ALERTS AND UPDATES

U.S. Department of Labor Clarifies When Employees Standing "In Loco Parentis" May Take FMLA Leave to Care for a Child

July 15, 2010

On June 22, 2010, the U.S. Department of Labor (DOL) issued guidance setting forth its interpretation of when an employee, who does not have a biological or legal relationship with a child, may take leave under the Family and Medical Leave Act (FMLA) for the birth, adoption, bonding or care of that child.

In *Administrator's Interpretation No. 2010-3*, the DOL declared that an employee may stand "in loco parentis" to a child when the employee provides *either* day-to-day care or financial support, where the employee intends to assume the responsibilities of a parent with regard to the child. The DOL's interpretation, which may be considered an expansive reading of the applicable FMLA regulations, is being regarded as supportive of nontraditional families.

The FMLA provides that an eligible employee may take up to 12 workweeks of unpaid, job-protected leave in a designated 12-month period 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.[1] The FMLA further defines a "son or daughter" as "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability."[2]

Responding to what it perceived as confusion by both employers and employees about the manner in which these definitions apply in the absence of a legal or biological parent-child relationship, the DOL noted that Congress intended the definition of a "son or child" to reflect nontraditional family relationships and to be construed in favor of providing FMLA leave to those employees who actually have day-to-day responsibility for caring for a child, even in the absence in the absence of a biological or legal relationship.[3]

The DOL acknowledged that its interpretation differs from the explicit language of the FMLA regulations defining "in loco parentis" as including those with day-to-day responsibilities to care for and financially support a child.[4] However, the DOL noted there are no specific factors that are dispositive on the issue of whether the "in loco parentis" relationship is present and that it did not feel the FMLA required an employee to demonstrate *both* day-to-day care and financial support in order to stand "in loco parentis" to a child. The DOL further illustrated its interpretation with several examples of where an employee may be entitled to take FMLA leave:

- Where an employee provides day-to-day care for his or her unmarried partner's child, but does not financially support the child;
- Where an employee shares equally in the raising of a child with the child's biological parent;
- Where an employee shares equally in the raising of an adopted child with a same-sex partner, but does not have a legal relationship with the child;
- Where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care; or
- Where an aunt assumes responsibility for raising a child after the death of the child's parents.

The DOL highlighted that these examples are in stark contrast to a situation where an employee cares for a child while the child's parents are on vacation; in such cases, an employee would not be considered to be "in loco parentis" to the child.

Finally, the DOL confirmed—consistent with the FMLA regulations—that an employer may seek documentation to confirm the family relationship, noting that a simple statement from the employee confirming the relationship is sufficient.[5]

In the event an employer receives a request from an employee to take FMLA leave in connection with a child, the employer should consider the following:

- Is there any biological or legal relationship?
- In the absence of such relationship, are there other factors—such as the age of the child, the degree of the child's dependence, financial support or the exercise of common parenting duties—that suggest that the employee is assuming the parental status and discharging the parental duties?
- Has the employee produced a statement or other documentation supporting the relationship?

What This Means for Employers

Since the DOL's interpretation is supportive of nontraditional family circumstances and appears to indicate a preference to be inclusive in the determination of family relationships falling within the scope of "in loco parentis," employers may choose to construe FMLA leave requests in this category more liberally than other types of leave. Given the significant publicity and support generated by the first DOL Administrator's Interpretation on the FMLA, employers should exercise due diligence in assessing an employee's request for leave in nontraditional family circumstances and consult their employment counsel in any questionable circumstances.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact any of the attorneys in our Employment, Labor, Benefits and Immigration Practice Group or the attorney in the firm with whom you are regularly in contact.

Notes

1. *See* 29 U.S.C. § 2612(a)(1)(A)–(C); 29 C.F.R. § 825.112(a)(1)–(3).
2. *See* 29 U.S.C. § 2611(12); 29 C.F.R. §§ 825.122(c), 825.800.
3. *See* S. Rep. No. 103-3, at 22.
4. *See* 29 C.F.R. §§ 825.122(c)(3).
5. *See also* 29 C.F.R. § 825.122(j) ("For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc.").