DREW CAPUDER'S EMPLOYMENT LAW BLOG

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FMLA now applies to leave for care of children by same-sex couples

The United States Department of Labor recently issued an Administrator's Interpretation 2010-3 which applies leave rights under the Family and Medical Leave Act to care of children by same-sex couples. The US Department of Labor issued a press release to help explain the Administrator's Interpretation. In other words, employees in same-sex relationships who qualify for leave under the FMLA will be entitled to protected leave for the qualifying care of their children.

As the DOL's press release succinctly says, 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". (29 U.S.C. 2612; 29 C.F.R. 825.200).

What is a "son or daughter"?

The key issue was when the child fell into the definition of "son or daughter" for the employee seeking leave. When does the law recognize the child as the "son or daughter" of the employee?

Administrator's Interpretation 2010-3 sets out the statutory language, and same-sex couples now have the necessary relationship to the child through the status of being "in loco parentis", which more or less means someone who "stands in the place" of the parent. Here is the discussion in the Administrator's Interpretation:

> The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave, in relevant part, "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and to care for a son or daughter with a serious health condition. See 29 U.S.C. § 2612(a)(1)(A) - (C); 29 C.F.R. § 825.200. 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." 29 U.S.C. § 2611(12). See also 29 C.F.R. §§ 825.122(c), 825.800.

(emphasis added).

"Son or daughter" applies to same-sex couples

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The Administrator's Interpretation then explains that "son or daughter" was intended in the FMLA to apply to children in non-traditional family settings:

> Congress intended the definition of "son or daughter" to reflect "the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults." See S. Rep. No. 103-3, at 22. 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." Id.
>
> 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. It embodies the two ideas of assuming the parental status and discharging the parental duties." Niewiadomski v. U.S., 159 F.2d 683, 686 (6th Cir. 1947) (quotations omitted). *Black's Law Dictionary defines the term in loco parentis as "in the place of a parent*." Black's Law Dictionary 803 (8th ed. 2004). "*The key in determining whether the relationship of in loco parentis is established is found in the intention of the person allegedly in loco parentis to assume the status of a parent toward the child. The intent to assume such parental status can be inferred from the acts of the parties*." Dillon v. Maryland-National Capital Park and Planning Comm'n, 382 F. Supp. 2d 777, 787 (D. Md. 2005), aff'd 258 Fed. Appx. 577 (4th Cir. 2007) (citations omitted; emphasis in original).

(emphasis added). In then follows that

> 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, 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.

The press release summarizes the effect of the Administrator's Interpretation to apply the FMLA leave rights to employees in non-traditional parental relationships, including same-sex couples:

> 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

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> 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*.

(emphasis added).

Employers will obviously want to review their FMLA leave policies in light of Administrator's Interpretation 2010-3. Click here for the DOL's Compliance Assistance page for the FMLA.

Written by Drew M. Capuder © (contact information); Voice: 304-333-5261; July 20, 2010

This Is a PDF copy of my article originally published on my blog at:
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