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CLIENT ALERT: The Department of Labor Proposes to Expand Definition of "Spouse" Under the FMLA

On June 27, 2014, the Department of Labor's Wage and Hour Division ("DOL") published its Notice of Proposed Rulemaking in the Federal Register, 79 FR 36445, which would expand the definition of "spouse" in the federal regulations. Under the proposed rule, the term "spouse" under the Family and Medical Leave Act ("FMLA") would be defined as the other person to whom an individual is married as defined or recognized under the State law of the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This change would have a significant impact on employers' FMLA policies in states that do not currently recognize same-sex marriage. The DOL has invited interested parties to submit comments regarding the proposed rule through August 11, 2014.

The FMLA provides eligible employees of covered employers the right to take job-protected, unpaid leave for up to a total of 12 workweeks in a 12-month period for, *inter alia*, the caring for an employee's spouse with a serious health condition or for any qualifying exigency arising out of the fact that the employee's spouse is a military member on covered active duty. 29 U.S.C. § 2612(a). Under the current regulations, a "spouse" is defined as "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." 29 CFR §§ 825.102 and 825.122(b) (emphasis added).

In response to the Supreme Court's 2013 decision in *United States v. Windsor*, which found Section 3 of the Defense of Marriage Act ("DOMA") to be unconstitutional, the Department proposed to amend the definition of spouse to include all "legally married spouses," regardless of whether they live in a state that does not recognize same-sex marriages.

The proposed rule will change the determining factor for applicability of the FMLA to same-sex couples. Under the current regulations, a same-sex spouse is a "spouse" for FMLA purposes if the couple's "state of residence" recognizes same-sex marriage. Under the proposed rule, the applicability will be determined based on the law of the state in which the marriage was performed, known as the "place of celebration," effectively allowing all same-sex couples to be afforded protections under the FMLA, regardless of where they reside.

Further, the proposed rule will similarly impact the requirements for a parent taking FMLA leave to care for a stepchild. Prior to the decision in *Windsor*, Section 3 of DOMA prevented same-sex parents, who lived in a state which does not recognize same-sex marriage, from taking such leave to care for a stepchild *unless* they satisfied the requirements of "in loco parentis" status. *See* 29 CFR § 825.122(d)(3)("Persons who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary."). However, under the proposed "place of celebration rule," an employee in a valid same-sex marriage

will be able to take leave to care for a stepchild to whom the employee does not stand in loco parentis, regardless of the state in which he or she resides.

If and when this new rule is effective, employers will need to update their FMLA policies and ensure that same-sex spouses receive FMLA rights. In the Notice, the DOL reminds employers that regardless of whether the rule is adopted, "[n]othing in the Act is intended to discourage employers from adopting or retaining more generous leave policies." 29 CFR § 825.700(b).

Employers are encouraged to contact their MBJ attorney with questions about how these changes affect their business.

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