# The Department of Labor Clarifies the "In Loco Parentis" Doctrine of the FMLA

The latest change to the Family and Medical Leave Act (FMLA) comes via the Department of Labor (DOL) rather than Congress. On Tuesday of this week, the DOL issued an opinion letter stating that the "in loco parentis" ("in the place of a parent") doctrine should be read by covered employers to allow same-sex partners to take FMLA leave for the birth of or to care for a newborn or sick child of a same-sex partner, or of any child for which they otherwise have or will have regular caretaking responsibilities.

The "in loco parentis" doctrine has been part of the FMLA since it was passed in 1993. All the DOL did in this opinion letter was clarify that this doctrine should be used by employers to allow same-sex partners, or any person who has or will have regular caretaking responsibilities for a child, to take FMLA leave for the birth of or to care for such child as a newborn or when it develops a serious health condition up until age 18.

Under the "in loco parentis" doctrine, the employee does not have to have any legally-recognized relationship to the child, through legal guardianship, marriage, blood, adoption or otherwise, in order to take FMLA leave for the birth of or to care for a newborn or a child who develops a serious health condition. This doctrine has always allowed anyone who "stands in the place of a parent" in a child's life and care to take FMLA leave in connection with the birth, newborn care or serious health condition of that child.

The DOL also explained in the opinion letter that this doctrine allows a child to have more than two parents. So, even if the child's biological parents both are "still in the picture," a same-sex partner, grandmother, etc. who also has or will have day-to-day responsibilities for caring for the child still can be deemed "a parent" for purposes of the DOL's current reading of the FMLA. Guess it really does "take a village" to raise a child now!

So, along with same-sex partners, this DOL opinion letter also is going to change the way employers deal with an "employee grandma" whose 18-year-old daughter is having a baby that she is going to help take care of and who wants to take time off to do so or just to be present for the birth. Previously, the employee's daughter would have been deemed an "adult" and therefore not a "son" or "daughter" under the non-military provisions of the FMLA, such that the "employee grandma" would not have been entitled to any FMLA leave in connection with the birth of her grandchild. But with this "anyone who has or will have day-to-day responsibility for caring for the child, even if in addition to the child's biological parents" reading of the "in loco parentis" doctrine, "employee grandma" now can take FMLA leave in this situation. The DOL does throw employers a bone in confirming that they can "request documentation" confirming "employee grandma's" day-to-day caretaking responsibilities. However, the bone is fairly tiny, in that the DOL goes on to expressly say that "a simple statement asserting that the requisite family relationship exists is all that is needed."

The DOL also states that "either day-to-day financial or physical care may establish an in loco parentis relationship." To complete the quandaries created by this opinion letter, the letter closes with a footnote which says, "there is no specific set of factors that, if present, will be considered to be dispositive in determining in loco parentis status." Employer translation -- "you can either provide the leave or spend years litigating this." The only situation the DOL felt comfortable saying would NOT qualify as an "in loco parentis" relationship was "a relative who cares for a child while the parents are on vacation."

One reason the DOL opinion letter was deemed necessary was that many employers have been trying to find ways to provide FMLA leave to same-sex partners merely by redefining on their own "who is a spouse?" – either by using the law of a state in which they do business or otherwise as a matter of "company" policy. However, FMLA leave granted based on such "redefinitions" of a "spouse" cannot truly be classified as FMLA leave as a matter of law due to the federal Defense of Marriage Act (DOMA), which precludes the term "spouse" as being legally interpreted to mean anything aside from the union of a woman and a man for purposes of any federal law, including the FMLA.

Note that because of the DOMA, the DOL could not go so far in this opinion letter as to provide FMLA leave to allow same-sex partners to care for one another, again, even in those states where same-sex marriage or other types of same-sex unions have been legalized. There is no "in the place of a spouse" provision of the FMLA. Employers who choose to provide leave in this situation, again based either on a state law which recognizes same-sex marriage or just a company policy doing so, cannot "count" such leave toward an employee's allotment of FMLA leave. Accordingly, employers who choose to "self-extend" leave so as to allow same-sex partners to care for one another also are choosing to treat same-sex partners more favorably than federally-recognized married individuals, in that these same-sex partners will still be eligible to take their 12 or 26 weeks of FMLA leave in addition to their employer-provided "same-sex partner care leave." One way around this result could be for such employers to ask their gay and lesbian employees to sign a release agreement stating that they are waiving their right to FMLA leave in exchange for the 12 or 26 weeks of "same-sex partner care leave" the employer is providing them, which is not required by federal law, so that they will receive the same amount of leave to care for one another as their heterosexual counterparts.

In those states outside of Tennessee and Georgia (like California) which have their own state leave of absence laws, this discussion of the FMLA versus the DOMA would not come into play concerning the interpretation of these separate state leave laws, as the employer's obligation to provide leave to same-sex partners under a state leave of absence law would be defined based on whether the state recognizes same-sex spouses or otherwise specifically requires that "same-sex marriages legally created in other states must be treated the same under state law as heterosexual marriages." (For a list of those states which currently recognize same-sex marriage and/or which otherwise require that same-sex spouses be given the same rights as heterosexual ones for purposes of their separate state leave of absence laws, please contact Stacie Caraway.)

For questions concerning this alert or any other Labor and Employment law topic, please feel free to contact Stacie Caraway or any other Miller & Martin Labor and Employment law attorney.