

DISCLAIMER: The portion of this letter that references the Defense of Marriage Act and the regulatory definition of “spouse” in effect at the time this letter was issued is superseded by 80 FR 37 (25 February, 2015) pp 9989 – 10001, which amended the definition of spouse under the FMLA at 29 CFR 825.102, 122(b)



U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

November 18, 1998

FMLA-98

Thank you for your inquiry of October 28, 1998, forwarding correspondence from *Name** about the Family and Medical Leave Act of 1993 (FMLA).

The Wage and Hour Division of the U.S. Department of Labor administers and enforces FMLA for all private, State and local government employees and some Federal employees. The FMLA entitles eligible employees of covered employers to take up to 12 weeks of unpaid, job-protected leave each year -- with continued group health insurance coverage during the leave -- for specified family and medical reasons.

Private employers are covered under FMLA if they have employed at least 50 employees during 20 or more calendar workweeks in the current or preceding calendar year; all public employers are covered. Employees are eligible under FMLA if they have worked for a covered employer for at least 12 months, have worked at least 1,250 hours during the 12 months immediately preceding the start of leave, and are employed at a worksite where the employer employs at least 50 employees at the site or within 75 miles of the site. The 12 months the employee has to have worked do not have to be consecutive.

Unpaid leave must be granted to an eligible employee for any of the following reasons: (1) for the birth of a son or daughter, and/or to care for the newborn child within one year of birth; (2) for placement with the employee of a son or daughter for adoption or foster care, and/or to care for the newly placed child within one year of placement; (3) to care for the employee's spouse, son or daughter, or parent, who has a serious health condition; and, (4) for a serious health condition that makes the employee unable to perform his/her job. For *Name** information, we are enclosing the Compliance Guide that provides a full explanation of FMLA's benefits and protections.

Under the FMLA (29 U.S.C. 2611(13)), the term "spouse" is defined as a husband or wife, which the regulations (29 CFR 825.113(a)) clarified to mean 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. The legislative history confirms that this definition was adapted to ensure that employers were not required to grant FMLA leave to an employee to care for an unmarried domestic partner. (See Congressional Record, S 1347, February 4, 1993) Moreover, the subsequently enacted Defense of Marriage Act of 1996 (DOMA) (Public Law 104-199) establishes a Federal definition of "marriage" as only a legal union between **one man and one woman** as husband and wife, and a "spouse" as only a person of the **opposite sex** who is a husband or wife. Because FMLA is a Federal law, it is our interpretation that only the Federal definition of marriage and spouse as established under DOMA may be recognized for FMLA leave purposes.

Title IV of the FMLA contains certain provisions as they relate to other laws and employment benefits. Section 401 of the Act provides that nothing in the FMLA supersedes any provision of any State or local law that provides greater family or medical leave rights than the rights under the FMLA, nor modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability. Section 402 of the Act provides that nothing in the FMLA diminishes an employer's obligation under a collective bargaining agreement (CBA) or employment benefit program or plan to provide greater family or medical leave rights to employees than the rights established under FMLA, nor may the rights established under FMLA be diminished by any such CBA or plan. These provisions of the FMLA have been highlighted, as they are the only alternatives that may provide some relief to *Name**. While the FMLA would not cover absences for the serious health condition of a "domestic partner," *Name** employer or possibly a State or local law may provide some benefits for job-protected leave along the lines that she needs.

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We appreciate the concerns raised by your constituent, and regret that we are unable to provide greater assistance. If we may be of further assistance to you, please do not hesitate to contact us.

Sincerely,

Michelle M. Bechtoldt
Office of Enforcement Policy
Family and Medical Leave Act Team

Enclosure

** Note: The actual name(s) was removed to preserve privacy in accordance with 5 U.S.C. 552 (b)(7).*