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LABOR & EMPLOYMENT DEPARTMENT

ALERT

U.S. Department of Labor Issues New Interpretation of Family and Medical Leave Regulations

By Jennifer DaCosta

On June 22, 2010, the Wage and Hour Division of the U.S. Department of Labor issued Administrator's Interpretation No. 2010-3. This interpretation clarifies what it means for an employee who seeks leave under the Family and Medical Leave Act of 1993 (FMLA) to stand *in loco parentis* to a child.

Background

The FMLA entitles an eligible employee to take a total of 12 work weeks of leave during any 12-month period for, among other things, the birth of a son or daughter of the employee; the placement of a son or daughter with the employee for adoption or foster care; and to care for a son or daughter who has a serious health condition. "Son or daughter" is defined to include a biological, adopted or foster child, a stepchild, a legal ward, as well as a child of a person standing *in loco parentis*, where the child is either under age 18, or age 18 or older and incapable of self-care because of a mental or physical disability.

In Loco Parentis

Whether an employee stands *in loco parentis* to a child is fact-dependent. Courts have considered the following factors when making such a determination: the age of the child; the degree to which the child is dependent on the person claiming to stand *in loco parentis*; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised.

The Administrator noted that, in defining "son or daughter," Congress intended to recognize that many children do not live in traditional nuclear families with their biological parents. Thus, the regulations provide that a person stands *in loco parentis* to a child when he or she is the one with day-to-day responsibilities to care for and financially support the child. A biological or legal relationship is not necessary.

The Interpretation

The Administrator has interpreted the regulations to mean that an employee who seeks FMLA leave due to an *in loco parentis* relationship and intends to assume the responsibilities of a parent need not establish that he or she provides both day-to-day care and financial support.

The Administrator offers the following examples of instances in which an employee may thus qualify for FMLA leave:

1. The employee seeks leave for the birth of a child and will share equally in raising the child with that child's biological parent.

2. The employee will share equally in raising the adopted child of his or her same-sex partner and seeks leave for the placement of the child.

3. The employee seeks leave to care for a child with a serious health condition where the employee provides day-to-day care for his or her unmarried partner's child but does not financially support the child.

In order to confirm that the employee is qualified for such leave, an employer may require that the employee giving notice of the need for leave provide reasonable documentation or a statement of the familial relationship. Where there is no legal or biological relationship, a simple statement from the employee asserting the requisite family relationship exists, will suffice.

Conclusion

Employers should be aware that the number of their workers who qualify to take FMLA leave in order to care for a child will probably increase. With this interpretation, an employee who provides either day-to-day care or financial support for a child may establish an *in loco parentis* relationship where the employee intends to assume the responsibility as that child's parent. Whether an employee stands *in loco parentis* to a child will depend entirely on the facts on a case by case basis.

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