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The DOL Redefines the Term "Spouse" and the EEOC Releases Data regarding Fiscal Year 2014

By Jerilyn Jacobs

Last month, there were two noteworthy releases by federal agencies regulating employment laws, one of which pertains to employer compliance and the second of which provides employers with a snapshot of recent employment litigation trends.

First, the Department of Labor ("DOL") issued a final regulatory rule last week revising the definition of "spouse" for purposes of the Family and Medical Leave Act ("FMLA") in order to adopt a "place of celebration" rule that provides coverage to same-sex couples when they move to a state that does not recognize same-sex marriage.

Previously, the provisions of the FMLA that defined the term "spouse" (29 C.F.R. § 825-102 and 29 C.F.R. § 825.122(b)) defined it as "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." This meant that employers would determine whether a spouse was a covered individual by looking to the law of the state in which the employee currently resided.

The newly revised definition of spouse in section 825-102 changes that:

Spouse, as defined in the statute, means a husband or wife. For

purposes of this definition, husband or wife refers to the other person with whom an individual entered into marriage as defined or recognized under state law for purposes of marriage in the State in which the marriage was entered into or, in the case of a marriage entered into outside of any State, if the marriage is valid in the place where entered into and could have been entered into in at least one State. This definition includes an individual in a same-sex or common law marriage that either:

(1) Was entered into in a State that recognizes such marriages; or
(2) If entered into outside of any State, is valid in the place where entered into and could have been entered into in at least one State.

This Final Rule goes into effect March 27, 2015. Once it is in effect, employers are to reference the law of the place in which an employee's marriage was entered into, and not the law of the state in which the employee currently resides, in order to determine whether an individual is a qualified spouse.

This Final Rule provides eligible employees with a same-sex spouse to take leave for the following reasons:

- caring for their spouse with a serious health condition;
- taking qualifying exigency leave due to their spouse's covered military service; and
- taking military caregiver leave for their same-sex spouse.

The Final Rule makes no changes to the documentation requirement of 29 C.F.R. § 825.122(k) that permits employers to require employees who take leave to care for a family member to provide reasonable documentation or a statement confirming the family relationship. The DOL has also noted in commentary on this Final Rule that civil unions are *not* considered marriages under the FMLA, and thus employees in same-sex civil unions, as well as opposite-sex civil unions, are not statutorily afforded rights under the FMLA.

Employers, especially employers doing business in states that do not recognize same-sex marriage, should take note of this change.

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Second, the Equal Employment Opportunity Commission ("EEOC") recently released data regarding the number and nature of charges it received in fiscal year 2014 ("FY 2014"), which ran from October 1, 2013, through September 30, 2014.

A total of 88,778 charges of workplace discrimination were filed with the EEOC during FY 2014, a slight decrease from prior years. The EEOC attributed this slight decrease, in part, to the federal government shutdown at the beginning of FY 2014.

Despite the overall decrease, claims of retaliation were on the rise, reaching their highest amount ever: 37,955. In fact, nearly 43% of the charges filed with the EEOC contained a claim of retaliation.

In descending order, the most common types of claims received in FY 2014 were: race (35% of all charges received); sex, including pregnancy and sexual harassment (29.3%); disability (28.6%); age (23.2%); national origin (10.8%); religion (4%); color (3.1%); and Equal Pay Act violations (1.1%). The EEOC also received 333 charges of violations of the Genetic Information Non-Discrimination Act, constituting just 0.4% of all charges received. It is worth noting that the aforementioned percentages tally to over 100% because charges can include multiple types of claims.

While this data is purely informational, it provides a helpful snapshot to employers of the current trend in charges of discrimination and potential areas for additional training. For instance, given the prevalence of retaliation claims across the board, employers may want to make it an area of particular focus when training supervisors and managers. Employers interested in delving further into the statistical information released by the EEOC can do so online.

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