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DOL Expands Parental Leave Rights Under FMLA

On June 22, 2010, the United Stated Department of Labor clarified the definition of "son and daughter" under the Family and Medical Leave Act, effectively extending parental leave rights to individuals who provide day-to-day care or financial support to a child, regardless of the legal or biological relationship between the individual and the child. Click here to view the clarification.

The FMLA entitles eligible employees to take up to 12 weeks of unpaid leave during a 12-month period because of – among other things – the birth of an employee's son or daughter, the placement with an employee of a son or daughter through adoption or foster care, and the need to care for a son or daughter with a serious health condition. The FMLA defines "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*." The FMLA regulations define *in loco parentis* to include those individuals with day-to-day responsibilities to care for and financially support a child. Thus, an employee who has no biological or legal relationship with a child may nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave.

Determining whether an individual stands *in loco parentis* is dependent upon the particular facts of each case. Factors to be considered include the child's age; the degree to which the child depends on the person claiming to stand *in loco parentis*; the amount of support, if any, the individual provides; and the extent to which duties commonly associated with parenthood are exercised. An individual does not have to prove that he or she provides *both* day-to-day care *and* financial support; one or the other will be sufficient. For example, according to the DOL's clarification, where an employee provides day-to-day care for his unmarried partner's child (with whom he has no biological or legal relationship), but does not support the child financially, the employee may be considered to stand *in loco parentis* to the child and be entitled to FMLA leave. Similarly, an employee who intends to share equally in the raising of a child with a same-sex partner, but who has no legal or biological relationship with the child, is now clearly entitled to FMLA leave for the birth or placement of the child or to care for the child if the child has a serious health condition.

The DOL's clarification tracks Congress' original intent that the definition of "son and daughter" reflect "the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother," and that the FMLA should be "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child." S. Rep. No. 103-3, at 22.

The DOL's clarification most obviously benefits lesbian, gay, bisexual, and transgender families. But its scope extends beyond same-sex parents. Where a heterosexual couple divorce and each parent subsequently remarries, the child will be considered the "son or daughter" of both the biological parents and the stepparents and all four adults would have the right to take FMLA leave to care for the child. Likewise, a grandparent may stand *in loco parentis* to a child where the child's parents either die or are otherwise incapable of providing care. The FMLA requires only that, if requested by the employer, an employee seeking leave in an *in loco parentis* capacity provide a simple statement asserting that the requisite family relationship exists.

For employers, the practical impact of the DOL's clarification is that by specifically referring to same-sex partners, the FMLA has been expanded to include "non-traditional" families even where the state in which the individuals and employer are located does not recognize such relationships. Consequently, an employer may not deny FMLA parental leave to an otherwise eligible lesbian, gay, bisexual, or transgender employee simply because the employee's familial relationship is not legally recognized by the state in which he or she resides. Accordingly, employers may find themselves granting FMLA parental leave to a greater number of employees than ever before.

An important caveat: The DOL's clarification applies only to FMLA leave for the birth or adoption of a child or to care for a child with a serious health condition. It does not expand coverage to allow a same-sex partner to take FMLA leave to care for his or her partner with a serious health condition. Nor does it address an employee's entitlement to take military FMLA leave for a son or daughter, which is governed by separate definitions in the statute.

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