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**FMLA Leave is Now Available to Same-Sex Spouses in All States Where
Same-Sex Marriage is Recognized**

As you will recall from our recent update, in *United States v. Windsor*, issued June 26, 2013, the U.S. Supreme Court struck down the provisions of the Defense of Marriage Act (DOMA) that denied federal benefits to legally married, same-sex couples. President Obama subsequently directed the U.S. Department of Labor (DOL) to coordinate with federal agencies to implement the *Windsor* decision.

DOL makes FMLA leave available to same-sex spouses wherever same-sex marriage is recognized

DOL announced that, as of August 9, 2013, it had updated guidance to remove references to DOMA and confirm the availability of spousal leave based on same-sex marriages under the Family and Medical Leave Act (FMLA). This change is undeniably significant, because the FMLA entitles eligible employees to take job-protected leave, with continuation of group health insurance coverage for covered family and medical reasons, to include caring for a same-sex spouse who has a “serious health condition.”

In an August 9, 2013 memorandum to DOL staff, the Secretary of Labor “directed Agency Heads within the Department to look for every opportunity to ensure that we are implementing this decision in a way that provides the maximum protection for workers and their families.” That directive does not expressly address benefits to same-sex spouses in states that do not recognize same-sex marriage. However, updated guidance in DOL’s Fact Sheet #28 (Qualifying Reasons for FMLA Leave), indicates that DOL currently only intends to expand FMLA benefits for same-sex married couples residing in the 13 states that recognize same-sex marriage and the District of Columbia (and presumably in like-minded states that do so in the future).*

OPM more broadly implements *Windsor* as applied to federal personnel

DOL's limited application of *Windsor* contrasts with the position taken by the U.S. Office of Personnel Management (OPM) in administering leave policies and programs for federal employees. Specifically, OPM has announced that benefits (including FMLA protections) have been extended to federal employees who have legally married a spouse of the same sex, regardless of the employee's state of residency. Such expanded benefits include unemployment insurance, health insurance, "and other important benefits to federal employees and their families, regardless of whether they are in same-sex or opposite-sex marriages."

Going Forward

- Examine your FMLA policies and accompanying documentation (e.g., leave request forms, etc.) to ensure that same-sex spouses are included, where applicable.
- Review procedures surrounding leave requests to ensure compliance with the revised definitions noted above.
- Ensure that managers, supervisors, and anyone else who may receive leave requests are aware that FMLA protections apply to same-sex couples in all states where same-sex marriage is recognized, and the District of Columbia.

* The following states currently recognize same-sex marriage: California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia.