DOL Extending FMLA Benefits for Same-Sex Couples

?By former Associate Jack Blum

On June 20, 2014, the Department of Labor ("DOL") proposed an amendment to its Family and Medical Leave Act ("FMLA") regulations that will extend the FMLA's spousal benefits to married same-sex couples living in the thirty-two states that do not currently recognize same-sex marriages. While the U.S. Supreme Court's decision in *U.S. v. Windsor* already eliminated the federal government's non-recognition of same-sex marriages under the Defense of Marriage Act ("DOMA"), the DOL's proposed amendment extends the availability of FMLA spousal benefits to same-sex couples by making the validity of a marriage for FMLA purposes dependent on the law of the state where the marriage occurred, not where the couple currently resides.

The FMLA, among other benefits, allows an eligible employee to take unpaid leave to care for the employee's spouse who has a serious health condition. After the employee takes FMLA leave, the employee is entitled to be restored to the same or an equivalent position to the one that he or she held before taking leave as well as many of the employment benefits to which the employee would have been entitled had the employee not taken leave.

The DOL's FMLA regulations currently define a "spouse" as "a husband or wife as defined or recognized under State law for purposes of marriage *"in the State where the employee resides."* Under that definition, an employee who is a party to a same-sex marriage that legally took place in the District of Columbia or Maryland could not take FMLA leave to care for his or her partner if the couple now lives in Virginia, which does not recognize same-sex marriages. Because a majority of American states still do not recognize same-sex marriages, many same-sex couples remain ineligible for FMLA spousal leave even after Windsor.

The DOL's proposal would broaden the definition of a "spouse" to include parties to a "marriage as defined or recognized under State law for purposes of marriage *in the State in which the marriage was entered into*." This would allow any employee, assuming the FMLA's other eligibility requirements are met, who is a party to a valid same-sex marriage to take spousal leave under the FMLA regardless of whether the employee's state of residence permits or recognizes same-sex marriages.

For the time being, DOL's proposal is not final and is subject to a public comment period and the publication of a final rule. However, employers should be aware that this change to FMLA leave eligibility is on the horizon and may require a change to existing FMLA leave policies.

