

FMLA Regulations Are “Clarified” by the Department of Labor

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On June 23, 2010, the Department of Labor issued guidance to clarify the definition of "son or daughter" under the FMLA as it applies to an employee taking FMLA-protected 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 regulations define a son or daughter as a biological or adopted child, foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*. The Department of Labor did not modify the Act or its Regulations, but merely clarified this definition.

As you are probably aware, the FMLA allows eligible employees to take 12 workweeks of job-protected 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 regulations define a son or daughter as a biological or adopted child, foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis*, who is under the age of 18 or 18 years of age or older and incapable of self-care because of mental or physical disability.

Questions concerning who was eligible for FMLA under the definition of in *loco parentis* spurred this clarification. In *loco parentis* has been described as "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption." *Niewiadomski v. U.S.*, 159 F.2d 683 (6th Cir. 1947). The DOL believed that Congress intended the definition of what constituted a "son" or "daughter" under the FMLA to reflect that many children do not live in a traditional family. Therefore, a broader understanding of the definition of an employee's son or daughter was needed.

While the DOL found that there are many factors to determine if an employee is standing in *loco parentis* to a child, the guidance now makes clear that there is no requirement for a biological or legal relationship with the child to stand in *loco parentis*. For example, the leave can be extended to domestic partners, grandparents, or other family members who provide either day-to-day on-going care or financial support for the child. As an example, the DOL stated, "an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in *loco parentis* to the child." Likewise, "an employee who will share equally in the raising of an adopted child with a same sex partner, but who, does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in *loco parentis* to the child." Additionally, there are no restrictions on the number of parents a child may have. For instance, if a child's biological parents are divorced and remarried, all four parents (biological and step-parents) are entitled to FMLA leave related to the child.

It remains lawful to require the employee to provide reasonable documentation or a statement of the family relationship if the employer questions the employee's relationship with the child. However, the DOL has found that a simple statement "asserting the requisite family relationship exists is all that is needed in situations such as in *loco parentis* where there is no biological relationship."

Based upon the DOL's recent clarification, many employers may need to adjust their FMLA policies to reflect

the broader definition of *in loco parentis*. Even if your policy doesn't need to be revised, it is clear that employers must ensure that their staff is well-trained to recognize what qualifies as an employee's son or daughter and if that employee is eligible for leave under FMLA to care for that son or daughter. Employers should be careful to ensure that the policy is applied to include all individuals who may qualify under the Department of Labor's guidance, including domestic partners, grandparents, or others without a legal relationship to a child who needs care as long as that employee has stood *in loco parentis*. If you have any questions as to how the policy should be applied to specific situations, please contact Dinsmore & Shohl for guidance.