CLIENT ALERT

Brought to you by:

The US Department of Labor has clarified the FMLA definition of 'son and daughter'. This clarification allows an employee who is "in loco parentis", to take approved leave. "In loco parentis" is a person who is in a caretaker role for the child, but who may not be biologically or legally the child's parent

FMLA BACKGROUND:

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave due to the birth of a child, or the placement of a child with employee for adoption or foster care, or to care for a son or daughter with a serious health condition. 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— (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

In Loco Parentis

The intention of this part of the law was to allow those who were in a caretaker role of a child to take protected leave regardless as to the legal or biological relationship between the employee and the child. Congress recognized that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother. Congress stated that the definition was intended to be "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.

In loco parentis is commonly understood to refer to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. Whether an employee stands in loco parentis to a child is 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, if any, provided; and the extent to which duties commonly associated with parenthood are exercised.

The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child. Employees 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. Further, that a child may have a biological parent in the home, or have both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child

Guidelines for Employers

Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. 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. 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.

BELOW IS A NEWS RELEASE FROM THE DEPARTMENT OF LABOR. ADDITIONAL INFORMATION MAY BE FOUND ON THE DOL'S WEBSITE, www.dol.gov

News Release

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US Department of Labor clarifies FMLA definition of 'son and daughter'

Interpretation is a win for all families no matter what they look like

WASHINGTON — The U.S. Department of Labor today clarified the definition of "son and daughter" under the Family and Medical Leave Act to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

The FMLA allows workers to take up to 12 weeks of unpaid leave during any 12-month period to care for loved ones or themselves. The 1993 law also allows employees to take time off for the adoption or the birth of a child. The administrator interpretation issued by Nancy J. Leppink, deputy administrator of the department's Wage and Hour Division, clarifies that these rights, which provide work-family balance, extend to the various parenting relationships that exist in today's world. This action is a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones.

"No one who loves and nurtures a child day-in and day-out should be unable to care for that child when he or she falls ill," said Secretary of Labor Hilda L. Solis. "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 that child is born simply because the state or an employer fails to recognize his or her relationship with the biological parent. These are just a few of many possible scenarios. The Labor Department's action today sends a clear message to workers and employers alike: All families, including LGBT families, are protected by the FMLA."

As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family

and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same sex partner will be able to exercise the right to FMLA leave to bond with that child.

"This is a critical step in ensuring that children have the support and care they need from the persons who have assumed that responsibility," said Leppink. "Nothing in the statute or regulations suggests that we should restrict the rights of various individuals who take on that very important role."

The administrator interpretation provides guidance to employers in applying the FMLA's provisions in the workplace and ensures that employees are aware of their rights. Under the act, covered employers must grant eligible employees up to 12 workweeks of unpaid leave during any 12-month period for the birth and care of a newborn child; to adopt or assume care for a foster child; to care for an immediate family member (spouse, child or parent) with a serious health condition; or to take medical leave due to a serious health condition.

For more information on the FMLA and the administrative interpretation, visit the Wage and Hour Division's website, http://www.dol.gov/whd, or call the division's toll-free helpline at 866-4US-WAGE (487-9243).

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