A Timely Analysis of Legal Developments

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On June 22, 2010, the Department of Labor issued an interpretation letter broadening the definition of *in loco parentis* under the FMLA. In so doing, the DOL expressly extended FMLA leave rights to same-sex partners and expanded the number of individuals who may qualify for leave under the FMLA.

Who's Watching the Kid? The Department of Labor Expands the FMLA Definition of a Son/Daughter for the Purposes of Child-Related Leaves

By James P. Smith, Gavin S. Appleby and Jeffrey J. Moyle

The U.S. Department of Labor has greatly expanded the definition of "son/daughter" for purposes of child-related leaves under the Family and Medical Leave Act (FMLA). In doing so, the Obama Administration has opened the door to extending parental leave to many additional employees, including same-sex partners. On June 22, 2010, the Department of Labor (DOL) issued an interpretation letter clarifying the definition of *in loco parentis* under the FMLA. According to the DOL, in order to qualify for *in loco parentis* status under the FMLA, an employee need only establish one – not both – of the following elements: (1) he or she provides day-to-day care for the child; or (2) he or she is financially responsible for the child.

Under the FMLA, eligible employees are entitled to up to 12 weeks of unpaid leave for the birth, placement, or adoption of a child, or to care for a son or daughter with a serious health condition. According to the FMLA regulations, a son or daughter includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing 'in loco parentis.'" Employees who have no biological or legal relationship with a child may stand *in loco parentis* to the child and be entitled to benefits under the FMLA.

The FMLA regulations define *in loco parentis* as individuals with day-to-day responsibilities to care for and financially support a child. The DOL's interpretation seems to broaden that regulatory language by turning "and" into "or." In its letter, the DOL states that, to attain *in loco parentis* status, the employee can either be: (1) responsible for the child's day-to-day care; or (2) financially responsible for the child. Further, the DOL states that, to prove *in loco parentis* status, an employee need only provide his or her employer with a simple statement "asserting the requisite familial relationship." In other words, an employee need only state that he or she is responsible for caring for the child or is financially responsible for the child to attain *in loco parentis* status and therefore become eligible to take a leave of absence under the FMLA.

The DOL's analysis could affect many employees from grandparents to stepparents

and other relatives and guardians. Most notably, the DOL's opinion is groundbreaking to the extent that, for the first time, it expressly mentions same-sex partners as qualifying for benefits under the FMLA. According to the DOL, "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 the placement, or to care for the child if the child had a serious health condition..."

Putting the politics of the gay rights issue aside, the key concern for employers is the DOL's extremely expansive view of the term "son/daughter." It seems that the DOL is taking the notion of "it takes a village to raise a child" quite literally. In its interpretation, the DOL makes it clear that having both a mother and father does not prevent a finding that the child is a "son or daughter" of another employee who lacks a biological or legal relationship with the child. This interpretation is somewhat perplexing in that, theoretically, any number of individuals could claim a single child as a son or daughter and obtain leave under the FMLA. The only example of a non-covered limitation in the DOL's analysis is that an employee who cares for a child for a week while the parents go on vacation would not be *in loco parentis*.

Legally, the DOL interpretation letter is merely an opinion of how the FMLA should be interpreted. The interpretation letter does not have the same effect as the statute or the FMLA regulations and does not automatically establish a new legal standard. It remains to be seen whether courts will be persuaded by the DOL's new interpretation of the term *in loco parentis*, and whether courts would be willing to adopt the same definition. As a practical matter, however, employers should consider extending FMLA leave time for the birth or adoption of a child, or to care for a sick child, to employees who can establish that they provide day-to-day care for a child, or that they are financially responsible for the child.

Many larger employers already provide certain benefits to same-sex partners in recognition of diversity as well as employee commitment and loyalty. Not all of those employers, however, extend those benefits to FMLA leave, and many smaller employers who are nevertheless covered by the FMLA have not previously extended benefits to same-sex partners. Employers should discuss with counsel all aspects of the DOL's new interpretation, including same-sex partnership issues. A change in policy should be considered as well. Employers should bear in mind, however, that the DOL's interpretation is not technically a change in the law.

The extension of FMLA child-oriented leaves to same-sex partners has created new discussion about a possible extension of "spousal" rights, as the FMLA also permits leave to care for a spouse with a serious health condition. The DOL's letter does not address that issue and such an expansion would be difficult in all but a few states given the FMLA regulations' definition of a spouse: "Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides . . ." Additional changes in the FMLA, however, could come through legislation or formal modification of the applicable regulations.

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