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CLIENT BULLETIN

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MUCH ADO ABOUT LITTLE:
New FMLA Interpretation Not as Dramatic as it Seems

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The U.S. Department of Labor issued last week an **interpretation** of the definition of "son or daughter" as it applies to an employee standing *in loco parentis* to a child under the Family and Medical Leave Act. A person *in loco parentis* does not necessarily have a biological or legal relationship to a child but, as a matter of fact, acts as the child's parent. This could include, for example, a step-parent who has not adopted his or her step-child but handles the day-to-day activities as if he or she were the parent.

The DOL interpretation grabbed headlines because it explicitly said that same-sex couples can be eligible for FMLA leave for the birth, adoption, foster placement, or serious health condition of a child if they are acting *in loco parentis* to that child. Despite the fanfare that this clarification has caused, this part of the DOL's interpretation has not changed existing law.

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." Parental leave has always been available under the FMLA to an employee who stands *in loco parentis* to the "new" or sick child.

Nonetheless, Secretary of Labor Hilda L. Solis has touted the interpretation as a victory for same-sex couples: "No one who loves and nurtures a child day-in and day-out should be unable to care for that child when he or she falls ill…No one who steps in to parent a child when that child's biological parents are absent or incapacitated should be denied leave by an employer because he or she is not the legal guardian…All families, including LGBT families, are protected by the FMLA." (LGBT is an acronym for lesbian-gay-bisexual-transsexual.) Under the DOL interpretation (and prior law), partners in "straight" unmarried relationships would have the same rights, as well as married step-parents.

However, there is one aspect of the DOL interpretation that seems to expand the definition of what is *in loco parentis*. The interpretation provides that, where a child's biological parents marry other people, all of the partners are entitled to FMLA leave for the child. Although the FMLA regulations define *in loco parentis* as including

those with day-to-day responsibilities to care for and financially support a child, the interpretation does not appear to require this level of involvement in the child's life. It is not clear whether the DOL really intended to make absentee, uninvolved, step-parents eligible for FMLA leave, and it is not clear whether the courts would uphold such an interpretation to the extent that it goes beyond the scope of the FMLA regulations and the language of the statute.

Although the interpretation's impact on same-sex couples has received the most press, employers should be prepared for FMLA leave requests from others who seek to take advantage of the (arguably) loosened definition. Extended family, such as grandparents, siblings, aunts, and uncles, may try to qualify for FMLA leave if they contribute to the care of a child by, for example, babysitting after school. Requests from step-parents will have to be carefully reviewed, as well. The FMLA regulations allow employers to require certification of the qualifying *relationship* and, in the case of serious health condition leave, medical certification that the child has a qualifying serious health condition and that the "parent" is "needed to care for" the child.

It should also be noted that the *in loco parentis* determination is relevant only where the FMLA leave is sought *for a son or daughter*. Unmarried employees remain ineligible to take FMLA leave for their *partners'* serious health conditions, including pregnancy and prenatal care even where the unmarried partner is the father. This is part of the statute, and the DOL does not have authority to change it; only an amendment to the FMLA by Congress would permit such a change.

If you need assistance with the new DOL interpretation or any other aspect of the Family and Medical Leave Act, please contact the Constangy attorney of your choice.