRRA restatement cycle for defined benefit pension plans started May 1, 2010 and ended on April 30, 2012. The PPA restatement cycle for pre-approved defined benefit pension plans is anticipated to begin May 1, 2016 and conclude on April 30, 2018.

All pre-approved defined contribution plans were required to adopt restated plan documents.

Tax-qualified retirement plans are either prototype or volume submitter pre-approved plan documents or Individually Designed Plans (IDPs). Upwards of 90 percent of all tax-qualified retirement plans in the United States are pre-approved plans. Collectively bargained plans, more complicated defined benefit plans, ESOPs and plans of larger corporations are frequently IDPs. IDPs are on five separate five-year restatement cycles based on the last digit of the employer identification number (EIN) of the plan sponsor/employer.

In addition to the complete plan restatements (i.e., the adoption of an entirely restated plan document), the IRS periodically requires that the tax-qualified retirement plans adopt interim amendments to comply with changes in law or regulations. At least nine such interim amendments were required between 2003 and 2013. Interim amendments are often adopted directly by the sponsor of the pre-approved plan document. In these cases, the individual employers are not required to execute specific interim amendments. Employers should keep copies of all interim amendments with their retirement plan records.

Employers who failed to adopt timely restated plan documents during the EGTRRA restatement cycle should restate their retirement plans and file with the IRS under the Voluntary Correction Program (VCP). VCP is part of the IRS Employer Plans Compliance Resolution System (EPCRS) under IRS Revenue Procedure 2013-12.

In summary, the IRS restatement cycles for prototype or volume submitter tax-qualified retirement plans are as follows:

Defined Contribution Plans
(e.g., 401(k) plans):
EGTRRA Cycle:
5/1/2008-4/30/2010
PPA Cycle:
5/1/2014-4/30/2016

Defined Benefit Pension Plans:
EGTRRA Cycle:
5/1/2010-4/30/2012
PPA Cycle:
5/1/2016-4/30/2018 (anticipated)

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