



## EMPLOYMENT AND LABOR UPDATE

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### DOL Interprets FMLA to Cover Employees Who Assume Parental Obligations Regarding a Child Even Absent a Biological or Legal Relationship to the Child

On June 22, 2010, the U.S. Department of Labor (DOL) issued an interpretation of provisions of the Family and Medical Leave Act, 29 U.S.C. § 2601 *et. seq.* (FMLA), defining the terms “son or daughter” as they apply to an employee taking leave for the purpose of caring for a child. Under the FMLA, an eligible employee generally has the right to take up to twelve weeks of unpaid leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. The DOL stated that it issued this interpretation because many employers and employees alike were uncertain whether those FMLA rights extended to employees caring for children who are not their biological or legal children. In its interpretation, the DOL confirmed that an employee can have FMLA rights with respect to a child that is not the employee’s biological or legal son or daughter as long as the employee intends to assume the responsibilities of a parent with regard to the child. These responsibilities can include either day-to-day care or financial support for a child. While not legally binding, the DOL’s interpretation confirms the broad reach of the FMLA’s protections, including to employees in same-sex or other domestic partner relationships who assume parental responsibilities. The DOL’s interpretation does not address an employee’s entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions.

The FMLA defines a “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, who is under 18 years of age; or 18 years of age or older and incapable of self-care because of a mental or physical disability.” 29 U.S.C. § 2611. The DOL’s regulations further provide that persons who stand “in loco parentis” include those with day-to-day responsibilities to care for and financially support a child.” 29 C.F.R. § 825.122(c)(3). The DOL’s interpretation clarifies the meaning of this regulation by providing that an employee who provides either financial support or day-to-day care for a child, and who thereby demonstrates the requisite intent to assume parental responsibilities for the child, may be entitled under the FMLA to take leave to care for the child.

According to the DOL, whether an employee stands in loco parentis to a child is a fact issue dependent on multiple factors, such as the age of the child, the degree to which the child is dependent on the person claiming to be standing in loco parentis, the amount of support provided, and the extent to which duties commonly associated with parenthood are exercised. There is no specific set of factors that, if present, will be considered to be dispositive in determining in loco parentis status.

The DOL's interpretation provides several examples of relationships between employees and children that, if the requisite parental intent is demonstrated, would entitle the employee to take leave under the FMLA to care for the child:

- An employee who will share equally in the raising of an adopted child with a same-sex partner, but who does not have a legal relationship with the child;
- An employee who provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child; and
- An employee who will share equally in the raising of a child with the child's biological parent.

The DOL's interpretation also clarifies that the FMLA and regulations thereunder do not restrict the number of parents that a child may have under the FMLA, and that an employee is not prevented from having in loco parentis status simply by virtue of the fact that the child has a biological parent in the home or has both a mother and father. For example, the DOL explained:

- Where a child's biological parents divorce, and each parent remarries, the child will be the "son or daughter" of both the biological parents and the stepparents, and all four adults would have equal rights to take FMLA leave to care for the child;
- Where a grandparent or aunt takes in a child and assumes ongoing responsibility for raising the child because the parents are incapable of providing care or are deceased, the grandparent or aunt stands in loco parentis to the child whether or not there is a legal relationship with the child;
- However, an employee who cares for a child while the child's parents are on vacation would not be considered to be in loco parentis to the child.

If an employee claims leave under the FMLA, the employer may inquire into whether the relationship between the employee and the child is covered by the FMLA. According to the DOL's interpretation and its regulations, the employee can answer the employer's inquiry by providing a simple statement that he or she stands in loco parentis to the child because he or she provides day-to-day care or financial support to the child. 29 C.F.R. § 825.122(j).

In light of this interpretation of the FMLA, employers may wish to review and revise their FMLA policies to ensure that they comply with the Act. Additionally, Human Resources personnel and supervisors will need to be aware of these FMLA provisions to avoid an inadvertent interference with rights under that Act. Please also note that state or local laws may grant leave rights in addition to those provided by the FMLA.

**For more information and assistance regarding this matter, please contact any member of the Sidley Austin LLP Employment and Labor Group.**

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