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Client Alert

July 2013

THE SUPREME COURT'S DEFENSE OF MARRIAGE ACT RULING AND ITS EFFECT ON THE FAMILY AND MEDICAL LEAVE ACT

On June 26, 2013, the U.S. Supreme Court issued a high-profile decision involving the legality of same-sex marriage. In *United States v. Windsor*, the Supreme Court held that Section 3 of the Defense of Marriage Act ("DOMA") is unconstitutional on Fifth Amendment grounds. Section 3 of DOMA defines the terms "spouse" and "marriage" for purposes of federal law as being solely between one man and one woman. Notably, the case did not involve the constitutionality of DOMA's other operative provision, Section 2, which allows states to refuse to recognize same-sex marriages performed under the laws of other states. The Supreme Court's decision will affect over 1,000 federal statutes and federal regulations, including the Family and Medical Leave Act ("FMLA").

As a result of the Supreme Court's ruling, same-sex spouses are considered spouses under federal law if they are spouses under state law. The FMLA refers to state law for the definition of "spouse." All federal laws and regulations that refer to spouses incorporate the same-sex definition in those states where same-sex marriage is legal. Therefore, an employee can now take FMLA leave to care for a same-sex spouse with a serious medical condition, including military-family leave to care for the same-sex spouse, if the employee lives in a state that allows same-sex marriage. In addition, children of same-sex spouses are now considered stepchildren of the non-birth or non-adoptive spouse, so the employee can take FMLA leave for their care as well. However, states still have the right not to recognize same-sex marriages originating in other states.

FMLA administration will become more difficult as employers will need to be aware of other states' laws on same-sex marriage. Each time an FMLA request is made by an employee to care for a spouse, the employer will need to know the state of residence of the requesting employee and the state or jurisdiction in which the marriage occurred in order to determine whether the employee qualifies as a spouse in the appropriate jurisdiction.

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Employee Practices

We recommend that employers in those states that allow same-sex marriage or recognize same-sex marriages performed in other jurisdictions immediately change the way they administer their FMLA policies. Employers should consider expanding their definition of "family member" beyond what is federally required, and include all same-sex domestic partnerships/civil unions so that the administration of each FMLA request is streamlined.

See the Client Alert by our Employee Benefits group discussing the effect of the *Windsor* decision on employee benefit plans.

For more information regarding the *Windsor* decision and its effect on your existing leave policies, or if you would like us to review your existing leave policies, please contact the Olshan attorney with whom you regularly work or either of the attorneys listed below.

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