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US Department of Labor Expands FMLA Definition of "Son or Daughter"

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The federal Family and Medical Leave Act ("FMLA") permits eligible employees to take up to twelve work weeks of unpaid leave for specified family and medical reasons. These reasons include caring for a child with a serious health condition or for bonding following the birth or adoption of a son or daughter (hereafter, "to care for a child"). 29 U.S.C. § 2612(a)(1)(A)-(C). The current definition of "son or daughter" includes a biological, adopted, or foster child, a stepchild, a legal ward, or the child of a person standing "*in loco parentis*," i.e., in the place of a biological parent. 29 U.S.C. § 2611(12). Federal regulations define *in loco parentis* to include "those with day-to-day responsibilities to care for and financially support a child… . A biological or legal relationship is not necessary." 29 C.F.R. § 825.122(3). However, the text of the FMLA does not plainly address whether an employee is entitled to leave to care for a child with whom there is no financial obligation, legal or biological relationship. This ambiguity has left employers wondering whether FMLA leave is available to persons in so-called "non-traditional" families, such as those in which grandparents care for their grandchildren or same-sex or unmarried heterosexual partners provide care for their partner's child.

DOL's Expansion of FMLA Rights to LGBT and other "Non-Traditional" Families

In late June, the Department of Labor ("DOL") issued new guidance explaining that an employee may take FMLA leave to care for a child for whom he or she is acting as a parent even if there is no legal or biological relationship to the child. *See* Administrator's Interpretation No. 2010-3. The guidance states that either financial obligations *or* day-to-day care of the child is required to take leave, but not both. In announcing the new guidance, the DOL specifically stated it covers lesbian, gay, bisexual, and transsexual ("LGBT") families. The Secretary of Labor said:

> 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. … 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.

The guidance provides several examples of situations in which FMLA leave is available, regardless of the legal or biological relationships between the employee, the child, and the child's biological or adoptive parent. In sum, the DOL has clarified that the FMLA's definition of "son or daughter" includes children being raised in LGBT and other so-called "non-traditional" families.

Washington Family Leave Act

Washington has its own Family Leave Act ("FLA"), RCW 49.78, which largely parallels the FMLA. Under the FLA, an employee is entitled to leave for the birth, placement, or care of a "child." The FLA definition of a "child" is essentially the same as the FMLA's definition of "son or daughter." Unlike the FMLA, the FLA applies equally to registered domestic partnerships and marital relationships, so eligible registered domestic partners are able to use FLA leave to care for a partner with a serious medical condition. However, like the FMLA, the FLA does not specifically address whether an employee may take leave to care for a child with whom there is no financial obligation, legal or biological relationship. In fact, neither the FLA nor its implementing regulations defines "*in loco parentis*." Nevertheless, given that Washington courts tend to interpret state laws to grant similar or even greater rights than their federal law counterparts, the DOL's expansive reading

of the FMLA will likely be used as support for asserting that the FLA grants (or should grant) the same kind of leave rights to non-traditional families.

Advice for Employers

The DOL's guidance provides parameters for when FMLA leave is available to care for a child with whom an employee has no legal or biological relationship. However, the guidance potentially creates problems for employers who wish to verify a true *in loco parentis* relationship. How will an employer determine whether an employee is legitimately acting as a parent? The DOL's guidance encourages an expansive reading of "*in loco parentis*" and looks to whether the employee is providing either day-to-day care *or* financial support to a child as proof that the employee is actually acting as a parent. Should an employer choose to require some documentation, the guidance states that, "[a] simple statement asserting that the requisite family relationship exists is all that is needed in situations such as *in loco parentis* . . . ." Administrator's Interpretation No. 2010-3 at 3. Under Washington's FLA, an employer may require that leave be supported by a certification issued by a health care provider and the employee's statement that he or she needs to care for a family member. RCW 49.78.270. These requirements are not stringent. Accordingly, employers generally should err on the side of finding a parent-child relationship when presented with an employee's assertion that such a relationship exists.

Another open question is whether the current limit of 12 total weeks of leave for spouses working for the same employer will apply to non-traditional parents seeking leave to care for a child. *See* 29 C.F.R. §825.202. The DOL's new guidance does not specifically address this point, but because federal regulations state that the limit applies to "husband and wife" and federal law does not recognize same-sex marriage or partnership, this limit will arguably not apply to non-traditional parents under federal law. Under Washington law, however, the 12-week limit does apply to registered domestic partners who work for the same employer and take FLA leave for the birth or placement of a child. *See* RCW § 49.78.260.

Employers should anticipate that employees, including those in LGBT families, will request leave for the birth or adoption of, or to care for, children with whom there is no legal or biological relationship. To ensure that such leave is granted where appropriate, employers should review and, if necessary, revise their FMLA policies to ensure they comply with the new guidance.