



Virginia Workplace Law

Caregiving Leave Expanded

By: Phyllis Katz. *This was posted Monday, September 13th, 2010*

In Loco Parentis FMLA Leave – Expansive Interpretation

With children heading [back to school](#) where [mono](#) and other serious illnesses may be transmitted more readily, employee requests for [Family and Medical Leave Act \(FMLA\) leave](#) to care for sick children will once again increase. In reviewing such requests, employers must now take into account the [U.S. Department of Labor's clarification](#) of who stands in loco parentis to a child. (In loco parentis is Latin for “in the place of a parent”).

In enacting the FMLA, Congress was aware of the many forms of non-traditional families that exist today and the role that an unrelated adult may serve in raising a child in such a non-traditional family. Hence, from the beginning, FMLA leave has been granted under qualified situations to persons standing in loco parentis to a child. For example, many children are raised by grandparents, aunts and uncles, older siblings, and in some situations non-blood relatives such as step-parents or unmarried partners. These caregivers often require time off from work to care for a child with a serious health condition or to be at the birth of a child.

What was uncertain under the FMLA regulations was who qualified as standing in loco parentis to a child. The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for a child and who financially support a child. To clarify the uncertainty as to who would fall into the category of “in loco parentis” the DOL issued this summer, [Interpretation \(No. 2010-3\)](#). The DOL expressly stated that the DOL does not interpret the regulation to require that a person standing in loco parentis provide both day-to-day care and financial support.

Either day-to-day support alone or financial support alone may establish in loco parentis status. The interpretation further states that employees who have no biological or legal relationship with a child may stand in loco parentis and there is no restriction on the number of “parents” a child may have under the FMLA. In short, whether an employee stands in loco parentis will be a case by case analysis based upon the specific facts of the situation.

The child must be under 18 years of age; or if 18 years of age or older must be incapable of self-care because of a mental or physical disability. Further, to qualify for FMLA parental leave the child must require care because

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of a serious health condition. Accordingly, an employee who serves “in loco parentis” may take leave to care for his or her grandchild, grand niece or nephew, or for the care of the child of his or her unmarried partner if in fact he or she provides care and protection to the child on a daily basis.

In a news release accompanying this Interpretation, [Secretary of Labor Hilda L. Solis](#) stated “No one who loves and nurtures a child day-in and day-out should be unable to care for that child when he or she falls ill. No one who steps in to parent a child when that child’s biological parents are absent or incapacitated should be denied leave by an employer because he or she is not the legal guardian. No one who intends to raise a child should be denied the opportunity to be present when that child is born simply because the state or an employer fails to recognize his or her relationship with the biological parent.”

Interpretation (2010-3) is simply that, the DOL’s interpretation of the law. A court may still define it differently, with the U.S. Supreme Court having the final say.

Interpretation (2010-3) does not address an employee’s entitlement to take military FMLA leave for a son or daughter. The definition of a “son or daughter” for military FMLA is defined in 29 C.F.R. §§ 825.122(g), (h) and is more limited.

Our [Virginia and North Carolina employment lawyers](#) closely follow the DOL pronouncements and opinions so that we can advise our clients on the newest regulations and requirements. If you have questions or concerns about the new FMLA clarification, we would be happy to get your comments below.

Will you have in your current workforce a lot of your employees that now qualify under the expanded caregiver definition that previously were not likely to request FMLA for this purpose?

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