



the work and family legal center

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August 7, 2014

Mary Ziegler

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

Re: Proposed Rule on Definition of Spouse in the FMLA (RIN 1235-AA09)

Dear Ms. Ziegler,

On behalf of A Better Balance, I write to express my strong support for the Department of Labor's proposed rule RIN 1235-AA09, which would amend the definition of spouse in the Family and Medical Leave Act (FMLA). We applaud the Department's decision to issue a new definition of "spouse" that covers all individuals who are lawfully married, regardless of their state of residence, and explicitly includes legally married same-sex couples. The new definition creates more clarity for employers and workers, provides essential protections to members of the LGBT community, and brings the FMLA in line with other federal regulations concerning spousal relationships. We thank you for the opportunity to comment on this proposed rule.

A Better Balance is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping workers across the economic spectrum care for their families without risking their economic security. We believe that workers should not have to face impossible choices between earning a paycheck and caring for themselves or their loved ones. We employ a range of legal strategies to promote flexible workplace policies, increase access to paid and unpaid leave, and end discrimination based on gender identity, sexual orientation, pregnancy and family caregiving status. Our organization also has a project focused on the LGBT community's need for inclusive workplace leave laws and nondiscrimination protections.

The FMLA's existing regulatory definition of "spouse," which depends on the laws of the state in which a worker currently resides, is too restrictive to meet the needs of same-sex couples and their families. The current definition's focus on *residency* has the effect of excluding same-sex spouses if they reside in a state that refuses to recognize their marriage. The proposed rule would amend 29 CFR §§ 825.102 and 825.122(b) to ensure FMLA coverage for same-sex

spouses by adopting a “place of celebration rule”; under this approach, the FMLA would recognize same-sex spouses who are lawfully married in any state, regardless of their current state of residence. The proposed definition of spouse would also recognize same-sex marriages that were validly performed in foreign jurisdictions, as long as the union could have been lawfully entered into in at least one state.

In the following sections, we detail our support for the proposed rule, which will advance the underlying purposes of the FMLA by more fully recognizing lawfully married couples and protecting the health and stability of LGBT families. Furthermore, the proposed rule will simplify FMLA coverage for employers and improve consistency across federal laws and departments. We also urge the Department of Labor to maintain the current FMLA interpretation of “son or daughter” as it applies to a worker standing *in loco parentis* to a child.

### **I. The Proposed Rule Will Advance the Stated Purposes of the FMLA By Fully Recognizing Same-Sex Spouses and Stepparents/Stepchildren in LGBT Families**

As the only federal law that explicitly guarantees job-protected leave from work, the FMLA provides critical support to millions of workers. In the 21 years since the FMLA went into effect, American workers have used its provisions to take leave more than 100 million times.<sup>1</sup> When the FMLA became law, Congress declared that the law’s purpose was, in part, “to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families,” and “to entitle employees to take reasonable leave . . . for the care of a child, spouse, or parent who has a serious health condition . . . .”<sup>2</sup>

The proposed rule furthers the underlying purpose of the FMLA, as it will ensure that all covered LGBT workers—regardless of where they live—are eligible to care for a seriously ill same-sex spouse and address qualifying exigencies when a same-sex spouse is called to active duty. Furthermore, the proposed rule will ensure that eligible workers can take FMLA leave to care for a seriously-ill stepchild or stepparent, regardless of their state of residency or the existence of an *in loco parentis* relationship with the stepchild or stepparent. By fully recognizing same-sex marriages and the resulting parent-child relationships, the proposed rule will help more LGBT workers to balance work and family without risking their jobs and economic stability.

### **II. The Proposed Rule Will Simplify FMLA Coverage for Both Workers and Employers**

The current definition of “spouse” in the FMLA generates confusion for both workers and employers. For example, many same-sex spouses who are legally married and live in a state with marriage equality may not realize that they will lose their right to care for each other under the FMLA if they move to a state that does not recognize their marriage. The proposed rule will clear up this confusion and uncertainty by ensuring that legally married same-sex spouses do not lose FMLA coverage merely by moving to a state without marriage equality.

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<sup>1</sup> Latifa Lyles, “Celebrating Mothers, Supporting Families,” (*Work in Progress*) *The Official Blog of the U.S. Department of Labor*, (May 13, 2013), available at <http://social.dol.gov/blog/celebrating-mothers-supporting-families/>.

<sup>2</sup> 29 U.S.C.A. § 2601(b)(1)-(2) (1993).

The proposed rule also simplifies FMLA coverage for employers, who will no longer need to track a worker's state of residence to determine if the worker's marriage is recognized under the FMLA. Once the proposed rule is finalized, employers—especially those who operate in multiple states—will have greater clarity regarding the FMLA's coverage of same-sex spouses.

### **III. LGBT Workers Have a Documented Need for LGBT-Inclusive Workplace Leave Protections**

Demographic research on the LGBT community underscores the necessity of LGBT-inclusive workplace leave rights. There are an estimated 5.4 million LGBT workers in the United States, and research shows that a large percentage of these workers have family caregiving responsibilities.<sup>3</sup> Our country's LGBT workers have a particular need for workplace security; multiple studies have shown that LGBT individuals have poverty rates that are higher than their heterosexual counterparts, with notably higher rates of poverty for same-sex couples raising children.<sup>4</sup> Based on these demographic findings, LGBT working families have a strong need for equal access to job-protected FMLA leave; without the FMLA's protections, LGBT workers who reside in states without marriage equality may risk their jobs and financial security when they need time off to care for a seriously ill spouse, address a qualifying exigency related to a spouse's military service, or care for a spouse's child or a parent's same-sex spouse. At these critical life moments, an inability to access job-protected FMLA leave often heightens a family's economic vulnerability.

Studies also suggest that LGBT workers are more likely to need job-protected FMLA leave to address a spouse's health issues. LGBT Americans face clearly documented health disparities, including a higher risk for certain cancers and high incidences of chronic conditions like diabetes, arthritis, and HIV/AIDS.<sup>5</sup> Given the existence of these health disparities, many LGBT workers have a pressing need for job-protected leave when a spouse is seriously ill.

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<sup>3</sup> See, e.g., Jared Make, *Time for a Change: The Case for LGBT-Inclusive Workplace Leave Laws and Nondiscrimination Protections*, (A Better Balance, November 2013), 21-22, available at <http://www.abetterbalance.org/web/news/resources/264-timeforachange>; *A Broken Bargain: Discrimination, Fewer Benefits and More Taxes for LGBT Workers* (Full Report) (Movement Advancement Project (MAP), Human Rights Campaign (HRC) and Center for American Progress (CAP), May 2013), 5.

<sup>4</sup> See, e.g., Make, *Time for a Change*, 23-24; M.V. Lee Badgett, Laura E. Durso, and Alyssa Schneebaum, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community* (Williams Institute, June 2013), 3; Randy Albelda, M.V. Lee Badgett, Gary J. Gates, and Alyssa Schneebaum, *Poverty in the Lesbian, Gay, and Bisexual Community* (Williams Institute, March 2009), 2; Jaime M. Grant, Lisa A. Mottet, and Justin Tanis with Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (National Gay and Lesbian Task Force and National Center for Transgender Equality, February 2011), 2, 22-23.

<sup>5</sup> See, e.g., Make, *Time for a Change*, 24; *All Children Matter: How Legal and Social Inequalities Hurt LGBT Families* (Full Report) (Movement Advancement Project (MAP), Family Equality Council, and Center for American Progress (CAP), October 2011), 83; Suzanne L. Dibble, Stephanie A. Roberts, and Brenda Nussey, "Comparing Breast Cancer Risk Between Lesbians and their Heterosexual Sisters," *Women's Health Issues* 14, no. 2 (March-April 2004), 60-68; Marshall Miller, Amy André, Julie Ebin, and Leona Bessonova, *Bisexual Health: An Introduction and Model Practices for HIV/STI Prevention Programming* (National Gay and Lesbian Task Force, Fenway Community Health and BiNet USA, March 2007), 4, 41, 108; Karen I. Fredriksen-Goldsen, "Resilience and Disparities among Lesbian, Gay, Bisexual, and Transgender Older Adults," *Public Policy and Aging Report: Integrating LGBT Older Adults into Aging Policy and Practice* 21, no. 3, ed. Robert B. Hudson (SAGE and National Academy on an Aging Society, Summer 2011), 3-7.

#### **IV. The Proposed Rule Is Consistent With Recent Actions By Other Federal Departments and Agencies**

The proposed FMLA rule will create welcome consistency across federal laws and departments. For example, Secretary of Defense Chuck Hagel issued a memorandum in August 2013, stating that the Defense Department “will continue to recognize all marriages that are valid in the place of celebration,” including same-sex marriages.<sup>6</sup> The proposed FMLA rule will ensure that same-sex spouses who are recognized by the Department of Defense are also covered by the FMLA’s definition of “spouse,” especially in relation to the FMLA’s military caregiver and qualifying exigency provisions.

Furthermore, the proposed rule is consistent with recent actions by the Department of Labor to adopt a “place of celebration” rule in the context of the Employee Retirement Income Security Act (ERISA). As detailed in the Department of Labor’s Technical Release 2013-04, “[i]n general, where the Secretary of Labor has authority to issue regulations, rulings, opinions, and exemptions in title I of ERISA and the Internal Revenue Code, as well as in the Department’s regulations at chapter XXV of Title 29 of the Code of Federal Regulations, the term ‘spouse’ will be read to refer to any individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages.”<sup>7</sup>

The Office of Personnel Management (OPM) has adopted the same approach to workplace leave for federal employees. According to the Benefits Administration Letter 13-203, “[b]enefits coverage is now available to a legally married same-sex spouse of a Federal employee or annuitant, regardless of the employee’s or annuitant’s state of residency.”<sup>8</sup> In June 2013, OPM issued a proposed rule (RIN 3206-AM90) to formally adopt the “place of celebration” approach for FMLA purposes. Same-sex marriages among private-sector workers who are eligible for FMLA coverage should be treated on the same basis as same-sex marriages among federal workers.

#### **V. Although the Proposed Rule Will More Fully Recognize Stepparents and Stepchildren in LGBT Families, the Department of Labor Should Maintain its Current FMLA Interpretation of *In Loco Parentis* Relationships**

As described earlier, we enthusiastically support the proposed rule’s expanded recognition of stepparents and stepchildren in LGBT families. Nevertheless, our organization strongly urges the Department of Labor to maintain the current FMLA interpretation of “son or daughter” as

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<sup>6</sup> Secretary of Defense Chuck Hagel, *Extending Benefits to the Same-Sex Spouses of Military Members* (Department of Defense, Memorandum for Secretaries of the Military Departments, Under Secretary of Defense for Personnel and Readiness, August 13, 2013), available at <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>.

<sup>7</sup> *Guidance to Employee Benefit Plans on the Definition of "Spouse" and "Marriage" under ERISA and the Supreme Court's Decision in United States v. Windsor* (U.S. Department of Labor, Technical Release No. 2013-04), available at <http://www.dol.gov/ebsa/newsroom/tr13-04.html>.

<sup>8</sup> Benefits Administration Letter No. 13-203 (U.S. Office of Personnel Management, July 17, 2013), available at <https://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

it applies to a worker standing *in loco parentis* to a child.<sup>9</sup> The Department’s interpretation of the *in loco parentis* standard provides essential FMLA coverage to workers who do not share a biological or legal relationship with their children. Many LGBT workers live in states without marriage equality or in states where the ability of a same-sex couple to legally adopt a child—either jointly or through second-parent adoption—is prohibited or legally uncertain.<sup>10</sup> Even in states that allow joint and second-parent adoption, the complexity and cost of the adoption process may delay or prevent some LGBT parents from establishing a legal relationship with their children.<sup>11</sup> Therefore, the FMLA’s current *in loco parentis* standard remains critically important to LGBT workers and their children.

Furthermore, the current interpretation of the *in loco parentis* standard covers parent-child relationships that may not be recognized otherwise, such as grandparents or other relatives who take in a child and assume ongoing responsibility for raising the child. Due to the growing diversity of family structures and caregiving arrangements, the Department’s broad recognition of the parent-child relationship remains critically important to both LGBT and non-LGBT workers.

In conclusion, A Better Balance is grateful for the Department of Labor’s efforts to ensure fair treatment of LGBT workers, and we look forward to the final adoption of this proposed rule. If you have any questions, please contact me at 212-430-5982 or [jmake@abetterbalance.org](mailto:jmake@abetterbalance.org).

Sincerely,

Jared Make  
Senior Staff Attorney  
A Better Balance

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<sup>9</sup> Administrator’s Interpretation No. 2010-3 (U.S. Department of Labor: Wage and Hour Division, June 22, 2010), *available at* [http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010\\_3.pdf](http://www.dol.gov/WHD/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf).

<sup>10</sup> *See, e.g.,* Make, *Time for a Change*, 21-22; *Securing Legal Ties for Children Living in LGBT Families* (Movement Advancement Project (MAP), Family Equality Council, and Center for American Progress (CAP), July 2012), 10-15, *available at* <http://www.lgbtmap.org/file/securing-legal-ties.pdf>; “Foster and Adoption Laws: Joint Adoption,” MAP, August 2014, accessed August 3, 2014, *available at* [http://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws); “Foster and Adoption Laws: Second-Parent,” MAP, August 2013, accessed August 3, 2014, *available at* [http://www.lgbtmap.org/equality-maps/foster\\_and\\_adoption\\_laws](http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws).

<sup>11</sup> *See, e.g.,* Make, *Time for a Change*, 28; *Securing Legal Ties for Children Living in LGBT Families*, 10-15.