



the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | info@abetterbalance.org | abetterbalance.org

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August 22, 2014

Brenda Roberts

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

Re: Proposed Rule on Definition of “Spouse” in the FMLA (RIN 3206–AM90)

Dear Ms. Roberts,

On behalf of A Better Balance, I write to express my strong support for proposed rule RIN 3206–AM90, which would amend the existing regulatory definition of “spouse” under title II of the Family and Medical Leave Act (FMLA) and codify the guidance released by the Office of Personnel Management (OPM) on October 21, 2013.¹ We applaud OPM’s decision to issue a definition of spouse that explicitly includes legally married same-sex couples and covers all lawfully married individuals, regardless of their state of residence. The new definition provides essential protections to LGBT federal workers and brings title II of 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 eliminate 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 existing regulatory definition of spouse under title II of the FMLA excludes same-sex couples and their families by defining spouse as “an individual who

¹ Elaine Kaplan, *Family and Medical Leave Act (FMLA) Coverage of Same-Sex Spouses* (U.S. Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies, Oct. 21, 2013), available at <http://www.chcoc.gov/transmittals/transmittalDetails.aspx?TransmittalID=5834>.

is a husband or wife pursuant to a marriage that is a legal union between one man and one woman.”² Following the Supreme Court’s ruling in *Windsor v. United States* that Section 3 of the Defense of Marriage Act is unconstitutional, OPM issued a memorandum in October 2013 announcing that its definition of spouse under the FMLA was no longer valid.³ The memorandum instructed departments and agencies to instead define spouse under title II of the FMLA to include “a partner in any legally recognized marriage, regardless of the employee’s state of residency.”⁴ OPM has now proposed a rule to codify the definition of spouse outlined in its October 2013 memorandum. Under this proposed approach, title II of 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 recognizing lawfully married couples and protecting the health and stability of LGBT families. Furthermore, the proposed rule will clarify FMLA coverage for the federal workforce and improve consistency across federal laws and departments. We also urge OPM to maintain its 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, including federal employees. In the 21 years since the FMLA went into effect, American workers have used its provisions to take leave more than 100 million times.⁵ 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”⁶

The proposed rule furthers the underlying purpose of the FMLA, as it will ensure that all covered LGBT federal 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 federal 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 recognizing same-sex marriages and the resulting parent-child relationships,

² 5 C.F.R. § 630.1202.

³ *Windsor v. United States*, 133 S. Ct. 2675 (U.S. 2013); Kaplan, *FMLA Coverage of Same-Sex Spouses*, Oct. 21, 2013.

⁴ Kaplan, *FMLA Coverage of Same-Sex Spouses*, Oct. 21, 2013.

⁵ 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/>.

⁶ 29 U.S.C.A. § 2601(b)(1)-(2) (1993).

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 Provide Consistency and Clarity for Federal Workers and Agencies

Rather than defining spouses according to the laws of the state in which the couple resides, OPM has proposed a “place of celebration” rule for title II of the FMLA. Under this approach, legally married same-sex couples will be considered spouses under the FMLA, even if the state in which they live does not recognize their marriage. The proposed rule will therefore provide greater clarity and consistency for federal workers and agencies by ensuring that legally married same-sex spouses do not lose FMLA coverage merely by moving to a state without marriage equality. The proposed rule’s definition of spouse will also benefit the federal government by making it more likely that federal workers will be willing to accept a requested transfer to another state.

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. 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.⁷ Based on these demographic findings, LGBT workers have a strong need for equal access to job-protected FMLA leave; without the FMLA’s protections, LGBT workers 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.⁸ Given the existence of these health disparities, many

⁷ 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), 21-24, 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; 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, *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.

⁸ 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), Oct. 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,

LGBT federal workers have a pressing need for job-protected leave when a spouse is seriously ill.

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

OPM's 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.⁹ 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 (DOL) to adopt a "place of celebration" rule recognizing same-sex marriages in the context of the Employee Retirement Income Security Act (ERISA). As detailed in DOL'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."¹⁰

Finally, DOL recently issued a proposed rule (RIN 1235-AA09) to amend the definition of spouse in title I of the FMLA that mirrors OPM's proposed change to title II. We strongly support the coordinated rulemaking by OPM and DOL, as the same-sex marriages of federal workers and non-federal workers should be treated the same for FMLA purposes.

V. Although the Proposed Rule Will More Fully Recognize Stepparents and Stepchildren in LGBT Families, the Office of Personnel Management 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 OPM to maintain the current FMLA title II interpretation of "son or daughter" as it applies to

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.

⁹ 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, Aug. 13, 2013), available at <http://www.defense.gov/home/features/2013/docs/Extending-Benefits-to-Same-Sex-Spouses-of-Military-Members.pdf>.

¹⁰ *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>.

a worker standing *in loco parentis* to a child.¹¹ OPM’s interpretation of the *in loco parentis* standard provides essential FMLA coverage to federal 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.¹² 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.¹³ Therefore, the FMLA’s current *in loco parentis* standard remains critically important to LGBT federal 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, OPM’s broad recognition of the parent-child relationship remains critically important to both LGBT and non-LGBT federal workers.

In conclusion, A Better Balance is grateful for the Office of Personnel Management’s efforts to ensure fair treatment of LGBT federal 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.

Sincerely,

Jared Make
Senior Staff Attorney
A Better Balance

¹¹ John Berry, *Interpretation of “Son or Daughter” Under the Family and Medical Leave Act* (U.S. Office of Personnel Management, Memorandum for Chief Human Capital Officers, Aug. 31, 2010), available at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalID=3122>.

¹² 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, Aug. 2014, accessed Aug. 3, 2014, available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws; “Foster and Adoption Laws: Second-Parent,” MAP, Aug. 2014, accessed Aug. 3, 2014, available at http://www.lgbtmap.org/equality-maps/foster_and_adoption_laws.

¹³ See, e.g., Make, *Time for a Change*, 28; *Securing Legal Ties for Children Living in LGBT Families*, 10-15.