



August 11, 2014

The Honorable David Weil, Administrator  
Wage and Hour Division  
U.S. Department of Labor, Room  
200 Constitution Avenue, NW  
Washington, DC 20210

By electronic submission: <http://www.regulations.gov>

**Re: RIN 1235-AA09: Comments in Response to the Department of Labor's  
Notice of Proposed Rulemaking, 79 Fed. Reg. 36445 (June 27, 2014)**

Dear Administrator Weil:

The Society for Human Resource Management (the "Society" or "SHRM"), the U.S. Chamber of Commerce ("Chamber"), and the College and University Professional Association for Human Resources (CUPA- HR) submit these comments to the U.S. Department of Labor ("the Department" or "DOL") in response to the Notice of Proposed Rulemaking defining "spouse" for purposes of the Family and Medical Leave Act (FMLA) published in the *Federal Register* on June 27, 2014. See 79 Fed. Reg. 124 (June, 27, 2014).

SHRM is the world's largest professional association devoted to human resource management. Founded in 1948, the Society represents more than 275,000 members in over 160 countries, the Society is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates. Visit SHRM at [www.shrm.org](http://www.shrm.org).

The Chamber is the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector, and region.

CUPA-HR serves as the voice of human resources in higher education, representing more than 17,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions, and 600 two-year and specialized institutions. Higher education employs over 3.8 million workers nationwide, with colleges and universities in all 50 States.

SHRM, the Chamber, and CUPA-HR support the goals of the FMLA to provide leave and job security to employees facing the need to be absent for family, medical or military-related reasons. Our members well understand the challenges employees face in balancing work and family demands and their desire to feel secure in their jobs. This means that on a daily basis, employers must determine whether or not an employee is entitled to protected leave pursuant to the FMLA and its implementing regulations. Employers must also track an employee's FMLA leave and determine how to maintain a satisfied and productive workforce during the employees' FMLA leave-related absences. Although employers have significant experience with the FMLA, applying it to various workplace situations often raises questions about its proper implementation. According to SHRM's Knowledge Center, a resource for member questions about federal and state employment laws and HR policies and practices, more SHRM members contact them with questions about the FMLA than any other federal statute. In fact, as of the date of this comment letter, SHRM's Knowledge Center has received more than 13,400 calls about the FMLA since January 1, 2014.

Given employer interest in the FMLA, we commend the Department for issuing regulations to revise the definition of spouse for FMLA purposes in light of the Supreme Court's decision in *United States v. Windsor*. To help ensure the successful and uniform interpretation, however, we request that DOL provide additional clarification about acceptable proof of valid marriage and examples of its application to various scenarios.

### **Consistent definitions**

In the proposed rule, the Department seeks to define "spouse" under the FMLA in light of the Supreme Court's decision in *United States v. Windsor*, which found section 3 of the Defense of Marriage Act (DOMA) unconstitutional. In defining "spouse," the proposed rule looks to the "State law for purposes of marriage in the State in which the marriage was entered into..." proposed Sec. 825.102, 79 Fed. Reg. 36454, in other words, the state of celebration, rather than the state of the employee's residency.

As the Department notes, using the "place of celebration" rule is consistent with the Department of Defense's policy regarding valid marriage for purposes of leave and benefits.<sup>1</sup> Similarly, the Internal Revenue Service used the place of celebration in its rules defining "spouse" and "marriage" for purposes of employee benefit plans<sup>2</sup> as did the Department of Homeland Security Citizenship and Immigration Services for purposes of immigration visa petitions for same-sex spouses.<sup>3</sup>

We appreciate the agencies' efforts to adopt consistent rules in this area. As employers implement benefit plans and coverage requirements for their employees, consistent definitions are of tremendous importance and value for those seeking to comply with the FMLA. We urge the Wage

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<sup>1</sup> Memorandum for Secretaries of the Military Departments. (August 13, 2013). Retrieved from <http://www.defense.gov/home/features/2013/docs/Further-Guidance-on-Extending-Benefits-to-Same-Sex-Spouses-of-Military-M.pdf>

<sup>2</sup> Technical Release No. 2013-04. Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in *United States v. Windsor*. (September 18, 2013). Retrieved from <http://www.dol.gov/ebsa/newsroom/tr13-04.html>

<sup>3</sup> Statement from Secretary of Homeland Security Janet Napolitano. (July 1, 2013). Retrieved from <http://1.usa.gov/13acoQT>

and Hour Division to continue to pursue consistent definitions and other consistencies across agencies and across implementing regulations in order to ease employer compliance.

### **Proof of marriage in order to determine eligibility**

In complying with the FMLA, employers must determine an employee's eligibility for the protected leave. This entails a review, not only of whether the employee meets specific baseline criteria such as hours of service and length of employment, but also of whether they are eligible for the specific type of leave they seek—serious health condition or, if the request is to care for another individual, the relationship of that individual to the employee. In this proposal, the Department requires employers to determine eligibility for certain spousal and family-related leaves by shifting from an analysis of State law in which the employee resides to an analysis of State law in which the marriage was entered into.

While some employers have already addressed situations in which an employee resides in one state but works in another or have multi-state operations, the majority of employers employ individuals who live and work in one state. For this reason, many employers will, for the first time under this rule, be looking to the laws of different states and jurisdictions other than in which they operate in order to determine eligibility for certain types of FMLA leave. In addition, the proposed regulation, for the first time, includes recognition of marriages entered into abroad. Now, rather than just understanding the marriage laws of their own state of business and possibly that of neighboring states, the proposed rule requires employers to understand the marriage laws of all 50 states and the District of Columbia as well as the laws of foreign countries with regard to all marriages, including same-sex and common-law. Recognition of common law marriages could prove particularly challenging given the absence of any official indicia and the greater variations between states.

Current regulations implementing the FMLA do not address what type of documentation is appropriate for proving eligibility for certain types of FMLA leave that are based on valid marriage. As the proposed regulation notes, changing the definition of spouse would have impact beyond spousal leave. Specifically, changing the definition of spouse yields changes to leave to care for a child, allowing an employee in a valid same-sex marriage to take leave to care for a stepchild even if the employee does not stand in loco parentis. Similarly, the employee could take FMLA leave to care for the employee's parent's same-sex spouse regardless of whether that person stood in loco parentis to the employee.

SHRM, the Chamber, and CUPA-HR appreciate the Department's efforts to ensure consistent federal family leave rights for all legally married couples regardless of their State of residence. Some employers may have policies in place that provide leave benefits to employees irrespective of marital status and many employers may not seek proof of valid marriage before approving leave. However, there may be circumstances in which an employee's eligibility for FMLA benefits is not clear and the employer may see a need to confirm the marital status. Furthermore, the increasing number of employees eligible for FMLA benefits under the proposed rule combined with the need for employers to understand marriage laws of all states and foreign countries amplifies the need for clarification. We suggest that the Department provide guidance on the following issues:

1. How an employer can efficiently determine if same sex marriage is recognized by a state or foreign country. A website that the DOL updates regularly would be very helpful. This could be developed in a similar way to the webpage currently available that displays the various minimum wage levels in the different states.

2. Clarification of type of proof an employer may request to confirm that the employee has a valid marriage.

3. Clarification that an employer may ask for documentation of proof of marriage on a case-by-case basis.

We also believe that a series of FAQs and specific examples in the final rule would be helpful in illustrating appropriate interpretations of the FMLA rules in light of the changed definition of spouse. We would be pleased to work with the Department in developing these examples.

The need for clear understanding of the new definition of spouse and its implications is heightened in the context of the recently issued Executive Order 13673, Fair Pay and Safe Workplaces. Under Executive Order 13673, federal contractors are at risk of losing the opportunity to do business with the federal government if they interpret the FMLA incorrectly and are found to have violated it.

Our members constantly strive to make sure they are in compliance with the FMLA. The new definition of spouse, while necessary and defensible, will nonetheless create some questions and uncertainty. For these reasons, we encourage the Department to develop a mechanism to provide guidance on where same sex marriage is recognized, to clarify what documents constitute proof of marriage, when those documents may be requested, and to also provide examples illustrating appropriate application of the rules.

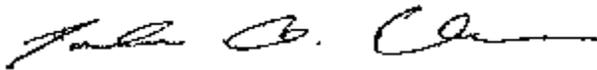
Sincerely,



Michael P. Aitken  
Vice President of Government Affairs  
Society for Human Resource Management  
1800 Duke Street  
Alexandria, VA 22314



Randel K. Johnson  
Senior Vice President  
U.S. Chamber of Commerce  
1615 H St. N.W.  
Washington, DC 20062



Joshua A. Ulman  
Chief Government Relations Officer  
The College and University Professional  
Association for Human Resources  
1811 Common Points Drive  
Knoxville, TN 37932