ALERT - DOL Clarifies Definition of "Son or Daughter" Under the FMLA

July 7, 2010

On June 22, 2010, the Deputy Administrator of the U.S. Department of Labor (DOL) issued Interpretation No. 2010-3, which clarifies the definition of "son or daughter" under the Family and Medical Leave Act (FMLA). The interpretation makes clear that an employee need not have a biological or legal relationship with a child in order to take FMLA leave for birth, bonding or to care for the child so long as the employee actually has or intends to have day-to-day responsibility for caring for the child. The interpretation is intended to address the fact that many children in modern families are cared for by adults who are neither their biological nor legal parents, but who have nonetheless assumed the responsibilities of caring for those children.

As background, the DOL's Wage and Hour Division began issuing Administrator's Interpretations earlier this year as descriptive guidance in lieu of providing Opinion Letters in response to requests for assistance. Prior interpretations have addressed the nonexempt status of mortgage bankers and compensable working time spent donning and doffing clothing. Each interpretation is intended to articulate the DOL's position on a given issue and enhance legal compliance.

As relevant to this most recent DOL interpretation, the FMLA authorizes an employee to take up to 12 weeks of leave per year: (1) because of the birth of a son or daughter and in order to care for the son or daughter; (2) because of the placement of a son or daughter with the employee for adoption or foster care; or (3) to care for a son or daughter with a serious health condition. The FMLA defines the term "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 — (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."

The interpretation focuses primarily on the definition of "in loco parentis"—a legal term used to refer to persons who assume or intend to assume the obligations of a parental relationship with a child without going through the formalities necessary for legal adoption. Generally, determining whether an individual stands "in loco parentis" to a child is based on several factors, such as: (i) the age of the child; (ii) the degree to which the child is dependent on the individual; (iii) the amount of financial support, if any, the individual provides to the child; and (iv) the extent to which the individual exercises common parenting duties.

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FMLA regulations define "in loco parentis" to include in particular those with day-to-day responsibilities to care for and financially support a child. The Administrator's Interpretation makes clear that an employee need not establish *both* day-to-day care *and* financial support in order to be found in loco parentis. Under this interpretation, an employee who provides day-to-day care, but not financial support to a child, would qualify as in loco parentis. On the other hand, an employee who is merely supervising a child while the child's parents are on vacation would not qualify as in loco parentis.

The Administrator's Interpretation also makes clear that the fact that a child already has both a mother and father does not prevent another individual who lacks a legal or biological relationship with the child from standing in loco parentis to the child. Thus, if a child's parents divorce and both remarry, all four of the child's biological and step-parents would be eligible to take FMLA leave to care for the child. Similarly, if a child has a biological mother and father, but is actually being cared for and raised by his or her uncle and grandmother, the child's uncle and grandmother would be eligible to take FMLA leave to care for the child.

To determine whether an employee stands in loco parentis toward a child, an employer may require the employee to provide reasonable documentation or a statement of the family relationship. If the employee provides a simple statement asserting that the required family relationship exists, the employee is eligible to take FMLA leave to care for the child.

In conclusion, the DOL's latest Administrator's Interpretation takes a broad view of the definition of "son or daughter" under the FMLA. This expansive view is intended to encompass the wide variety of parenting relationships found in modern society, regardless of biological or legal formalities. Under this interpretation, same-sex partners and other nontraditional parental figures are eligible to take FMLA leave for birth, bonding or to care for a child so long as they intend to assume the responsibilities of a parent toward the child.

In response to this Administrator's Interpretation, employers should take the time to review their existing FMLA policies to ensure consistency with this new DOL guidance. Further, supervisors and managers responsible for implementation of FMLA leaves of absence should be made aware of this interpretation and grant leave status accordingly.

If you have any questions regarding this new development or need assistance with policy drafting or training, please contact any member of the Employment, Benefits and Labor Section.

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