



## *Office of the General Counsel*

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August 11, 2014

### **Submitted Electronically**

Mary Ziegler  
Director of the Division of Regulations, Legislation and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Comments on Proposed FMLA Regulations  
Department of Labor, Wage and Hour Division  
RIN 1235-AA09**

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Dear Ms. Ziegler:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the Department of Labor's proposed regulation redefining the term "spouse" under the Family and Medical Leave Act. 79 Fed. Reg. 36445 (June 27, 2014).

### **I. Background**

The Family and Medical Leave Act ("FMLA") allows an employee to take unpaid leave, or to substitute accrued paid leave for unpaid leave, for any of several specified reasons involving the employee's "spouse."

Theoretically, the term "spouse" as used in FMLA could mean one of at least three things. It could mean the employee's "spouse" as defined by the law of the jurisdiction in which the employee (a) resides, (b) works, or (c) was married. Commentators on the 1993 interim final rule, published just a few months after FMLA's enactment, raised the first two options (place of residence or

employment), but apparently not the third (place of celebration). 79 Fed. Reg. at 36447 (describing regulatory history). The Department decided to adopt a place-of-residence rule. *Id.*; see 60 Fed. Reg. 2180, 2191 (June 6, 1995). That rule has been in place for nearly 20 years. After the Defense of Marriage Act (“DOMA”) was enacted, the Department retained the place-of-residence rule, but clarified through an opinion letter that “spouse” referred only to a party to a marital union of one man and one woman. 79 Fed. Reg. at 36447 (describing the letter).

The Department now proposes eliminating its longstanding place-of-residence rule and adopting instead a place-of-celebration rule. Under the proposed rule, the employer must look to the state in which the employee was married and determine whether under its laws the claimed marriage is valid. If an employee were married in a foreign country, then the employer would be required to look to the law of that country as long as the marriage would be recognized in the law of at least one of the 50 states, even if the employee has had no contact with that state. The Department describes the proposed rule as a response to *United States v. Windsor*, 133 S. Ct. 2675 (2013). The Department also cites the interest in reducing the administrative burden on employers as a reason for adopting a place-of-celebration rule.

## **II. Analysis**

Neither the *Windsor* decision nor the interest in reducing the administrative burden on employers justifies the Department’s departure from its longstanding place-of-residence rule. On the contrary, both of these concerns favor either retention of that rule, or the adoption, alternatively, of a place-of-employment rule.

*Windsor* struck down Section 3 of DOMA, which defined marriage for purposes of federal law as the union of one man and one woman. The dominant theme of Justice Kennedy’s majority opinion in *Windsor* is that states, not the federal government, have the power to define and regulate marriage. “The State’s power in defining the marital relation,” Justice Kennedy wrote, “is of central relevance in this case.” 133 S. Ct. at 2692; see *id.* at 2691 (noting that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations”); *id.* (noting that “[t]he significance of state responsibilities for the definition and regulation of marriage dates to the Nation’s beginning; for when the Constitution was adopted the common understanding was that the domestic relations of husband and wife ... were matters reserved to the States”) (internal quotation marks omitted); see also *id.* at 2697 (Roberts, C.J.,

dissenting) (noting that “[t]he dominant theme of the majority opinion is ... the Federal Government’s intrusion into an area ‘central to state domestic relations law applicable to its residents and citizens’ ...”).

The Department’s proposed response to *Windsor* is ironic because that decision requires deference to state law *differences* in the definition of marriage. The effect of the proposed regulation, however, is to invite individuals in same-sex relationships to ignore the law of the state where they reside, travel to one of 19 states which recognize same-sex marriage for purposes of celebrating their marriage, and return to their home state where the Department will now recognize their marriage for FMLA purposes (even though their home state does not). Thus, the proposed regulation does not defer to, but ignores, the laws of 31 states that define marriage as the union of one man and one woman. This result cannot be squared, and is positively at odds, with *Windsor*.

The Department claims that its proposed definition of spouse will reduce the administrative burden on employers. We believe the rule will have precisely the opposite effect. Consider the case of a hypothetical mid-size employer with offices in Kansas City, Missouri. Its employees may reside in Missouri or across the river in Kansas. Under the current rule, implementation of spousal leave under FMLA is relatively simple: the employer need be familiar only with the marriage laws of Missouri and Kansas. Indeed, having decided to set up business operations in Missouri, it is not an unreasonable expectation that the employer will know the law there and in the contiguous jurisdictions where its employees reside. Under the proposed rule, however, the employer has the more complex task of determining the marriage law of any of 50 states or even a foreign country. In addition, the proposed rule widens the disparity between state and federal law requirements, which does little to decrease, but will only increase, the administrative burden on employers. An employee who could assert eligibility for unpaid FMLA leave under the proposed rule in circumstances involving a spouse might well be the very same employee who would be *ineligible* for unpaid spousal leave under *state* law. Of course, there is no requirement that federal and state law mirror each other, but the Department should be under no illusions that it is “reducing” the administrative burden on employers by only widening the disparity between federal and state law when it comes to employer-provided leave or other benefits.

Finally, a place-of-celebration rule can have, in our view, odd and inequitable results. Such a rule would apply even if the employee himself or herself has little-to-no contact with the place of celebration other than having been

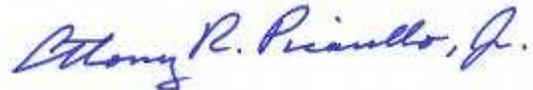
married there. Indeed, an employee residing and working in a state that does not recognize same-sex marriage may travel briefly to another state or foreign country that does, be married (literally) on the tarmac, and then return to the home state whose law he or she wishes to evade. *See Obergefell v. Wymyslo*, 962 F.Supp.2d 968 (S.D. Ohio 2013) (describing precisely this situation). An individual having little or no connection with a jurisdiction has no reasonable expectation that he or she will be able to assert the protection of its law, but every expectation that the law of his or her place of residence or employment will govern.

For these reasons, neither *Windsor* nor the interest in reducing the administrative burden on employers justifies a departure from the traditional rule under which marital status is determined by place of residence. Both favor retention of either that rule or, alternatively, a place-of-employment rule.

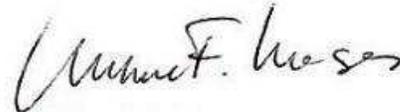
### **III. Conclusion**

We request that the rule be modified to provide that, for purposes of FMLA, marital status be determined by the place of an employee's residence or, alternatively, by his or her place of employment.

Respectfully submitted,



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