We ARE Family: A DOL Interpretation That Simplifies an FMLA Issue for Iowa Employers

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No, we are not talking about the Sister Sledge song; rather, the Wage and Hour Division of the Department of Labor issued an interpretation this week clarifying who may take leave under the Family and Medical Leave Act to care for a son or daughter, even in the absence of a biological or legal relationship. A link to this interpretation can be found on the DOL's website.

To summarize, the FMLA allows eligible employees to take up to 12 workweeks of leave for the birth of a son or daughter of the employee or to care for such son or daughter. Additionally, an eligible employee may take FMLA leave due to the placement of a son or daughter with the employee for adoption or foster care, or 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.

Seems clear, right? By statute and regulation, 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). "In loco parentis" is generally understood to mean a person who puts himself or herself in the place of a parent. An employee who stands in loco parentis to a child could be a grandparent caring for a grandchild on an ongoing basis or an unmarried partner (same sex or opposite sex) that shares in the raising of the other partner's biological child. The DOL states the following regarding the number of "parents" a child may have and what may be required to prove the relationship:

> "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 'son or daughter' of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child. 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. *See* 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008)."

What does this mean for Iowa employers? In Iowa, same-sex couples are allowed to marry, but under federal law – the Defense of Marriage Act (DOMA) – marriage is exclusively considered to be between one man and one woman regardless of whether the union is legal under state law. This has caused some confusion for Iowa employers wanting to comply with both federal and Iowa employment laws. With regard to FMLA leave to care for a child, however, this week's DOL interpretation makes it clear that unmarried partners or other individuals that do not have a legal or biological relationship with a child – including same-sex partners – may have a right to it.

If you have questions about the FMLA, please contact attorney Ann Holden Kendell at 515-246-4555 / akendell@dickinsonlaw.com, or another member of the firm's Iowa Employment Law and Labor Law Group at employmentlaw@dickinsonlaw.com.