The changing employment law landscape: Sexual orientation and gender identity

By James H. Kizziar Jr. and Amber K. Dodds

On June 26, 2013, the United States Supreme Court decided *U.S. v. Windsor*, which declared a portion of the Defense of Marriage Act (commonly referred to as DOMA) unconstitutional. To comply with that ruling, several federal agencies began revising their regulations to treat married same-sex couples in the same manner as married heterosexual couples.

Before the DOMA decision, the federal Family and Medical Leave Act (FMLA) allowed job-protected leave for employees to care for their spouse with a serious health condition. "Spouse," as defined by the FMLA, was "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides."[1]

Changed definition of "spouse" proposed under FMLA

Exactly one year and one day—June 27, 2014—after the court ruling in *Windsor*, the U.S. Department of Labor (DOL), which enforces the FMLA, proposed a new rule to change the definition of "spouse" under the FMLA.[2] Under the new rule, "spouse" would be defined by the state law where the parties entered into marriage (the "place of celebration") rather than where the employee lives (the "place of residence").

The proposed rule specifically references the inclusion of partners in same-sex marriages and common-law marriages as "spouses" for FMLA-leave purposes. Additionally, partners in same-sex marriages entered into abroad will also be considered "spouses" for FMLA-leave purposes because the marriage "is valid where entered into and could have been entered into in at least one state."[3]

The proposed rule is not yet final. Interested parties may submit comments to the DOL regarding the rule until August 11, 2014. Following the comment period, the DOL will finalize the rule and publish it as a federal regulation. The rule may be finalized in its current form or it may be modified based on public comments.

Impact of proposed changes to FMLA

If the rule is finalized as proposed, employers will be required to provide job-protected leave for up to 12 weeks to care for a spouse with a serious health condition and up to 26 weeks to be a military caregiver (as required by the final rule).[4] As with all FMLA leaves, the leave time need not be paid, but employers may choose to pay employees while on FMLA leave.

This proposed change in FMLA regulations is a good reminder to employers to reevaluate their leave and other employment policies. Issues such as the need for leave may bring an employee's sexual orientation into the workplace when it previously was unknown or undiscussed. Employers must know their obligations to prevent employment discrimination based on sexual orientation and gender identity/expression.

Currently, neither federal nor Texas employment discrimination law prohibits discrimination based on sexual orientation or gender identity/expression. However, both prohibit discrimination based on sex, which has been

interpreted to cover situations that may implicate sexual orientation or gender identity/expression, such as gender stereotyping.[5]

Local anti-discrimination ordinances

Several major cities in Texas have approved local ordinances prohibiting employment discrimination based on sexual orientation and gender identity/expression that affect private employers. In 2000 the City of Fort Worth enacted an ordinance prohibiting discrimination based on sexual orientation. The ordinance was amended in 2009 to also prohibit discrimination based on gender identity, gender expression and transgender.

In 2002, the City of Dallas enacted an ordinance that prohibits employment discrimination based on sexual orientation, which is defined to include real or perceived gender identity. In 2004 the City of Austin enacted an ordinance prohibiting discrimination based on sexual orientation and gender identity.

Most recently, the City of Houston joined the group of cities with ordinances that prohibit employment discrimination based on sexual orientation and gender identity. The Houston ordinance was signed on May 28, 2014, and took effect on June 27, 2014. Accordingly, Fort Worth, Dallas, Austin and Houston all have ordinances that expressly apply to private employers. In September 2013, the City of San Antonio adopted a similar ordinance (prohibiting employment discrimination based on sexual orientation or gender identity/expression) that applies to City employees and private employers with City contracts.

Employers should reevaluate policies and procedures to ensure that they are not unintentionally discriminating against employees based on sexual orientation or gender identity/expression. Does the language of policies assume or require that married employee benefits are available only to heterosexual couples? Are dress and grooming policies based on legitimate business reasons rather than gender stereotypes?[6]

Employers can prevent difficult situations and employee relationship problems by updating policies that unintentionally discriminate and, when justified by legitimate business reasons, being able to clearly articulate why policies apply in the way that they do.

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[1] 29 C.F.R. § 825.122(b).

[2] http://www.dol.gov/whd/fmla/nprm-spouse/

[3] *Id.*

[4] Employers may provide leave to employees to care for their same-sex spouse or partner and many employers do. However, for employees who live in states that do not currently recognize same-sex marriages, this is not FMLA leave.

[5] For example, in *EEOC v. Boh Brothers Construction Company*, No. 11-30770 (5th Cir. Sept. 27, 2013), an employer was found liable for supervisor actions belittling a male employee because the employee was not "manly enough." Although sexual orientation was not at issue in *Boh Brothers*, harassment based on gender stereotyping could extend to circumstances in which sexual orientation or gender identity/expression played a role.

[6] If policies distinguish between men and women – why? Is the business reason for wearing hair at a certain length (such as for food service) or in hat really different for male and female employees?