DOL Expands Leave Rights Under FMLA

Insights
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On June 22, 2010 the Department of Labor issued an Administrative Interpretation clarifying the definition of "son or daughter" under the Family and Medical Leave Act (FMLA) with respect to non-military leave. The new Interpretation grants leave rights to individuals who assume the responsibilities of a parent by providing day-to-day care or financial support for a child, regardless of whether there is a legal or biological relationship between the individual and the child.

The DOL declared that the Interpretation "is a victory for many non-traditional families." Hilda Solis, United States Secretary of Labor, stated, "The Labor Department's action today sends a clear message to workers and employers alike: All families, including LGBT [lesbian-gay-bisexual-transgender] families, are protected by the FMLA."

FMLA Leave for a Son or Daughter
The FMLA allows eligible employees to take up to 12 weeks of protected leave for three reasons related to an employee's son or daughter: 1) to care for a son or daughter with a serious health condition; 2) "because of the birth of a son or daughter of the employee and in order to care for such son or daughter"; and 3) "because of the placement of a son or daughter with the employee for adoption or foster care."

The FMLA's definition of a son or daughter includes not just biological or adopted children, but also foster children, stepchildren, legal wards and the son or daughter of individuals who serve as if they were parents (in loco parentis).

The FMLA regulations define persons standing "in loco parentis" as "those with day-to-day responsibilities to care for and financially support a child . . . [a] biological or legal relationship is not necessary." In determining whether a person stands in loco parentis, courts have historically evaluated a series of factors to determine whether the persons seeking leave have put themselves in the position of a lawful parent by assuming the obligations and discharging the duties of a parent.

Each relationship between an individual and a child is evaluated on a case-by-case to determine whether the individual is entitled to FMLA-protected leave. As a result, the DOL received several requests for additional guidance on when employees are entitled to take leave related to a child if no legal or biological relationship exists between the employee and the child.

Broad Definition of "Son or Daughter"

The FMLA was enacted in 1993 and at the time it was enacted, Congress intended for the definition of "son or daughter" to be construed broadly in favor of coverage. The Senate Report from 1993 states that "many children in the United States today do not live in traditional â€˜nuclear' families with their biological father and mother . . . the [Congressional] committee intends that the terms â€˜parent' and â€˜son or daughter' to be broadly 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."

The new interpretation codifies the intent of Congress and makes clear that "[e]mployees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave."

The Interpretation provides that in order for individuals to stand in loco parentis, they do not need to provide both day-to-day care *and* financial support for the child. For example, an employee who cares for his or her unmarried partner's child on a day-to-day basis could be considered to stand in loco parentis to the child and be entitled to FMLA leave to care for the child, even in the absence of a biological or legal relationship and even if such employee does not provide financial support for the child.

Therefore, an employee who intends to share equally in the raising of the child with the child's biological parent is entitled to FMLA leave for the child's birth or to care for the child if he or she has a serious health condition. "Similarly, an employee who will share equally in the raising of an adopted child with a same sex parent, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child."

Accordingly, the protections of the FMLA extend to grandparents, aunts, partners and others who assume the responsibilities of raising a child and allow employees who have assumed such responsibilities to take leave for FMLA qualifying reasons related to the child.

The DOL specifically noted a determination that an individual stands in loco parentis to the child is not precluded simply because the child has a biological parent in the home or has both a mother and father. "Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. For example, where a child's biological parents divorce, and each parent remarries, the child will be the â€˜son or daughter' of both biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child."

"No one who steps in to parent a child when that child's biological parents are absent or incapacitated should be denied leave by an employer because he or she is not the legal guardian. No one who intends to raise a child should be denied the opportunity to be present when the child is born simply because the state or the employer fails to recognize his or her relationship with the biological parent," said Labor Secretary Solis.

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What it Means for Employers

The new Administrative Interpretation's clarification of the definition of "son or daughter" and the scope of in loco parentis relationships is not a substantial departure from the original intention of Congress or many courts' interpretations of the FMLA's application to non-traditional familial relationships. But the clarification expanded the definition of in loco parentis by stating that an individual need only provide day-to-day care or financial support, but not both, to be found to stand in loco parentis and be entitled to leave under the FMLA.

Additionally, the Interpretation expressly applied the definition of "son or daughter" and in loco parentis to lesbian and gay families, regardless of whether the state in which the employer is located legally recognizes the relationship. As a result, more employees may be entitled to take FMLA leave to care for a child or be present for the birth or adoption of child.

If you as an employer need to substantiate a relationship between the employee and the child, you may require the employee to provide "reasonable" documentation or a statement regarding the relationship. But the DOL stated that "[a] simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship."

For assistance in reviewing and revising your FMLA policies, procedures and forms to comply with the Administrative Interpretation or for assistance with any leave-related issue, please contact your local Fisher Phillips attorney.

This Legal Alert provides an overview of a specific new regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.