BOND INFORMATION MEMO

Labor and Employment Law

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DOL Proposes to Expand the Availability of FMLA Leave to All Same-Sex Spouses

On Friday, June 20, 2014, the Wage and Hour Division for the U.S. Department of Labor (DOL) announced a proposed rule that would extend the spousal leave protections afforded by the Family and Medical Leave Act (FMLA) to include all eligible employees in legal same-sex marriages – regardless of where the employees live.

The FMLA provides eligible employees with the right to take unpaid leave for a variety of qualifying reasons and to various qualifying family members. When focusing purely on FMLA leave for spouses, eligible employees may take FMLA leave to care for their spouse under the following circumstances: (1) when time off is needed to care for a spouse with a serious health condition; (2) when time off is needed to care for a spouse who is a covered servicemember with a serious injury or illness; and/or (3) when time off is needed for a qualifying exigency related to the covered military service of a spouse.

The FMLA regulations currently define the term "spouse" to mean 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." This definition of spouse has historically excluded same-sex marriages because of certain definitions contained in Section 3 of the Defense of Marriage Act (DOMA), a federal law that permits states to refuse to recognize same-sex marriages granted under the laws of other states. However, in June 2013, the United States Supreme Court declared Section 3 of DOMA unconstitutional in its *U.S. v. Windsor* decision. What result did the Court's *Windsor* decision have on the FMLA? In sum, this decision enabled eligible employees in legal same-sex marriages residing in states that recognize their marriage to avail themselves of the various leave rights and protections to care for spouses offered under the FMLA.

Despite the practical developments stemming from *Windsor*, many same-sex couples remain unable to take FMLA spousal leave. For example, employees who are legally married in a state which recognizes same-sex marriages, but subsequently move to a state which does not, may not be entitled to seek FMLA spousal benefits because FMLA spousal benefits are governed by the state of the employee's residence. With its newly proposed rule, the DOL is attempting to rectify this inconsistency by revising the definition of spouse so that the FMLA regulations will look to the law of the state (or country) where the marriage was entered into, as opposed to the law of the state where the employee resides. The DOL believes that this change from a "place of residence" rule to a "place of celebration" rule will allow all legally married couples, whether opposite-sex or same-sex, to have consistent FMLA rights, regardless of the state in which they reside.

The DOL's proposed rule would also permit eligible employees to take FMLA leave to care for their stepchild (child of the employee's same-sex spouse) or stepparent (employee's parent's same-sex spouse) without establishing an *in loco parentis* relationship.

Like all proposed administrative changes, this DOL rule is subject to a notice and comment period before it can be implemented. We will continue to follow this FMLA issue and provide additional updates if and when a final rule is issued.

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