



Larry Martinez / Photo by Bob Giglione

DOL expands definition of ‘spouse’ for FMLA benefits

By: [Kristen D’Andrea](#) March 18, 2015 Comments Off on DOL expands definition of ‘spouse’ for FMLA benefits

Living in New York City in 2008, attorney Larry Martinez wanted his long-term partner to receive his health insurance benefits. At the time, before same-sex marriage was legalized in New York, the only option available to the couple was to enter into a domestic partnership and enjoy rights provided by the county in which they resided. There was no security or protection of those rights, however.

“If we moved somewhere else, we could lose those benefits,” Martinez said.

Fast-forward seven years and a lot has changed.

Same-sex marriage was legalized in New York in June 2011. Two years later, the U.S. Supreme Court issued an important decision in *United States v. Windsor*, ruling that that the federal government cannot discriminate against married lesbian and gay couples for the purposes of determining federal benefits and protections, such as the Family and Medical Leave Act of 1993, which entitles eligible employees of covered employers to take unpaid, job-protected leave for various family and medical reasons, including caring for a spouse. Prior to the Windsor decision and revisions to the definitions of “marriage” and “spouse,” FMLA leave for a spouse could only be taken to care for a spouse of the opposite sex.

While the Windsor verdict continued the trend toward courts granting more protections and benefits to people who were previously excluded based on sexual orientation, the definition of spouse was still limited to covering same-sex spouses residing in states that recognize such marriages. An employee living in a state that did not currently recognize same-sex marriage would not be protected, Martinez said.

Last month, however, the [U.S. Department of Labor](#) issued new regulations closing the last loophole for states that do not allow or recognize same-sex marriages. The DOL's Final Rule, which will be effective March 27, revises the regulatory definition of "spouse" under the FMLA so that eligible employees in legal same-sex marriages will be able to take FMLA leave to care for their spouse or family member, regardless of where they live.

"It's a significant shift because it creates mobility of the labor force and portability of federal family leave rights that might not have otherwise been available to employees," said Martinez, who married his partner in 2011 and is currently of counsel at [Meltzer, Lippe, Goldstein & Breitstone](#) in Mineola. Hypothetically, he said, now, "I could move to Texas (a state where same-sex marriage is not recognized) and, potentially, have the same leave rights I had in New York."

The regulation change will likely be more significant and impactful outside of New York, in states where same-sex marriage is not recognized, according to Jessica Moller, an associate in [Bond, Schoeneck & King's](#) Garden City office.

"There are some employers who will definitely already be in compliance," she said, noting many of her clients' policies already defined a group of family members to include domestic partners, regardless of their gender. "But, I have also seen plenty of policies that don't specifically include same-sex partners."

Martinez recommends all employers – especially those with offices in states where same-sex marriage is not recognized – review their company policies pertaining to the FMLA and become aware of the developments in the dialogue on same-sex marriage on a state-by-state basis.

Even if companies are not required to provide FMLA – such as those employing less than 50 individuals – internal leave policies should be established, as well, said Megan Moran, human resources specialist at Insperity in Melville. Employers should ensure they "are being fair and consistent and set policies that are free of discrimination or harassment, that speak to all of their employees," Moran said. Employees who recognize their employers are open to diversity are happy, more productive and have a sense of pride for the company they work for, she said.

Martinez said he sees a definite trend toward increasing protections in the workplace and the benefits offered. While this dialogue has been ongoing for some time at the state level, Title VII, the primary federal anti-discrimination statute that prohibits, among other things, gender discrimination, is silent on the issue of sexual orientation discrimination, he said.

"The feds will have to get involved and get active in this dialogue and encourage the trend on providing broader benefits and protections to a broader group of people," Martinez said.

Even though Title VII does not prohibit discrimination based on sexual orientation, the Equal Employment Opportunity Commission has recently taken the position that sexual orientation is a form of gender-based discrimination and, therefore, prohibited by Title VII. In fact, the EEOC has said coverage of lesbian, gay, bisexual and transgender individuals is one of its six enforcement priorities in its 2013-2016 strategic plan, Moller said.

Last year, the EEOC filed two test cases on sex discrimination on behalf of transgender employees. EEOC v. RG and GR Harris Funeral Homes Inc., filed in the Eastern District of Michigan, and EEOC v. Lakeland Eye Clinic PA, filed in the Middle District of Florida,

are both still pending. Since both lawsuits were filed in different states and circuits within the federal court system, they could potentially cause a split in the circuits, bringing the issue to the U.S. Supreme Court, Moller said.

While it will likely take several years for the courts to offer any clear guidance on this issue, the new regulation “is catching the federal government up to what we, in New York, already recognize,” she said.

Meanwhile, later this month, the DOL’s change to the definition of spouse under the FMLA will offer more protection to those previously excluded.

“This amendment is about eliminating burdens and obstacles,” Martinez said. “It’s an exciting change.”