



Employment Law Alert

Legal developments affecting human resource management

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FMLA protections extended to same-sex and other parents without a biological or legal relationship to a child

By Sandra Kahn

The U.S. Department of Labor (“DOL”) has issued a new interpretation that effectively extends certain protections of the Family and Medical Leave Act (“FMLA”) to employees who stand “*in loco parentis*” to a child although they lack a legal or biological relationship to the child. Although the language of the FMLA remains the same, DOL Administrative Interpretation No. 2010-3 clarifies the definition of “son or daughter” under Section 101(12) of the FMLA to make clear that an employee who has either day-to-day or financial responsibility for caring for a child, specifically including an employee who will share in the raising of a child with a same-sex partner, stands “*in loco parentis*” to the child and therefore will be entitled to take FMLA leave to care for that child. Because this clarification is made through a DOL interpretation and not a change in the FMLA itself, however, it is subject to change by future administrations.

The FMLA protection at issue provides that eligible employees may take up to 12 workweeks of leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a serious health condition. The definition of “son or daughter” under the FMLA includes not only a biological or adopted child, but also a “foster child, a stepchild, a legal ward, or a child or a person standing *in loco parentis*.” 29 U.S.C. § 2611(12).

The FMLA regulations define “*in loco parentis*” as including those with day-to-day responsibilities to care for and financially support a child. 29 CFR § 825.122(c)(3). The DOL has now clarified this position, stating that “the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child.” The Administrative Interpretation provides a number of examples of when an employee will be found to be *in loco parentis* (despite having no legal or biological relationship to the child) and therefore entitled to FMLA leave to care for the child:

- Where an employee provides day-to-day support for his or her unmarried partner’s child, but does not financially support the child
- Where an employee will share equally in the raising of a child with the child’s biological parent(s)

- Where an employee will share equally in the raising of an adopted child with a same sex partner

In each of these cases, the employee would be eligible for FMLA leave to bond with the child following birth or placement, and to care for the child if the child had a serious health condition. The DOL notes that the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that another individual stands *in loco parentis* to that child. Further, there is no limit on the number of individuals who may be found to stand *in loco parentis* to a child—for example, if parents divorce, and each remarries, the child’s biological parents and step-parents each have equal rights to FMLA leave to care for the child.

The DOL also clarifies that this leave is available to employees who do have a biological relationship to the child other than that of parent, when they stand *in loco parentis* to the child, including, for example, a grandparent or aunt who takes in a child and assumes responsibility for the child if the parents are not capable of providing care.

Employers may require an employee to provide reasonable documentation or a statement regarding the family relationship between the employee and the child, where an employer has questions about whether an employee’s relationship to a child is covered under the FMLA. The DOL cautions, however, that “a simple statement asserting the family relationship exists” is all that is needed where an employee asserts an *in loco parentis* relationship with a child with whom he or she has no legal or biological relationship.

This change affects only the provision of the FMLA that provides leave to bond with a child or to care for a child with a serious health condition; it does not affect an employee’s entitlement to take military FMLA leave for a son or daughter, which is governed by a different definition, nor does it affect (or extend) the interpretation of an employee’s ability to take leave to care for a “spouse.”

Employers should review their FMLA policies to confirm that they comply with this new interpretation of the law. FMLA policies with a more restrictive definition of “child” or “son or daughter” should be revised.

For more information on this interpretation of the FMLA, or assistance with implementing this change, contact your Nixon Peabody attorney or:

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