The Demise of DOMA and the Impact on the Family Medical Leave Act

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I. Family Medical Leave Act[1]

FMLA was enacted in 1993 to protect qualified employees from adverse employment actions if the employee required medical leave for themselves or a family member. All employees that are employed by a business that has 50 or more employees within a 75 mile radius of his or her worksite, or a public agency, and have worked for at least 12 months and at least 1,250 hours within the last year are eligible for FMLA leave. An eligible employee is entitled to take up to 12 weeks of unpaid leave in a 12 month period for the employee's own serious health condition or to care for an immediate family member who has a serious health condition. Protected events include leave to care for a new child or for the adoption or placement of a child in foster care, to care for a seriously ill family member, or to recover from an employee's own serious illness. FMLA also requires employers to provide eligible employees with unpaid time off to take care of a military service member or veteran who has a serious injury or illness as a result of military service or which was aggravated as a result of military service, as well as unpaid time off from work for a qualifying exigency related to a spouse's military leave.

FMLA and its accompanying regulations define "spouse" as a husband or wife as defined or recognized under state law for purposes of marriage in the state where the employer resides. However, prior to *Windsor*, the Department of Labor, which enforces FMLA, issued a 1998 Opinion Letter[2], stating that as DOMA established a

[1] 29 U.S.C. 2601, *et seq.*

[2] Available at: http://www.dol.gov/WHD/opinion/FMLA/prior2002/FMLA-98.htm

definition of marriage subsequent to the enactment of FMLA, "only the Federal definition of marriage and spouse as established under DOMA may be recognized for FMLA purposes." Thus, while states may have chosen to afford greater benefits with regard to medical leave for same sex couples, regardless of whether or not a state legalized same sex marriage, FMLA did not grant any such rights to same sex married couples. Striking down DOMA hugely expanded the population of Americans granted protection under FMLA. However, *Windsor's* implications are not universal to all same sex couples. Employers must take the necessary steps to ensure compliance with the Supreme Court's decision.

II. *U.S. v. Windsor*[3]

In 2007, Edith Windsor and Thea Spyer entered into a legal marriage in Ontario, Canada, and the couple resided in New York, where the marriage was recognized as valid. Spyer died two years later in 2009, leaving her entire estate to Windsor. Windsor sought to claim the marital exemption from the federal estate tax. The IRS, looking to the definition of "spouse" under federal law, determined Windsor did not qualify for the exemption and taxed her over $360,000. Windsor paid the tax and subsequently brought suit in the Southern District of New York, seeking a refund of the tax, arguing that DOMA singled out legally married same sex couples for differential treatment compared to other similarly situated couples without justification.

The SDNY ruled that Section 3 of DOMA was unconstitutional under the Due Process guarantees of the Fifth Amendment, and ordered the federal government to issue the tax refund to Windsor, including interest.[4] The Second Circuit affirmed.[5] Following the Second Circuit's decision, the Bipartisan Legal Advisory Group of the House of Representatives appealed to the Supreme Court, and the Court granted certiorari.

On June 26, 2013, the Supreme Court, in a 5-4 decision, struck down the definition of spouse as between a man and a woman in Section 3 of DOMA as a deprivation of the liberty of the person protected by the Fifth Amendment. The Court found that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."[6]

The Supreme Court determined that as Windsor's marriage was valid in New York, the state where she resided, her marriage was equal to that of heterosexual spouses. Further, as marriage was traditionally within the purview of states' rights, the Court found DOMA's definition of marriage to be a departure from federalist principles. Even though certain federal statutes address marital and family status, the federal government traditionally deferred to state legislatures for governance in the realm of family and marital relations.

III. Post *Windsor* FMLA

Since the *Windsor* decision, the Department of Labor has issued a new fact sheet clarifying how FMLA implementation is affected by the Supreme Court striking down Section 3 of DOMA.[7] Fact Sheet 28F[8], issued

[3] United States v. Windsor, 133 S.Ct. 2675 (2013).

[4] Windsor v. United States, F. Supp. 2d 394 (S.D.N.Y 2012).
[5] Windsor v. United States, F.3d 169 (2d Cir. 2012).
[6] United States v. Windsor, 133 S.Ct. 2675, 2694 (2013).
[7] Available at: http://www.dol.gov/whd/regs/compliance/whdfs28f.htm

in August 2013, provides:

> Spouse means a husband or wife as defined or recognized under state law for the purposes of marriage in the state where the employee resides, including common law marriage and same sex marriage.

Thus, if an employee resides in a state that recognizes same sex marriage, they are entitled to FMLA protection. However, in states that do not recognize same sex marriage, same sex couples will still be barred from accessing FMLA.

The implications of granting FMLA leave by where the employee lives, as opposed to where he or she works, could add to confusion. For example, if an employer is based in D.C., which legalized same sex marriage in 2009, but has employees commuting in from Maryland, which legalized same sex marriage in 2013, and Virginia, which bans same sex marriage, that employer could have two or three people working side by side with the exact same job title and marital situation receiving different FMLA benefits.

However, in states that both recognize same sex marriage and have passed legislation granting leave rights to same sex spouses, implementation of leave rights are significantly less burdensome to employers than pre-*Windsor*. Now, at least where same sex married employees live and work within the same state, leave should qualify as protected under both the state leave law and the FMLA. In many cases, such leave for events that qualify under both federal and state law can be counted under both laws concurrently. Before the DOMA ruling, employers in states that recognized same sex marriages were required to grant leave under the state leave law, but could not count it as FMLA leave.

While the landscape of federal and state law interaction is seemingly always changing, the relationship between FMLA and the recently struck down DOMA is clear. It is now in the hands of each state to determine whether same sex couples will have legal and binding marriages, and thus be entitled to the benefits of the federal FMLA, it is always within a state's right and each individual employer's to expand the benefits to same sex couples.

[8] It is important to note that this Fact Sheet is neither an amendment to the FMLA nor a federal regulation. The Fact Sheet itself reads, "This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations."