

EMPLOYMENT LAWS SCENE ALERT: THE FMLA, WFMLA, AND SAME-SEX SPOUSES

On February 25, 2015, the Department of Labor (DOL) issued a Final Rule revising the definition of “spouse” under the FMLA. Currently, 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.” The Final Rule amends the FMLA definition of “spouse” to include eligible employees in same-sex marriages, even in states that do not recognize same-sex marriages. Importantly, same-sex marriages will be deemed valid based on the place in which the marriage was entered into, instead of the state in which the employee lives or works. Marriages will be valid if they are performed in any state or country that deems the marriage legal. Wisconsin, through a series of recent federal court decisions, recognizes same-sex marriages. Therefore, if an employee in a same-sex marriage was married in a place that legally recognizes same-sex marriages, an employer in any state, even those that do not currently recognize same-sex marriages, must grant that employee FMLA leave for the care of a same-sex spouse if the employee is otherwise eligible for that leave.

The amendment to the meaning of “spouse” under the federal FMLA does not affect the Wisconsin Family Medical Leave Act (WFMLA). The WFMLA is broader in scope than the federal FMLA as it not only recognizes the right of an employee to take a leave of absence for the serious health condition of a “spouse,” defined as “an employee’s legal husband or wife” (including a same-sex spouse), but also provides leave rights to employees engaged in domestic partnerships. The WFMLA defines “domestic partner” in one of two ways. First, domestic partner can mean two individuals who: (i) are 18 years or older and competent to enter into a contract; (ii) are not married to or in a domestic partnership with anyone else; (iii) are not related by blood in a way that would prohibit marriage; (iv) consider themselves each other’s immediate family; (v) agree to be responsible for each other’s basic living expenses; and (vi) share a common residence. Second, domestic partners can be those who have signed and filed a declaration of domestic partnership in the office of the registrar of deeds of the county in which they reside. In Wisconsin, domestic partnerships can apply to same-sex couples who are not married as well as to opposite-sex couples who are not married. Therefore, even employees who are not legally married can be eligible for up to two weeks of WFMLA leave if they are part of a domestic partnership recognized under state law.

The new FMLA regulation goes into effect on March 27, 2015 and the WFMLA is already in

effect for Wisconsin employers, so employers should review their policies and educate supervisors, managers, and human resources personnel on the Final Rule as well as Wisconsin law so that they can be applied properly.