

FMLA Expanded to Include Same Sex Parents

Under the Family and Medical Leave Act (FMLA), eligible employees may take up to 12 weeks of job-protected leave for several reasons, including the birth, adoption, foster placement or serious health condition of a “son or daughter.” A “son or daughter” includes a biological child, adopted child, foster child, stepchild, legal ward, or the child of “a person standing in loco parentis.” The FMLA regulations require that “a person standing in loco parentis” has day-to-day responsibilities to care for the child and financially support the child but the regulations do not require a biological or legal relationship with the child. However, employers and employees had expressed confusion about how to apply the FMLA when there is no legal or biological parent-child relationship.

To address these concerns, the Wage and Hour Division of the Department of Labor recently issued an Administrator’s Interpretation to clarify who is “a person standing in loco parentis” in the context of an employee taking FMLA-protected 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 Interpretation seeks only to clarify the existing requirements regarding employees who stand “in loco parentis.” It is not intended to impose new requirements for either employers or employees. Administrator’s Interpretations are not legally binding in judicial proceedings, but may be used by employers as evidence of their good faith efforts to comply with the law.

Clarification of “In Loco Parentis”

The Wage and Hour Division’s Interpretation expressly includes same sex partners as employees “standing in loco parentis,” whether or not that partner has a legal or biological relationship to the child. In other words, employees who will share equally in the raising of their partner’s biological or adopted child are entitled to FMLA leave following the child’s birth or placement, or to care for the child if the child has a serious health condition. The Interpretation does not address an employee’s entitlement to take military FMLA leave for a son or daughter, which is governed by different statutory definitions.

Under the Interpretation, employees who intend to assume parental responsibilities for a child can be “standing in loco parentis” if they establish that they provide the child with either day-to-day care or financial support, and the employee

intends to assume the responsibilities of a parent with regard to a child. This includes grandparents or aunts and uncles who assume long-term care of a child. Because the FMLA and its regulations do not limit the number of parents (or parent figures) a child may have, the Interpretation clarifies that there may be more than two adults who may qualify for FMLA leave to care for that child.

Whether an employee is actually “standing in loco parentis” will depend on the particular facts of a given situation. If an employer has questions about whether the employee’s relationship to a child is covered under FMLA, the Interpretation clarifies that the employer may require the employee to provide reasonable documentation or a statement of the family relationship. But when there is no legal or biological relationship, the employee only needs to provide a simple statement asserting the existence of the necessary family relationship.

How Should Employers Respond?

In view of this new Interpretation, employers should review their FMLA policies and procedures and train their human resources professionals and supervisors/managers to ensure that requests for FMLA leave take into consideration this expanded definition of “a person standing in loco parentis” for employees who have no legal or biological relationship to a child. Employers should look at the specific, day-to-day responsibilities of the employee requesting the leave with respect to the child in question, and should ask the same questions of the employee regardless of whether it is a same sex partner, an unmarried opposite sex partner, a stepparent or a grandparent.

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