Family and Medical Leave HANDBOOK

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Ask the Experts

Changing Course: The DOMA Ruling's Implications for Employer Leave Policies


By Dena B. Calo, Esq., and Harris S. Freier, Esq.

Following is a discussion of what the U.S. Supreme Court's June 26 ruling in *U.S. v. Windsor* means for application of, and compliance with, the Family Medical Leave Act.

Dear Employment Law Experts,

With the U.S. Supreme Court's recent ruling on the Defense of Marriage Act there are going to be subsequent changes in federal law for same-gender couples. One of my employees has been married to his partner for the last two years. He recently asked me about how his FMLA benefits might change in light of the Court's decision. How should I advise him?

In addition, I live in a state that does recognize same-gender marriage but I have been contemplating expanding my business to another state where

See *DOMA Implications*, p. 6

Compliance Focus

How to Avoid and Defend RIF-related FMLA Claims

By Peter A. Susser, Esq.

One of the fundamental protections the Family and Medical Leave Act provides is the requirement that at the end of an approved period of statutory leave, the employee is entitled to be restored to the same position held before leave began, or to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment. (See 29 U.S.C. §2614.)

A question that has arisen frequently through the economic challenges of the last five years involves whether an employer implementing a reduction-in-force can include employees recently, currently or soon-to-be on FMLA leave in the group termination. Alternatively, many employers wonder, in RIF-related circumstances, if an employee seeking to return from a protected leave must be reinstated even if the employee's old position no longer exists?

An employee must show five elements to establish a *prima facie* case of FMLA violation when the employer fails to reinstate the individual out on a protected leave:

See *FMLA Claims*, p. 8

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¶000 — Added new discussion about additional leave that is not covered under FMLA.

¶000 — Made editorial changes.

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In the States

Rhode Island Enacts Paid Family Leave

Rhode Island is the third state to guarantee workers paid time off to care for a new child or a sick family member.

Gov. Lincoln Chafee, a Democrat, signed the new law earlier this month. It expands the states' temporary disability insurance program to include temporary caregiver insurance. Workers can tap into the pool to care for a seriously ill child, spouse, parent, grandparent, parent-in-law or domestic partner, or to bond with a new child.

Workers can take up to four weeks' paid family leave. Those on leave will continue to make about two-thirds of their normal pay. Compensation is capped for anyone making more than $61,400.

The program will be funded by a small payroll deduction. Public-sector employees will not be eligible to participate.

Employers may require workers taking leave under the new law to take the time off concurrently with leave under the federal Family and Medical Leave Act or Rhode Island's Parental and Family Medical Leave Act.

Family rights groups heralded the bill as a victory.

"Rhode Island lawmakers, advocates and workers have shown that progress is possible," said Debra L. Ness, president of the National Partnership for Women and Families, a D.C.-based family rights advocacy group.

The Rhode Island law goes into effect in 2014.

California and New Jersey have similar temporary disability provisions. Lawmakers in Washington (state) passed paid family and medical leave insurance in 2007, but the program has been delayed through three budget cycles.

DOMA **(continued from p. 1)**

same-gender marriage is not permitted. Will there be differences between the policies for my employees in same-gender relationships in states that do not recognize same-gender marriages as opposed to where I am currently located? Any guidance in helping me figure out the implications of the Supreme Court's decision for my small business would be great.

Thanks,

A.C. New York Small Business Owner.

Dear A.C., The Supreme Court's decision in *U.S. v. Windsor* (No. 12-307, June 26, 2013) is relevant for small business owners outside of California as it struck down Section 3 of the federal DOMA, the provision which restricted the definition of "marriage" and "spouse" to heterosexual marriages for all federal laws. There is now no definition of "marriage" or "spouse" under federal law, and the likely analysis would hold that the relevant state law would apply. This ruling will affect more than 1,000 federal statutes, including leave, benefits and tax laws, as tallied in the 2004 U.S. General Accounting Office report, *Defense of Marriage Act: Update to Prior Report*.

In short, under federal law in the 12 states including New York as well as Washington, D.C., where same-gender marriage is legal, and California where it again will become legal, same-gender married couples will receive FMLA federal benefits. Employers in the affected states should immediately examine their leave policies and benefits plans, and consult with counsel as appropriate.

Differences among States

In response to your second question, there will be different protections for your employees because each state has different marriage laws. The nation lacks marriage law uniformity under federal law after the removal of DOMA. Therefore, depending on where your business expands, the rights and obligations conferred upon your employees will vary with the inconsistencies in the definition of "marriage." The federal law will likely defer to state law for its definition of "marriage" and "spouse." There are states that provide for same-gender marriage, states that adhere to traditional marriage, and states that have civil unions or domestic partnerships.

Depending on what market you choose to expand your business, that state's definition of "marriage" will govern. In *Windsor* the Court reiterated that states have the broad authority in their sovereign capacity to regulate the subject of domestic relations within their borders as they seem fit. A wide array of approaches toward marriage is a natural consequence of such leeway from the

See *DOMA*, p. 7

DOMA **(continued from p. 7)**

Court and diversity among the states. Your obligations to your employees will mirror that diversity from state to state.

FMLA in States Where Same-gender Marriage Is Legal

Under federal law, current employment policies are required to provide FMLA leave. FMLA entitles employees to a total of 12 unpaid weeks of leave during any 12-month period for the birth of a child, the placement of a child through adoption or foster care, the sickness of a *spouse*, son, daughter or parent, or because of a serious health condition that makes the employee unable to perform the functions of their job. FMLA also includes up to 26 weeks for an eligible service member *spouse* with a serious injury or illness. See 29 U.S.C. §2612 (emphasis added).

> "In states that allow same-gender marriage, the employer must now provide all benefits under federal law that heterosexual married couples receive."

In the states that allow same-gender marriage, such as New York, the employer is now under an obligation to provide FMLA leave benefits to same-gender married couples for the sickness of their spouse, and these same-gender married couples will receive all benefits under federal law that heterosexual married couples receive.

Note that under the FMLA, regardless of a state's law on same-gender marriage, an employee is able to take leave to care for the child of a same-gender partner if they are the primary care-giver. "Son or daughter" under the statute means "a biological child, a foster child, stepchild, legal ward, or a child of a person standing in loco parentis." See 29 U.S.C. §2611(12).

"Congress stated that the definition was intended to be 'construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.'" (See Nancy J. Leppink, *Administrator's Interpretation No. 2010-3*, June 22, 2010, quoting the Committee on Labor and Human Resources in S. Rep. No. 103-3, at 22.)

Traditional Marriage and Civil Union States

Many states, such as Pennsylvania, recognize marriage as a union between a man and a woman. These states do not recognize same-gender partners as "married" or "spouses." Therefore, the repeal of Section 3 of DOMA in these states was muted in the face of state-level statutes which mirror the federal DOMA.

Civil unions recognize same-gender couples' relationships and provide legal rights to partners similar to those of spouses in opposite-gender marriages *under state law*. These states include Colorado, Hawaii, New Jersey and Illinois. While these states often provide for equal rights for civil unions between same-gender couples in relation to heterosexual marriages, because these states still restrict "marriage" to only heterosexual spouses, the repeal of DOMA does not lead to increased federal rights for same-gender couples in civil unions in these states.

City- and State-level Protections

As an employer looking to expand your business, you should also be cognizant of city- and state-level protections for same-gender couples that may further affect your leave policies. Some states such as New Jersey have fashioned their own state-level version of FMLA and allow leave to care for a same-gender partner in a civil-union. (See N.J.S.A. §34:11B-3; 4.) Similarly, some states and even some cities, such as New York City, provide for *paid* family leave to care for same-gender spouses. (See N.Y. ADC. LAW §§20-911-924.)

Ultimately, for any employer looking to expand their business, there are a wide range of differences in leave policy from one state to the next. The Court's recent DOMA ruling further accentuates the distinctions from state to state. In terms of leave law, employers should be flexible and accommodating to make sure they do not run afoul of the protections afforded married couples after the historic rulings.

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