



6325-39

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN: 3206-AM90

Family and Medical Leave Act; Definition of Spouse

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is revising the definition of *spouse* in its regulations on the Family and Medical Leave Act (FMLA) as a result of the decision by the United States Supreme Court holding section 3 of the Defense of Marriage Act (DOMA) unconstitutional. The new definition replaces the existing definition, which contains language from DOMA that refers to “a legal union between one man and one woman.” The new definition permits Federal employees with same-sex spouses to use FMLA leave in the same manner as Federal employees with opposite-sex spouses.

DATES: This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kurt Springmann by email at pay-leave-policy@opm.gov or by telephone at (202) 606-2858.

SUPPLEMENTARY INFORMATION: The U.S. Office of Personnel Management is issuing a final regulation that revises the definition of *spouse* under 5 CFR 630.1202 for purposes of the Family and Medical Leave Act. This change stems from the June 26, 2013, decision of the U.S. Supreme Court in *United States v. Windsor*, 133 S. Ct. 2675 (2013), invalidating Section 3 (1 U.S.C. 7) of the Defense of Marriage Act (Public Law 104-199, 110 Stat. 2419 (1996)). The

revised definition establishes in regulation that Federal employees who are in legal marriages with same-sex spouses can use their leave entitlement under FMLA in the same manner as Federal employees who are in legal marriages with opposite-sex spouses.

Background

Two Federal agencies administer regulations governing FMLA. The Department of Labor (DOL) issues regulations for title I of FMLA, which covers non-Federal employees and certain Federal employees not covered under title II. OPM issues regulations for title II of FMLA, which covers most Federal employees. Title II of FMLA directs OPM to prescribe regulations that are consistent, to the extent appropriate, with regulations prescribed by the Secretary of Labor to carry out title I of FMLA. (See 5 U.S.C. 6387.) DOL published its final regulations on the definition of *spouse* under title I of FMLA on February 25, 2015, at 80 FR 9989.

On June 26, 2013, the U.S. Supreme Court ruled in *Windsor* that Section 3 of DOMA is unconstitutional. Section 3 states in part: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” OPM’s definition of *spouse* in the FMLA regulations had its basis in the Section 3 language. In response to this ruling, OPM issued a memorandum on October 21, 2013, informing Federal agencies that the definition of *spouse* used in OPM’s FMLA regulations was no longer valid. (See CPM 2013-14, *Family and Medical Leave Act (FMLA) Coverage of Same-Sex Spouses*, at <https://www.chcoc.gov/content/family-and-medical-leave-act-fmla-coverage-same-sex-spouses>.) The memorandum made clear that, effective June 26, 2013, an

employee in a legally recognized same-sex marriage, regardless of state of residency, could use his or her FMLA leave entitlement in the same manner as an employee with an opposite-sex spouse.

Evaluation of Comments

On June 23, 2014, at 79 FR 35497, OPM published a notice of proposed rulemaking to change the definition of *spouse* in the regulations implementing title II of FMLA to mirror the definition proposed by DOL for title I employees. OPM also proposed conforming amendments that would revise the definition of *parent* and add a definition for *State* to align with DOL's definitions of these terms. We received 27 comments in response to the proposed regulations, of which 24 supported the changes.

The three commenters who opposed the change cited religious and traditional beliefs as reasons for adhering to a definition of marriage that applies only to opposite-sex couples. One supported equal benefits for same-sex couples, but did not agree with redefining marriage as other than between one man and one woman. Another maintained that the Government should not impose this change on States that had previously banned same-sex marriage. The change to the definition complies with the Supreme Court's ruling in *Windsor*, which invalidated the language in Section 3 of DOMA that had limited Federal recognition of marriages only to opposite-sex marriages, as well as its decision in *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), which held that States are required to license marriages between same-sex couples and to recognize same-sex marriages performed in other States. The change is also in accordance with 5 U.S.C. 6387, which directs that OPM's FMLA regulations be consistent, to the extent practicable, with those of the Department of Labor. Moreover, OPM's definition of *spouse* in these regulations only applies to Federal employee coverage under FMLA and does not affect

State marriage licensing practices. We note that, to the extent the commenter is suggesting that a marriage performed in one State should have no effect in a State that banned same-sex marriage, the Supreme Court squarely rejected that position in Obergefell.

Six commenters urged OPM to maintain support for the in loco parentis standard in parent and child FMLA eligibility determinations. Four of these commenters requested that OPM clarify that the regulations will not affect its implementation of the DOL Administrator's Interpretation No. 2010-3, both in how parents may be determined to stand in loco parentis and in recognizing that more than two adults may stand in loco parentis to a child. OPM noted its continuing use of the in loco parentis standard described in Administrator's Interpretation No. 2010-3 in the Supplementary Information to the proposed rule under the section, "Children of Same-Sex Couples," which referenced OPM's August 31, 2010, memorandum titled Interpretation of 'Son or Daughter' Under the Family and Medical Leave Act. (See CPM 2010-15 at <https://www.chcoc.gov/content/interpretation-son-or-daughter-under-family-and-medical-leave-act>.) As noted in the memorandum, Administrator's Interpretation No. 2010-3 applies only to title I of FMLA; however, OPM has adopted the interpretation to also apply to employees covered by title II of FMLA. The memorandum specifies how individuals may be determined to stand in loco parentis and that neither the law nor OPM regulations restrict the number of parents a child may have under FMLA.

Two commenters asked that OPM consider amending the definition of parent to extend eligibility to parents-in-law. The definition of parent in the regulations derives from the statutory definition at 5 U.S.C. 6381(3). Inclusion of parents-in-law would require a statutory change; therefore, it is outside the scope of these regulations.

Three commenters noted that the phrase “in a same-sex or common law marriage” used in the definition of *spouse* could be interpreted as excluding same-sex common law marriages. We do not see the need to deviate from DOL’s definition on this point. The definition uses the term “common law marriage” without exclusion; therefore, it applies to all common law marriages, including same-sex common law marriages. Additionally, OPM’s October 21, 2013, memorandum (cited above in the Background section) makes clear that same-sex spouses in common law marriages are included in the definition of *spouse*.

One commenter said the Federal Government should take legislative action to meet the needs of working families excluded by FMLA because of the business-size threshold and employee tenure and hours-worked requirements. These exclusions do not apply to Federal employees covered by title II of FMLA and, regardless, legislation is outside the scope of the regulations. The same commenter expressed the need for paid family leave. FMLA does not authorize paid family leave; therefore, this comment is outside the scope of the regulations.

A Federal agency suggested adding “at the time of the marriage ceremony” in four places within the definition of *spouse* to make clear that, for purposes of the FMLA entitlement, the marriage need only have been valid in a State at the point in time that the ceremony took place. We believe that the verb tense used in the definition provides the needed clarity on this point where applicable. Therefore, we are not adopting this suggestion.

We made a minor editorial change to the definition of *spouse* (changing “*was* valid” to “*is* valid” in subparagraph (2)) to conform to the definition used by DOL in its title I regulations. We also made a minor change to the wording of the definition of *parent* to ensure coverage not only of individuals who stood in loco parentis to an employee but also of individuals who still

stand in loco parentis to an employee. Because OPM received no comments requiring further changes to the definitions provided in the proposed rule, we are adopting the definitions as final.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

List of Subjects in 5 CFR Part 630

Government employees.

U.S. Office of Personnel Management.

Beth F. Cobert,
Acting Director.

Accordingly, OPM amends 5 CFR part 630 as follows:

PART 630 – ABSENCE AND LEAVE

1. The authority citation for part 630 continues to read as follows:

Authority: 5 U.S.C. 6311; § 630.205 also issued under Pub. L. 108-411, 118 Stat 2312; § 630.301 also issued under Pub. L. 103-356, 108 Stat. 3410 and Pub. L. 108-411, 118 Stat 2312; § 630.303 also issued under 5 U.S.C. 6133(a); §§ 630.306 and 630.308 also issued under 5 U.S.C. 6304(d)(3), Pub. L. 102-484, 106 Stat. 2722, and Pub. L. 103-337, 108 Stat. 2663;

subpart D also issued under Pub. L. 103-329, 108 Stat. 2423; § 630.501 and subpart F also issued under E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G also issued under 5 U.S.C. 6305; subpart H also issued under 5 U.S.C. 6326; subpart I also issued under 5 U.S.C. 6332, Pub. L. 100-566, 102 Stat. 2834, and Pub. L. 103-103, 107 Stat. 1022; subpart J also issued under 5 U.S.C. 6362, Pub. L. 100-566, and Pub. L. 103-103; subpart K also issued under Pub. L. 105-18, 111 Stat. 158; subpart L also issued under 5 U.S.C. 6387 and Pub. L. 103-3, 107 Stat. 23; and subpart M also issued under 5 U.S.C. 6391 and Pub. L. 102-25, 105 Stat. 92.

2. In § 630.1202, the definitions of *parent* and *spouse* are revised and the definition of *State* is added in alphabetical order to read as follows:

§ 630.1202 Definitions.

* * * * *

Parent means a biological, adoptive, step, or foster father or mother, or any individual who stands or stood in loco parentis to an employee meeting the definition of son or daughter below. This term does not include parents “in law.”

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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 where 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.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

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[FR Doc. 2016-08081 Filed: 4/7/2016 8:45 am; Publication Date: 4/8/2016]