



Automobile Dealers Association of Indiana, Inc.

BULLETIN

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U.S. DEPARTMENT OF LABOR ISSUES NOTICE OF PROPOSED RULEMAKING TO EXTEND FMLA PROTECTIONS TO EMPLOYEES IN SAME-SEX MARRIAGES

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On June 20, 2014, the U.S. Secretary of Labor, Thomas E. Perez, announced a proposed rule that will have significant impact on those employers covered by the Family and Medical Leave Act (FMLA). The announcement indicated the Department of Labor's intent to extend the protections afforded under the Family and Medical Leave Act ("FMLA") to all eligible employees in legal same-sex marriages without regard to their state of residence. The proposed rule is one of many results that flowed from the U.S. Supreme Court's decision in *United States v. Windsor*, in which the Court struck down the Defense of Marriage Act provision that interpreted "marriage" and "spouse" to be limited to opposite-sex marriage for purposes of federal law. The Labor and Employment Group at Bose McKinney & Evans advised covered employers to expect this expansion of FMLA protection earlier this year.

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons. These reasons include being entitled to take FMLA leave to care for a spouse who has a serious health condition. The proposed rule would change the FMLA's regulatory definition of "spouse" so that eligible employees in legal same-sex marriages would be able to take FMLA leave to care for a spouse for purposes recognized by the Act. This would include care for a same-sex spouse with a serious health condition, qualifying exigency leave because of a same-sex spouse's covered military service, and military caregiver leave to care for a same-sex spouse. Currently, legally married same-sex couples are eligible for FMLA benefits only if they reside in a state in which same-sex marriage is legal.

The Department of Labor has prepared a fact sheet on the proposed rule. The fact sheet spells out major features of the rule as well as the expected impact on FMLA leave. It also explains that the proposed definition of "spouse" expressly includes same-sex marriages, as well as common-law marriages, and encompasses same-sex marriages that were entered into abroad and would be legal in at least one state. In addition, the fact sheet notes that the proposed rule would entitle eligible employees to take FMLA leave to care for a stepchild (i.e., child of employee's same sex spouse) even if the *in loco parentis* requirement of providing day-to-day care or financial support for the child is not met by the employee, and to care for their stepparent (i.e., employee's same-sex spouse's parent), even though the stepparent never stood *in loco parentis* to the employee.

The Office of Management and Budget has reviewed the Notice of Proposed Rulemaking (NPRM), but it has not yet been published in the Federal Register. The NPRM that appears in the Federal Register will specify the dates of for public comment and may contain minor differences in accordance with other requirements. Once published, interested parties are encouraged to submit comments within 45 days. The proposed rule cannot go into effect until some announced time after this comment period has elapsed. We will keep you informed of its status and substance.

Also, on Wednesday, June 25, 2014, Chief Judge Richard Young of the U.S. District Court for the Southern District of Indiana issued his ruling in *Baskin et al. v. Bogan et al.* which challenged the propriety of Indiana's marriage law. The chief judge agreed with plaintiffs that the state's law prohibiting same-sex couples from marrying violated the due process and equal protection clauses of the 14th Amendment. Young noted his decision is part of an historic change sweeping through the federal court system. Federal courts across the country are coming to the same conclusion that state laws banning same-sex marriage violate the U.S. Constitution. Young wrote in his ruling, "It is clear that the fundamental right to marry shall not be deprived to some individuals based solely on the person they choose to love"... "In time, Americans will look at the marriage of couples such as Plaintiffs, and refer to it simply as marriage-not same-sex marriage." Young concluded his decision stating, "These couples, when gender and sexual orientation are taken away, are in all respects like the family down the street. The Constitution demands we treat them as such."

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Immediately after the ruling was issued, county clerk's offices around Indiana began fielding requests from same-sex couples for marriage licenses. As of 6:00 p.m. on June 25th, the Marion County Clerk's Office had processed approximately 90 marriage license applications and conducted 63 wedding ceremonies. The Indiana Attorney General's Office has filed an emergency motion to stay implementation of the order pending an appeal, as well as formally notified the court that the decision will be appealed to the Seventh Circuit Court of Appeals.

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