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LEGAL ALERT

Legal Alert: DOL "Clarifies" that FMLA Definition of Son or Daughter Includes Children of Same-Sex Domestic Partners

6/24/2010

The U.S. Department of Labor (DOL) recently issued an Administrative Interpretation (AI) clarifying its opinion that employees are entitled to take Family and Medical Leave Act (FMLA) leave for birth, bonding or to care for the child of a domestic partner or same-sex domestic partner, as well as other children for whom an employee has responsibility for day-to-day care or financial responsibility, even though the employee has no biological or legal relationship with the child. According to the DOL, the AI was issued in response to numerous inquiries from employers regarding when an employee with no legal relationship to a child is considered to be standing "in loco parentis" under the FMLA and, accordingly, entitled to leave. (The AI does not address an employee's entitlement to take military-related leave under the FMLA, which is governed by different definitions.)

Although the DOL states that it is clarifying the definition of when an employee is considered to stand "in loco parentis," this is the first time the agency has specifically stated that otherwise covered employees are entitled to take FMLA leave to care for the children of same-sex domestic partners.

Background

The FMLA allows an eligible employee to take up to 12 weeks of 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 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."

The AI explains that Congress intended the definition of "son or daughter" to reflect the reality that many children in the Unites States today do not live in traditional "nuclear" families with their biological father and mother. Congress further stated that the definition was intended to be construed to ensure that an employee who 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 the child. Accordingly, Congress included the term "in loco parentis," which is defined as "in the place of the parent" within the definition of "son or daughter." The key in determining whether someone is "in loco parentis" is the intention of the person to assume the status of parent toward a child.

Interpretation

The DOL stated that whether an employee stands "in loco parentis" to a child is a fact issue dependent on multiple factors including:

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the age of the child;

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the degree to which the child is dependent on the person claiming to be standing "in loco parentis";

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the amount of support, if any, provided; and

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the extent to which duties commonly associated with parenthood are exercised.

Further, the FMLA regulations define "in loco parentis" as including those with day-to- day responsibilities to care for and financially support a child. The AI interprets this regulation to require ***either*** day-to-day responsibilities for care ***or*** responsibility for financial support, but states that an employee is not required to show both factors to be considered standing "in loco parentis" for a child.

Thus, the AI states that employees with no legal or biological relationship to a child may nonetheless stand "in loco parentis" to a child and be entitled FMLA leave. Examples of persons who might fit the definition of "in loco parentis" include:

• an employee raising a child with the biological parent;

• same sex partners raising a child where the employee has no legal or biological relationship with the child;

• an employee who requests leave to bond with the adopted child of a same sex- partner; and

• a grandparent or other relative who has taken on the responsibility to raise a child but has not legally adopted the child.

It should be noted that the fact that a child has biological parents does not prevent a finding that the child is the "son or daughter" of an employee who lacks a legal relationship with the child because "neither the statute nor the regulations restrict the number of parents a child may have under the FMLA." 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. According to the Administrator, an employer who is not sure whether the employee is entitled to leave as standing "in loco parentis" should be satisfied with a simple statement asserting that the requisite family relationship exists.

Employers' Bottom Line

Whether an employee's relationship to a child is covered under the FMLA

must be analyzed on a case by case basis. The fact that an employee provides either day-to-day care or financial support may be sufficient to establish an "in loco parentis" relationship where the employee intends to assume the responsibilities of a parent. Therefore, it is important to be aware of the broad interpretation the DOL gives this term and carefully analyze every request under the FMLA for leave to care for a child.

If you have any questions about the Administrative Interpretation or other FMLA issues, please contact the author of this Alert, Karen Montas-Coleman, kcoleman@fordharrison.com, or the Ford & Harrison attorney with whom you usually work.