

August 11, 2014

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Director, Division of Regulations, Legislation, and Interpretation
U.S. Department of Labor
Wage and Hour Division
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Re: Proposed Department of Labor Rule on Definition of Spouse in the Family and Medical Leave Act (**RIN 1235-AA09**)

Submitted online at www.regulations.gov

Dear Ms. Ziegler,

The Fenway Institute at Fenway Health strongly supports the Department of Labor's (DOL) proposed change to the definition of "spouse" in the Family and Medical Leave Act (FMLA) to refer to all legally married individuals, including same-sex spouses who live in a state that does not recognize same-sex marriages (RIN 1235-AA09).

The Fenway Institute is an LGBT-focused, interdisciplinary center for research, training, education and policy development. It is the research division of Fenway Health, a federally qualified health center that serves LGBT people and the broader community.

The rights established by the Family Medical Leave Act are critically important to Americans balancing work and caregiving responsibilities. Without the FMLA's protections, millions of American workers would be at risk of losing their jobs and/or health insurance to attend to family or medical needs.

Until 2013, because of DOMA, a worker in a same-sex marriage could not take leave to care for his or her spouse, although the Obama Administration in 2010 adopted guidance clarifying that an individual who is parenting may take leave to care for the child, regardless of the legal relationship between parent and child.¹ Where the federal law was lacking until the 2013 *U.S. v. Windsor* ruling, states and local jurisdictions, as well as employers, had stepped in to allow family and medical leave for same-sex spouses and partners. At least 13 states,

¹ Burns C, Baker K. Despite 20 years of progress, Family and Medical Leave Act fails to protect gay and transgender families. Washington, DC: Center for American Progress, 2013. Available at: <http://www.americanprogress.org/issues/labor/news/2013/02/05/51781/despite-20-years-of-progress-family-and-medical-leave-act-fails-to-protect-gay-and-transgender-families/>.

plus the District of Columbia, had LGBT-inclusive family and medical leave laws as of early 2014.²

Although the FMLA allows eligible workers to take job-protected leave to care for a seriously ill spouse and to address qualifying exigencies when a spouse is called to active military duty, **the FMLA's regulatory definition of "spouse" excludes many lawfully married, same-sex spouses.** Currently, the FMLA's definition of "spouse" only applies to same-sex spouses who reside in a state that recognizes their marriage. As a result, LGBT workers who live in a state without marriage equality are often forced to risk their jobs and financial well-being when they need time off to care for a seriously ill spouse or address certain needs relating to a spouse's military service.

The proposed rule would fix this problem by adopting a "place of celebration" rule, where same-sex spouses are recognized if they were lawfully married in any state. This approach will create greater certainty for LGBT workers, whose eligibility for the FMLA will not change if they move to a state that does not recognize their marriage. The proposed rule will also simplify FMLA coverage for employers, who will no longer have to track a worker's state of residence when determining FMLA eligibility.

Numerous federal departments and agencies, including the Department of Defense and the Internal Revenue Service, have already adopted a "place of celebration" rule. In addition, DOL now uses this approach when defining spouses under the Employee Retirement Income Security Act. Therefore, the proposed rule will improve consistency across federal departments and laws, and create greater uniformity for both workers and employers.

Thank you for the opportunity to comment on this proposed rule, which will remove a barrier to FMLA coverage for many same-sex spouses. Should you have any questions or require more information on any of the suggestions made here, please contact Sean Cahill at scahill@fenwayhealth.org or 617-927-6016.

Sincerely,

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² Family Equality Council. Equality Maps. State Medical Leave Laws. Available at: http://www.familyequality.org/get_informed/equality_maps/state_medical_leave_laws/.

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