August 8, 2014

VIA* electronic submission to *http://www.regulations.gov

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

Re: Response To Notice Of Proposed Ruling, Definition Of Spouse Under the FMLA 79 Fed.Reg. 36,445; RIN 1235-AA09

Dear Ms. Ziegler:

The National Employment Lawyers Association (NELA) respectfully submits the following comments strongly supporting the Department of Labor's (DOL) proposed change to the definition of "spouse" in the Family and Medical Leave Act (FMLA) to refer to all legally married individuals, including same-sex spouses who live in a state that does not recognize same-sex marriage.

NELA is the country's largest professional organization that is comprised exclusively of lawyers who represent employees in employment discrimination and other employment-related matters. Along with our 69 circuit, state, and local affiliates, we have more than 4,000 members around the country. Our mission is to advance employee rights and serve lawyers who advocate for equality and justice in the American workplace. NELA and its members have played a significant role in legislative, regulatory, and legal advocacy to establish, protect, and expand FMLA rights. Today, NELA joins with other organizations that advocate for employees and their families in submitting these comments.

The rights established by the FMLA are critically important to employees balancing work and caregiving responsibilities. Congress passed the FMLA in 1993 to provide job-protected leave to workers who need to take time off to care for a new child, for their own serious health condition, or to care for a family member—including a spouse—with a serious health condition. The law has since been amended to provide workers with leave to address certain qualifying exigencies arising from having a family member who is a member of the military. The FMLA is the first and only national law designed to help America's employees meet the dual demands of work and family. Workers have taken job-protected leave under the FMLA more than 100 million times since the law's enactment.[1] Nearly one in five FMLA users takes leave to care for a family member's serious health condition.[2] Without the FMLA's

[1] Klerman, J., Daley, K., & Pozniak, A. (2012, September 7). Family and Medical Leave in 2012: Technical Report. Abt Associates Publication. Retrieved 14 July 2014, from http://www.dol.gov/asp/evaluation/fmla/FMLA-2012-Technical-Report.pdf.

[2] See note 1, p. 70.

protections, millions of America's workers would be at risk of losing their jobs and/or health insurance to attend to family or medical needs.

Although the FMLA allows eligible workers to take job-protected leave to care for a seriously ill spouse and to address qualifying exigencies when a spouse is called to active military duty, the FMLA's regulatory definition of "spouse" excludes many lawfully married, same-sex spouses. Currently, the FMLA's definition of "spouse" only applies to same-sex spouses who reside in a state that recognizes their marriage. As a result, LGBT workers who live in a state without marriage equality are often forced to risk their jobs and financial well-being when they need time off to care for a seriously ill spouse or address certain needs relating to a spouse's military service.

The proposed rule would fix this problem by adopting a "place of celebration" rule, where same-sex spouses are recognized if they were lawfully married in any state. This approach will create greater certainty for LGBT workers whose eligibility for the FMLA will not change if they move to a state that does not recognize their marriage. The proposed rule will also simplify FMLA coverage for employers who will no longer have to track a worker's state of residence when determining FMLA eligibility.

Numerous federal departments and agencies, including the Department of Defense and the Internal Revenue Service, have already adopted a "place of celebration" rule. In addition, DOL now uses this approach when defining spouses under the Employee Retirement Income Security Act. The proposed rule will improve consistency across federal departments and laws, and create greater uniformity for both workers and employers.

NELA also supports the Department's explicit inclusion of the children of same-sex spouses as stepchildren for purposes of leave eligibility under the FMLA based on the proposed "place of celebration" rule, rather than the laws of the state of residence to determine eligibility. We commend the Department for taking these steps to ensure that all same-sex stepparents will be treated the same way as any opposite-sex stepparents would be. In light of these proposed changes, however, we wish to underscore the importance of the continued inclusion and usage of the *in loco parentis* standard for determining eligibility of a child and an adult to take leave to care for one another. Under the existing FMLA regulations, *in loco parentis* has been applied broadly, including both adults currently providing care for a child as well as those persons who cared for a child when the child was below the age of eighteen. Given the patchwork nature of today's marriage and parental recognition laws, this language helps ensure that families of all kinds have access to leave under FMLA to care for one another.

Again, NELA appreciates the opportunity to submit comments in support of this proposed rule that will remove barriers to FMLA coverage for many same-sex spouses, their children, and their parents. We thank the Department for its consideration and attention to this important matter.

Respectfully submitted,

Terisa E. Chaw
Executive Director