

March 2015

## Federal FMLA in Flux: “Spouse” Revised and “Expired” Forms Revived

### U.S. LABOR DEPARTMENT REVISES THE DEFINITION OF “SPOUSE” UNDER THE FMLA

The U.S. Department of Labor’s (DOL) Wage and Hour Division announced a Final Rule revising the regulatory definition of “spouse” under the Family and Medical Leave Act of 1993 (FMLA). Effective March 27, 2015, the federal FMLA will define a spouse based on the law of the place where the employee’s marriage was entered into rather than the law of the state in which the employee resides. Under the current FMLA regulations, the definition of spouse does not include legally married same-sex spouses if the employee resides in a state that does not recognize the employee’s same-sex marriage.

This shift to a “place of celebration” interpretation will require that covered employers permit eligible employees in legal same-sex marriages to take FMLA leave to care for their spouse or covered family member regardless of the law in the state where they live. The new definition also includes same-sex spouses that entered into a valid marriage outside the United States. The effect of this change is that covered employers must permit leave for employees to (1) care for their same-sex spouse, stepchild, or stepparent with a serious health condition; (2) take qualifying exigency leave due to their same-sex spouse’s covered military service; or (3) take military caregiver leave for their same-sex spouse.

The rule change aligns the regulatory definition of spouse under the FMLA with guidance previously issued by the DOL concerning the definition of spouse under the Employee Retirement Income Security Act (ERISA) and similar guidance issued by the Internal Revenue Service (IRS) in the aftermath of the United States Supreme Court’s 2013 decision in *United States v. Windsor*. The *Windsor* decision struck down as unconstitutional Section 3 of the Defense of Marriage Act (DOMA), which restricted the definition of “marriage” for purposes of federal law to a union between a man and a woman.

Employers, particularly those with employees in states that do not recognize same-sex marriage, may wish to review and update their FMLA policies and to train supervisors responsible for reviewing family leave requests with respect to the new regulation.

### OFFICE OF MANAGEMENT AND BUDGET EXTENDS EXPIRATION DATE OF MODEL FMLA FORMS

The U.S. Office of Management and Budget (OMB), the agency responsible for approving the DOL’s model FMLA forms, recently extended the expiration date of the current model forms for 30 days, through March 31, 2015. The OMB last approved the model forms in February 2012 for the maximum period of three years. The DOL has not yet submitted revised forms to the OMB for approval and is currently accepting public comment on its forms until March 27, 2015. Employers that utilize the model forms are encouraged to continue their use until further notice from the agency. Links to model forms are available as follows:

- [Certification of Health Care Provider for Employee’s Serious Health Condition \(WH-380-E\)](#)
- [Certification of Health Care Provider for Family Member’s Serious Health Condition \(WH-380-F\)](#)

- [Notice of Eligibility and Rights & Responsibilities \(WH-381\)](#)
- [Designation Notice \(WH-382\)](#)
- [Certification of Qualifying Exigency For Military Family Leave \(WH-384\)](#)
- [Certification for Serious Injury or Illness of a Current Servicemember — for Military Family Leave \(WH-385\)](#)
- [Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave \(WH-385-V\)](#)

It is important to note, however, that these model forms pertain only to the federal FMLA law. Some states (such as Connecticut) have state FMLA laws that may differ from the federal FMLA. Employers in those states may wish to ensure that forms comply with the applicable state FMLA as well as the federal FMLA.

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To receive additional information regarding state or federal Family and Medical Leave Acts, to get assistance reviewing policies or forms, or to ask questions concerning employee leaves of absence, please contact any of the following members of Robinson+Cole's [Labor, Employment, Benefits + Immigration Group](#):

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