



# DOL Proposes Rule to Expand FMLA Protections for Same-sex Spouses

Provided by Employee Benefit Strategies Group

### Quick Facts

- The DOL has issued a proposed rule that would expand FMLA leave rights for same-sex spouses.
- The proposed rule would move to a “place of celebration” rule, instead of the “state of residence” rule that currently applies.
- The rule would also redefine “spouse” under the FMLA to expressly reference the inclusion of same-sex marriages in addition to common law marriages, and include same-sex marriages entered into abroad.

Under the proposed rule, eligible employees in legal same-sex marriages would be able to take FMLA leave to care for their spouse or family member, regardless of where they live.

On June 20, 2014, the Department of Labor (DOL) issued a [proposed rule](#) that would expand protections under the federal Family and Medical Leave Act (FMLA) for same-sex spouses. This proposed rule would revise the definition of “spouse” under the FMLA to:

- Adopt a “**place of celebration**” rule (which is based on where the marriage was entered into), instead of the “state of residence” rule that currently applies; and
- **Expressly include same-sex marriages** in addition to common law marriages, and encompass same-sex marriages entered into abroad that could have been entered into in at least one state.

Thus, under the proposed rule, eligible employees in legal same-sex marriages would be able to take FMLA leave to care for their spouses or family members, regardless of where they live.

This proposed rule updates [guidance](#) regarding FMLA protections for same-sex spouses that was issued following the U.S. Supreme Court’s decision in [United States v. Windsor](#). The *Windsor* decision, issued on June 26, 2013, invalidated Section 3 of the federal Defense of

Marriage Act (DOMA), which barred same-sex couples from being treated as married under federal law.

### Background

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. The FMLA also includes certain military family leave provisions.

Following the U.S. Supreme Court’s ruling on DOMA, the DOL issued [Fact Sheet #28F](#) to clarify the scope of an employer’s obligation to make FMLA available to same-sex spouses. This fact sheet confirmed that, under the FMLA, the term “spouse” includes a same-sex spouse **if the marriage is recognized under the laws of the state in which the employee resides.**

As a result, employers in states that allow same-sex marriages were required to treat employees’ same-sex and opposite-sex spouses equally for purposes of federal employee benefit laws. However, these protections applied only to same-sex marriages that are valid under state law. They did not apply to same-sex couples in civil unions or domestic partnerships, or same-sex couples living in



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states that do not recognize same-sex marriage.

### Overview of the Proposed Rule

The proposed rule would change the definition of “spouse” under the FMLA to look to **the law of the jurisdiction in which the marriage was entered into** (including for common law marriages), as opposed to the law of the state in which the employee resides. The proposed definition would also:

- Expressly reference the inclusion of same-sex marriages in addition to common law marriages; and
- Include same-sex marriages entered into abroad.

Under the proposed rule, eligible employees in legal same-sex marriages would be able to take FMLA leave to care for their spouse or family member, regardless of where they live. However, these protections still do not apply to same-sex couples that are not legally married (for example, same-sex couples in civil unions or domestic partnerships).

### Proposed Definition

The proposed rule would define the term “spouse” under the FMLA as follows:

*Spouse, as defined in the statute, means a husband or wife. For purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage:*

- *As defined or recognized under state law for purposes of marriage in 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 definition includes an individual in a same-sex or common law marriage that either:*

1. *Was entered into in a state that recognizes such marriages; or*

2. *If entered into outside of any state, is valid in the place where entered into and could have been entered into in at least one state.*

The proposed definition makes clear that the terms “husband” and “wife” include all individuals in lawfully recognized marriages. According to the DOL, this proposed definition is intended to cover all spouses in legal marriages as defined in the regulation, regardless of whether they use the terms “husband” or “wife.”

### “Place of Celebration” Rule

The proposed rule would also move from a “state of residence” rule to a rule based on the jurisdiction where the marriage was entered into (place of celebration). This rule is intended to ensure that all legally married couples, whether opposite-sex or same-sex, will have consistent FMLA rights, regardless of where they live.

According to the DOL, as of June 18, 2014, 19 states and the District of Columbia have legalized same-sex marriage (California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington). Additionally, 16 countries extend the right to marry to same-sex couples (Argentina, Belgium, Brazil, Canada, Denmark, England/Wales/Scotland, France, Iceland, The Netherlands, New Zealand, Norway, Portugal, Spain, South Africa, Sweden and Uruguay).

The DOL believes that a “place of celebration” rule would:

- Give fullest effect to the purpose of the FMLA to permit employees to take unpaid leave for a spouse, child or parent;
- Reduce barriers to the mobility of employees in same-sex marriages in the labor market; and



- Reduce the administrative burden on employers that operate in more than one state or have employees who move between states with different marriage recognition rules.

#### **Impact on FMLA Leave Usage**

The proposed definitional change would mean that eligible employees, regardless of where they live, would be able to:

- Take FMLA leave to care for their same-sex spouse with a serious health condition;
- Take qualifying exigency leave due to their same-sex spouse's covered military service; or
- Take military caregiver leave for their same-sex spouse.

Additionally, in [Fact Sheet #28B](#), the DOL recognized the eligibility of same-sex partners, whether married or not, to take leave to care for a partner's child, provided that they meet the *in loco parentis* requirement of providing day-to-day care or financial support for the child. However, under the proposed rule, eligible employees would be entitled to take FMLA leave to care for their stepchild (the child of the employee's same-sex spouse) even if the *in loco parentis* requirement of providing day-to-day care or financial support for the child is not met.

The proposed rule would also entitle eligible employees to take FMLA leave to care for their stepparent (same-sex spouse of the employee's parent), even though the stepparent never stood *in loco parentis* to the employee.

#### **More Information**

Comments on the proposed rule are due 45 days after the rule is published in the Federal Register.

For more information on the FMLA, please visit the DOL's [FMLA Web page](#).

