



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

OCT 21 2013

The Director

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: ELAINE KAPLAN
ACTING DIRECTOR

A handwritten signature in blue ink, appearing to read "Elaine Kaplan".

Subject: Family and Medical Leave Act (FMLA) Coverage of Same-Sex Spouses

On June 26, 2013, the Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) is unconstitutional. This ruling impacts the definition of *spouse* found in the U.S. Office of Personnel Management's (OPM) Family and Medical Leave Act (FMLA) regulations. As a result of the Supreme Court's decision, Federal employees with same-sex spouses are now provided the same FMLA entitlements as those with opposite-sex spouses.

Definition of *Spouse*

Section 3 of DOMA provided that, when used in a Federal law, the term *marriage* meant only a legal union between one man and one woman as husband and wife, and that the term *spouse* referred only to a person of the opposite sex who is a husband or a wife. After enactment of DOMA, OPM changed the definition of *spouse* in the FMLA regulations (61 FR 64441, Dec. 5, 1996) to incorporate the "one man and one woman" language prescribed by DOMA. Because the Supreme Court invalidated Section 3, that language in the definition is no longer valid.

OPM is in the process of amending its FMLA regulations in response to this Supreme Court decision. In the interim, this memorandum directs departments and agencies to discontinue use of the definition of *spouse* found in OPM's current FMLA regulation at 5 CFR 630.1202 and, instead, define *spouse* as a partner in any legally recognized marriage, regardless of the employee's state of residency. The term "spouse" does not include unmarried domestic partners, unless they meet the requirements of being spouses in a common-law marriage in States where such marriages are recognized.

Employee FMLA Leave Entitlement

As a result of the Supreme Court decision, Federal employees are now entitled to use FMLA leave 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. Before the invalidation of Section 3 of DOMA, this coverage was available only to opposite-sex spouses.

The Supreme Court decision did not affect an employee's current FMLA entitlement to care for a child of a same-sex spouse or domestic partner. A child of a same-sex spouse continues

to be eligible for care under the FMLA and should be treated the same as a child of an opposite-sex spouse. An employee may take FMLA leave to care for any child to whom he or she stands *in loco parentis*. See [CPM 2010-15](#), Interpretation of “Son or Daughter” Under the Family and Medical Leave Act, August 31, 2010.

Effective Date

The effective date of this directive is June 26, 2013. Agencies should promptly notify employees of this memorandum. Typically, an employee may not retroactively invoke his or her entitlement to FMLA leave. However, employees who took otherwise-qualifying leave for a same-sex spouse between June 26, 2013, and the date of this memorandum will be permitted to re-designate such time off as FMLA leave. Any re-designation of the above-referenced leave should be made by the end of the second pay period following the date that the Agency has notified employees of this memorandum.

Other Leave Benefits

The Supreme Court decision does not affect an employee's entitlement to use other leave benefits to care for a same-sex domestic partner. On June 14, 2010, OPM amended the regulations concerning the definitions related to *family member* and *immediate relative* to cover same-sex and opposite-sex domestic partners when using sick leave, funeral leave, voluntary leave transfer, voluntary leave bank, and emergency leave transfer under 5 CFR part 630, subparts B, H, I, J, and K. See [CPM 2010-11](#), June 14, 2010. Under these regulations, the definition of a *family member* is broad and includes both same-sex and opposite-sex domestic partners.

Links to fact sheets on these other leave benefits are as follows:

- [Sick Leave for Family Care or Bereavement Purposes](#)
- [Sick Leave to Care for a Family Member with a Serious Health Condition](#)
- [Leave for Funerals and Bereavement](#)
- [Voluntary Leave Bank Program](#)
- [Voluntary Leave Transfer Program](#)
- [Emergency Leave Transfer Program](#)

Also, agencies are reminded that they should continue to allow the use of up to 24 hours of leave without pay each leave year for (i) school and early childhood educational activities, (ii) routine family medical purposes, and (iii) elderly relatives' health or care needs to meet the needs of an employee's same-sex domestic partner or the partner's children. This policy is explained further in [CPM 2010-16](#), September 10, 2010.

Additional Information

Agency headquarters-level human resources offices may contact OPM at pay-leave-policy@opm.gov. Employees should contact their agency human resources office for further information on this memo.

cc: Chief Human Capital Officers
Human Resources Directors