



This document is scheduled to be published in the Federal Register on 06/23/2014 and available online at <http://federalregister.gov/a/2014-14514>, and on [FDsys.gov](http://FDsys.gov)

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:** Proposed rule.

**SUMMARY:** The U.S. Office of Personnel Management (OPM) is proposing to revise 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 will replace 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:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by RIN number “3206–AM90,” using either of the following methods:

*Federal eRulemaking Portal:* [www.regulations.gov](http://www.regulations.gov). Follow the instructions for submitting comments.

*E-mail:* [pay-leave-policy@opm.gov](mailto:pay-leave-policy@opm.gov).

Mail: Brenda Roberts, Acting Deputy Associate Director, Pay and Leave, Employee Services, U.S. Office of Personnel Management, Room 7H31, 1900 E Street, NW, Washington, DC 20415-8200.

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

**SUPPLEMENTARY INFORMATION:** The U.S. Office of Personnel Management (OPM) is issuing a proposed regulation to revise the definition of *spouse* for purposes of the Family and Medical Leave Act (FMLA) under 5 CFR 630.1202 based on the June 26, 2013, decision of the United States Supreme Court, 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)). This change will permit Federal employees who are in legal marriages with same-sex spouses to use their leave entitlement under the 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 the FMLA, which covers non-Federal employees and certain Federal employees not covered by title II. OPM issues regulations for title II of the FMLA, which covers most Federal employees. Title II of the 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 the FMLA. (See 5 U.S.C. 6387.)

On July 23, 1993, OPM issued interim regulations (58 FR 39596) to implement title II of FMLA. The interim regulations adopted the definition of *spouse* used by DOL in its regulations implementing title I of FMLA. Under the interim regulations, OPM defined *spouse* as “a

husband or wife, as defined or recognized under State law for purposes of marriage, including common law marriage in States where it is recognized.”

On September 21, 1996, the Defense of Marriage Act (DOMA) was enacted. Section 3 of DOMA defined the terms marriage and spouse for purposes of Federal law as follows: “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.” In final regulations implementing title II of the FMLA, published on December 5, 1996 (61 FR 64441), OPM revised the definition of spouse in accordance with DOMA. The current definition reads as follows: “Spouse means an individual who is a husband or wife pursuant to a marriage that is a legal union between one man and one woman, including common law marriage between one man and one woman in States where it is recognized.”

On June 26, 2013, the United States Supreme Court ruled in United States v. Windsor that Section 3 of DOMA is unconstitutional. In response to this ruling, OPM issued a memorandum on October 21, 2013, at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=5834> informing Federal agencies that the definition of spouse used in OPM’s FMLA regulations was no longer valid. The memorandum made clear that, effective June 26, 2013, an employee with a same-sex spouse could use his or her FMLA leave entitlement in the same manner as an employee with an opposite-sex spouse: to care for a same-sex spouse with a serious health condition (including care for a same-sex spouse who gives birth to a child), to care for a same-sex spouse who is a covered servicemember with an injury or illness incurred or aggravated in the line of duty on active duty, or for qualifying exigencies

while a same-sex spouse is on covered active duty or has been notified of an impending call or order to covered active duty status in accordance with the statute at 5 U.S.C. chapter 63, subchapter V, and the regulations at 5 CFR part 630, subpart L.

### **Definition of Spouse**

In this regulation, OPM proposes to change the definition of spouse to remove the DOMA language and to clarify that “spouse” means a husband or wife 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 a husband or wife in a same-sex or common law marriage entered into in a State that recognizes such marriages or, if entered into outside of any State, was valid in the place where entered into and could have been entered into in at least one State.

Under this definition, an employee who is legally married to a same-sex spouse in one State and who resides or works in a State where the marriage is not legally recognized may use FMLA leave for his or her spouse. This proposed regulation deviates from DOL’s current regulatory definition of spouse as “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 in States where it is recognized.” (See 29 CFR 825.102 (emphasis added).) However, DOL is concurrently issuing a Notice of Proposed Rulemaking that will propose to change the definition of spouse. OPM’s proposed definition in this NPRM is the same as DOL’s proposed definition.

OPM believes that this definition of spouse is appropriate for the Federal workforce and that Federal employees would benefit from this broader definition. To support an agency’s

mission, employees may be stationed in a State other than the State of their marriage, and, at times, relocated throughout the United States and abroad. Accordingly, consistent with DOL's Notice of Proposed Rulemaking, OPM believes that using this definition of spouse will enable the Federal Government to consider the needs of a diverse workforce and provide consistent application of policy across the Federal Government. Uniform treatment of all Federal employees will make it more likely that employees will accept voluntary details and transfers to States where a same-sex marriage is not recognized.

### **Children of Same-Sex Couples**

By clarifying that a same-sex spouse qualifies as a spouse for purposes of the FMLA, children of an employee's same-sex spouse now qualify as stepchildren because their parents are in a legal same-sex marriage. Same-sex spouses who stand in loco parentis to the spouse's child are already entitled to take FMLA leave to care for the child. Additionally, the proposed rule clarifies that same-sex spouses are able to take leave to care for their spouse's child by virtue of being the child's stepparent regardless of whether they stand in loco parentis. For information about the ability of employees to take FMLA leave for the children of their domestic partners, employees should review the OPM memorandum CPM 2010-15, sent to agencies on August 31, 2010, titled "Interpretation of 'Son or Daughter' Under the Family and Medical Leave Act," available at [www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3122](http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3122).

### **Conforming Amendments**

We are also proposing conforming amendments to revise the definition of *parent* and add a definition for *State* to align with DOL's definitions of these terms. DOL revised its definition of *parent* on November 17, 2008, at 73 FR 67934, to include adoptive, step, or foster parents. This change will permit an employee to use FMLA leave to care for a stepparent who did not

stand in loco parentis to the employee when the employee was a child. The definition of *State* clarifies that the term, as used in the definition of *spouse*, includes the District of Columbia and any Territory or possession of the United States.

### **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.

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Katherine Archuleta,  
Director.

Accordingly, OPM proposes to amend 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 stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents "in law."

\* \* \* \* \*

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, was 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. 2014-14514 Filed 06/20/2014 at 8:45 am; Publication Date: 06/23/2014]