KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 18, 2015

To: All State Agency Heads

Re: State of Texas lawsuit against the federal government regarding the newly revised definition of "spouse" under the Family and Medical Leave Act

This letter is to advise you that the State of Texas has filed suit against the federal government and the U.S. Department of Labor over the newly revised definition of spouse in the federal Family and Medical Leave Act (FMLA), scheduled to take effect March 27, 2015. This significant change in definition would direct the extension of FMLA benefits in Texas to same-sex spouses. The lawsuit can be viewed at http://www.texasattorneygeneral.gov/files/epress/files/2015/March/dkt_1_complaint_for_declaratory_and_jnjunctive_relief.pdf.

Texas is suing the U.S. Department of Labor because the rule is inapplicable to the State for at least three reasons: (1) it violates the federal full faith and credit statute; (2) it runs afoul of the principles of federalism the Supreme Court recognized in *Windsor*; and (3) it attempts to abrogate Texas's sovereign immunity.

First, the rule violates the federal full faith and credit statute, which expressly provides that "[n]o State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, . . . or a right or claim arising from such relationship." 28 U.S.C. § 1738C. But that is precisely what the rule does by requiring Texas to "give effect to" a same-sex marriage from another state by granting FMLA benefits in violation of Texas law, which does not recognize such marriages.

Second, the rule violates the longstanding federalism principles in this area the Supreme Court recognized in *Windsor*, where the Court reaffirmed that "regulation of domestic relations" is "an area that has long been regarded as a virtually exclusive province of the States." *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013). The U.S. Department of Labor's rule, which requires States to disregard their time-honored definitions of marriage, violates the careful balance of power the founders set forth in the United States Constitution.

Third, the U.S. Department of Labor asserts powers it does not have by attempting by rule to abrogate Texas's sovereign immunity. The United State Supreme Court has held that the FMLA (the self-care provision) did not abrogate the States' immunity because Congress failed to show evidence of a pattern of state constitutional violations. *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327, 1333-35 (2012). Under the Eleventh Amendment, the United States Supreme Court requires Congress to identify "a pattern of state constitutional violations" in the FMLA along with a congruent and proportionately tailored remedy in order to abrogate the immunity of a state and its political subdivisions. *Id.* Here, Congress had no role in the writing of this rule, and the rule points to no Congressional findings of a pattern of State unconstitutional violations. The rule is an invalid attempt to abrogate the State's immunity.

Due to these multiple fatal defects, the State is seeking temporary and permanent injunctive relief in federal court that will bar the U.S. Department of Labor from applying its rule. The Office of the Attorney General is not amending its policy to comply with the Department's unlawful rule, and we advise state agencies to follow state law and not accede to the U.S. Department of Labor rule.

Very truly yours,

Ken Paxton

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