



## *Windsor* in the Workplace: Examining an Employer’s Right to Demand More of Gay Employees Who Request FMLA Leave

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### I. THE PROBLEM *WINDSOR* CREATED

Imagine your spouse is seriously ill. If you want to take a leave of absence from work to care for your spouse pursuant to the Family and Medical Leave Act of 1993 (“FMLA”),<sup>1</sup> and your employer exercises its right to verify that you qualify for FMLA leave,<sup>2</sup> the proof you would need to provide depends on your sexual orientation. Unlike employees in opposite-sex marriages, employees in same-sex marriages are entitled to FMLA leave only if they currently reside in a state that recognizes their marriage. Herein, I examine this dichotomous requirement for gay employees from the perspective of management; conclude that the FMLA not only permits, but encourages, employers to demand more of gay employees; and resolve that the U.S. Department of Labor must amend the regulations implementing the FMLA to eliminate employers’

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1. 29 U.S.C. §§ 2601–2654 (2006 & Supp. V 2012).

2. 29 C.F.R. § 825.302(c) (2013) (“An employee has an obligation to respond to an employer’s questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.”); *id.* § 825.122(k) (an employer may request documentation to confirm a spousal relationship when an employee requests leave to care for a covered servicemember).

perverse incentive to hold employees to a different standard on account of who they love.

This dichotomy reared its head for the first time in the wake of *United States v. Windsor*.<sup>3</sup> In *Windsor*, Ms. Edith “Edie” Windsor and Ms. Thea Spyer legally wed in Canada and resided in New York.<sup>4</sup> New York recognized their marriage when Spyer died.<sup>5</sup> Yet, pursuant to Section 3 of the Defense of Marriage Act of 1996 (“DOMA”), the federal government did not recognize the couple’s marriage.<sup>6</sup> As a result, Windsor was required to pay estate taxes on her inheritance of Spyer’s estate.<sup>7</sup> These estate taxes would not have been levied against Windsor had Spyer been a man.<sup>8</sup> Windsor sued the United States, claiming Section 3 of DOMA was unconstitutional.<sup>9</sup> The U.S. Supreme Court agreed with her, holding that Section 3 of DOMA violated the Equal Protection component of the Fifth Amendment.<sup>10</sup>

Prior to *Windsor*, when the FMLA was subject to Section 3 of DOMA, the term “spouse” as used in the FMLA meant “a person of the opposite sex who is a husband or a wife.”<sup>11</sup> Accordingly, employees in legal, same-sex marriages could not take FMLA leave to care for their spouses. Post-*Windsor*, however, gay employees were—for the first time—entitled to FMLA leave to care for their spouses.<sup>12</sup> Yet, even after *Windsor*, gay employees still are not equal; an employer would need to ask for more documentation from an employee in a same-sex marriage than from an employee in an opposite-sex marriage to verify FMLA eligibility for leave involving the employee’s spouse. To understand why, I will briefly explain the contours of the FMLA.

Generally, under the FMLA, employees who meet certain requirements are entitled to twelve work weeks of leave in a twelve-month period under several circumstances, including when their *spouses* are suffering from a serious health condition or when a qualifying exigency arises in connection with their *spouses* being on or called to

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3. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

4. *Id.* at 2682.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Windsor*, 133 S. Ct. at 2682.

9. *Id.*

10. *Id.* at 2693.

11. 1 U.S.C. § 7 (2012), *declared unconstitutional by United States v. Windsor*, 133 S. Ct. 2675 (2013).

12. *Fact Sheet #28F: Qualifying Reasons for Leave Under the Family and Medical Leave Act*, U.S. DEPARTMENT LAB. (Aug. 2013), <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (“Spouse means 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 and same-sex marriage.”).

active duty in the Armed Forces.<sup>13</sup> Sans DOMA's definition of spouse, and pursuant to the regulations implementing the FMLA, an individual is an employee's "spouse" if that individual would be considered a spouse by the employee's current state of residence.<sup>14</sup>

As applied to an employee in a legal, same-sex marriage, this regulation treats that employee differently than an employee in a legal, opposite-sex marriage. For an employee in an opposite-sex marriage to prove that he or she qualifies for FMLA leave to care for a spouse, that employee must show: (1) that the employee's spouse is suffering from a serious health condition or a qualifying exigency related to a spouse being on or called to active duty in the Armed Forces; and (2) that the employee is legally married to the spouse. Yet, for an employee in a same-sex marriage to enjoy the same rights as an employee in an opposite-sex marriage, the employee in a same-sex marriage must show these same two preconditions, *as well as* a third precondition: (3) that the employee currently resides in a state that recognizes same-sex marriage. As a consequence, employers are concerned about violating certain state anti-discrimination laws simply by exercising their right under the FMLA to verify leave eligibility.

## II. THE PROBLEM IN ACTION

Proof of employees' current state of residency is not something all employers have on file. The address employers have on file for tax filing purposes may not be where the employee actually resides. Furthermore, the employee may have moved and failed to advise the employer. Whatever the situation may be, for an employee requesting FMLA leave to care for a same-sex spouse, employers would need to solicit documentation of the employee's current state of residency to guarantee that the employee is actually entitled to FMLA leave.

Herein lies the problem for employers in any of the states that prohibit employment discrimination on the basis of sexual orientation.<sup>15</sup> Employers are concerned about running afoul of such laws by requiring a gay employee prove more than a straight employee.<sup>16</sup> This concern may

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13. 29 U.S.C. § 2612(a)(1) (2006 & Supp. V 2012).

14. 29 C.F.R. § 825.122(b) (2013) ("Spouse means a husband or wife as defined or recognized under State law for purposes of marriage *in the State where the employee resides. . . .*" (emphasis added)).

15. For a list of states prohibiting employment discrimination on the basis of sexual orientation, see *Statewide Employment Laws and Policies*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/files/assets/resources/employment\\_laws\\_072013.pdf](http://www.hrc.org/files/assets/resources/employment_laws_072013.pdf) (last updated July 22, 2013).

16. An employer successfully may argue that the increased burden on the employee in a same-sex marriage is *de minimis*. However, since such a case has never been litigated, employers would need to live with the risk that such an argument would fail.

motivate employers to forego requiring a gay employee to prove that he or she currently resides in a state that recognizes same-sex marriage. Essentially, *Windsor* indirectly chilled employers' federal right to verify that employees requesting FMLA leave are entitled to it.

Yet, employers would be ill-advised to forego verification of FMLA leave eligibility. Employers do not want to be in the predicament of designating an employee's leave time as FMLA leave only to find out later that the designation was incorrect. Employers—even those acting in good faith—do not satisfy their obligations under the FMLA by mistakenly designating leave as FMLA leave. Such a mistake may enable employees to “double dip” with greater than twelve weeks of leave.

For example, assume an employee residing in Nevada requests leave to care for his seriously ill same-sex spouse. The employer requests only proof of marriage and proof of serious illness. The employee provides a valid California Marriage Certificate and sufficient proof of serious illness. The employer grants the employee leave and designates that leave as FMLA leave. Twelve weeks later, the employee moves from Nevada to California, returns to work, and requests an additional twelve weeks of leave. Because Nevada does not recognize same-sex marriage, the employee's same-sex spouse did not qualify as a “spouse” under the FMLA until the employee began residing in California. As such, the leave the employer mistakenly designated as FMLA leave was, in fact, non-FMLA leave. The employee legally is entitled to the additional twelve weeks of leave (i.e., “double dipping”) because only now is he eligible for FMLA leave. The employer cannot legally deny an employee FMLA leave in this situation.

Employers rightly are fearful of employees who are cunning enough to game the system or lucky enough to benefit from this loophole. Accordingly, employers would do well to verify that an employee requesting FMLA leave is actually eligible for it so the employer is not faced with the possibility of having to grant that employee more than the twelve weeks of leave. Consequently, employers should verify that an employee in a same-sex marriage who requests FMLA leave to care for a spouse currently resides in a state that recognizes same-sex marriage. However, employers may fear that doing so would violate state laws prohibiting employment discrimination on the basis of sexual orientation.

### III. ADMINISTRATIVE ACTION IS NEEDED TO ELIMINATE THE PROBLEM

Employers are caught between a rock and a hard place. By verifying FMLA eligibility, they ostensibly violate state employment discrimination laws prohibiting sexual orientation discrimination; by

foregoing verification, they run the risk of employees “double dipping.” Yet, upon examination, this dilemma turns out to be based on the faulty assumption that an employer violates state law by exercising its rights under the FMLA.

Any state law that “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” is preempted by federal law<sup>17</sup> by virtue of the Supremacy Clause.<sup>18</sup> Applying that maxim here, an employer likely does not violate a state employment discrimination law by verifying the residency of an employee in a same-sex marriage who requests post-*Windsor* FMLA leave because such a state law impedes the purposes and objectives of the FMLA regulations. Essentially, the state law restricts the exercise of a federal right. True: there has never been a case confirming this proposition; the issue is unique to the post-*Windsor* world. Yet preemption doctrine is clear in this context, and one could hardly argue that a state law depriving an employer of a federal right would not be preempted.

So—in theory—employers have nothing to worry about. But—in practice—what employer wants to spend thousands upon thousands of dollars in attorney’s fees when the worst-case scenario (i.e., the employer doesn’t verify FMLA eligibility and the employee “double-dips” with leave time) is an easier pill to swallow than the litigation invoice? When faced with this catch-22, I believe most employers will make the business decision *not* to verify the state of residence for gay employees who request FMLA leave to care for their spouses so as to avoid potential litigation.

To rectify this dilemma, either the U.S. Department of Labor or state legislatures must act. Option A: the Department of Labor could amend the regulations implementing the FMLA to change the definition of “spouse” to mean a husband or wife as defined or recognized under the law of the place where the marriage was celebrated. This way, an employee in a same-sex marriage could prove FMLA eligibility in the same manner as an employee in an opposite-sex marriage: by providing the employer with a marriage license, which contains proof that the employee is legally married and proof of where that marriage was celebrated.<sup>19</sup>

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17. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

18. U.S. CONST. art. VI, cl. 2.

19. While an employee who was once legally married, but is no longer legally married, could present a once-valid marriage license so as to falsely claim entitlement to FMLA leave, such a possibility would exist equally for employees in same-sex marriages as it would for employees in opposite-sex marriages. As such, Option A would resolve the problem of employers placing greater burdens on employees in same-sex marriages, while leaving unresolved the issue of fraudulent claims to FMLA leave.

Option B: state legislatures in states that prohibit employment discrimination on the basis of sexual orientation could clarify that employers seeking to determine whether an employee in a same-sex marriage qualifies for FMLA leave do not violate state law by requesting that the employee provide proof of current residency in a state that recognizes same-sex marriage.

While both options would achieve the same laudable end, only Option A is practical. The idea that dozens of state legislatures—many of which are some of the most progressive legislatures in the country—would exempt employers from liability for burdening gay employees more than straight employees is highly unlikely. Thus, the Department of Labor should solve this problem by amending the regulations implementing the FMLA to focus on the place of celebration of employees' marriages in determining the definition of "spouse."

Burdening an employee in a same-sex marriage more than an employee in an opposite-sex marriage is wrong. Yet, at present, the best practice for employers is to do just that. Employers should verify that an employee in a same-sex marriage who requests FMLA leave to care for his or her spouse resides in a state that recognizes same-sex marriage. Regardless of how slight this additional burden may seem, equality in the workplace of the twenty-first century means *completely* equal treatment of employees regardless of their sexual orientation. The Department of Labor should incentivize employers to reach this goal by amending the regulations implementing the FMLA to change the definition of "spouse" to mean a spouse as recognized by the laws of the place where the marriage was celebrated.