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Are Eligible Workers In Same-Sex Marriages Entitled to FMLA Leave?

Those employers located within in the Sixth Circuit (Ohio, Michigan, Kentucky and Tennessee) have no doubt heard of the 2 to 1 opinion of the Court in *Obergefell vs. Hodges*, decided on November 6, 2014. In the decision, the Sixth Circuit upheld bans of same-sex marriages or recognition of out-of-state same-sex marriages. Since this decision is contrary to other Federal Circuit decisions on the same issue, on January 16, 2015 the United States Supreme Court announced it would hear an appeal of the Sixth Circuit's same-sex marriage ban, and resolve the differing opinions of the Circuit Courts of Appeal.

Hearings on this appeal have been set for the week of April 20 and it is anticipated that the decision by the Supreme Court should be announced over the summer.

Nevertheless, based on the law as it currently stands in the Sixth Circuit, is an employer required to provide FMLA leave to eligible workers in same-sex marriages where those same-sex marriages were legal in the states when they were performed?

For the answer, let's begin with legislation regarding same-sex marriage. In 1996, Congress passed the Federal Defense of Marriage Act (DOMA). Bipartisan majorities in both Houses of Congress supported the bill, and the bill was signed by President Bill Clinton. Under Section 2 of the Act, states were not required to recognize same-sex marriages from other states, and Section 3 provided that under federal law, marriage would be defined only as the union of one man and one woman.

Seven years later, the U.S. Supreme Court was confronted with the following facts: two women, both New York residents, obtained a same-sex marriage in Canada. At the time of the marriage, New York did not provide marriage licenses to same-sex couples. However, in 2008, New York began recognizing same-sex marriages from other jurisdictions. In 2009, one of the women in the marriage in question died, and left her estate to her partner. The partner then sought a spousal exemption under the federal estate tax. DOMA prohibited such an exemption. The partner, Windsor, then contested the denial in *U.S. vs. Windsor*, 133 S.Ct. 2675 (2013).

The United States Supreme Court, in a 5 to 4 decision, held that Section 3 of DOMA was unconstitutional. Overly simplified, the Court determined that the federal

government has throughout its history deferred to state law policy decisions with respect to domestic relations. The U.S. Supreme Court added, via the majority opinion authored by Justice Kennedy, that by history and tradition the definition and regulation of marriage has been treated as within the authority and realm of the separate states. Justice Kennedy added that the DOMA also "violates basic due process and equal protection principles applicable to the federal government." In short, therefore, the decision requires that same-sex couples who are legally married must now be treated the same under federal law as the union of a man and woman in the states.



Based on Windsor, the U.S. Department of Labor ("DOL") through Secretary of Labor, Thomas E Perez, issued a news release on February 23, 2015. In it, the DOL announced a rule change to the FMLA in keeping with the US Supreme Court's decision in Windsor. **Consequently, workers in legal, same-sex marriages, regardless of where they live, will now have the same rights as those in opposite-sex marriages to federal job protected leave under FMLA. Hence, the FMLA definition of "spouse" now includes an eligible employee in a legal same-sex marriage.**

An employee will be able to take FMLA leave for his or her spouse regardless of the state in which the employee resides or where their employment is located, as long as the employee is in a legally recognized marriage. Under this rule, eligibility for federal FMLA protection is based on the law of the place where the marriage was entered into (the "place of celebration" according to the news release), not where the employee resides.

As stated by Secretary Perez regarding the announced rule change, "With our action today, we extend that promise so that no matter who you love, you will receive the same rights and protections as everyone else. All eligible employees and legal same-sex marriages, regardless of where they live, can now deal with a serious medical and family situation like all families - without the threat of job loss."

The FMLA is enforced by the Wage and Hour Division of the DOL. The agency investigates complaints of violation of the FMLA. The DOL can compel compliance through court action. An aggrieved employee can also file suit against an employer alleging FMLA violations. The employee is not required to proceed first with the DOL before bringing a private civil suit.



Felix Gora is an Ohio State Bar Association Certified Specialist in Labor and Employment law. His practice is concentrated in the areas of employment, appellate, aviation, bad faith and personal injury. Felix's court appellate background is a key factor in his selection to handle some of the most difficult procedural issues in litigation.

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