

Legislative Brief

FMLA Rights Expanded for Nontraditional Families



EXECUTIVE SUMMARY

On June 22, 2010, the US Department of Labor-Wage and Hour Division (WHD) issued an Administrator's Interpretation letter expanding the definition of "son or daughter" under the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child.

The Administrator's Interpretation concludes that:

- Either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child;
- The employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship; and
- In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts.

This FAS-EBA, Inc. Legislative Brief provides an overview of this WHD Administrator's Interpretation letter. Please read below for more information.

OVERVIEW OF THE DOL ADMINISTRATOR INTERPRETATION

The WHD received several requests for additional guidance regarding whether employees who do not have a biological or legal relationship with a child may take FMLA leave for birth, bonding and to care for the child. The WHD has now clarified and expanded the definition of "son or daughter" under the FMLA to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.¹ Based on the WHD's experience in administering the FMLA, WHD found that many employees and employers are unsure of how the FMLA applies when there is no legal or biological parent-child relationship. Thus, the Administrator issued an interpretation to provide needed guidance on this important area of law.

The FMLA allows workers to take up to 12 weeks of unpaid leave during any 12-month period to care for loved ones or themselves. It also allows employees to take time off for the adoption or the birth of a child. The Administrator Interpretation clarifies that these rights, which it asserts provide work-family balance, extend to the various parenting relationships that exist in today's world.

¹ See WHD Administrator's Interpretation No. 2010-3 (June 22, 2010) found at www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf

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Protection of Nontraditional Families

The WHD believes that this action is a victory for many nontraditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones.

"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," said Secretary of Labor Hilda L. Solis. "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. No one who intends to raise a child should be denied the opportunity to be present when that child is born simply because the state or an employer fails to recognize his or her relationship with the biological parent. These are just a few of many possible scenarios. The Labor Department's action today sends a clear message to workers and employers alike: All families, including LGBT families, are protected by the FMLA."

As the Interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. And an employee who intends to share in the parenting of a child with his or her same sex partner will be able to exercise the right to FMLA leave to bond with that child.

Applicable FMLA Regulations

The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child. Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave.

Even though the regulations specifically state that "persons who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child," it is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition.

The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, 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. Similarly, 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.

Purpose of Administrator Interpretations

In order to provide meaningful and comprehensive guidance and compliance assistance to the broadest number of employers and employees, the WHD Administrator issues Administrator Interpretations when

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determined, in the Administrator's discretion, that further clarify regarding the proper interpretation of a statutory or regulatory issue is appropriate. Administrator Interpretations set forth a general interpretation of the law and regulations, applicable across-the-board to all those affected by the provision in issue. Guidance in this form is useful in clarifying the law as it relates to an entire industry, a category of employees or to all employees.

In this case, the Administrator Interpretation provides guidance to employers in applying the FMLA's provisions in the workplace and ensures that employees are aware of their rights.

Employer Response

Until a court rules on the appropriateness of the WHD's expanded definition of the FMLA regulations, employers should consider taking an expanded application of the regulations when granting such FMLA leaves. Employers should review their FMLA policies and actual practices to ensure that they are in compliance with this newly expanded reading of the regulations. Note that for some individuals working for the same employer, they may not be limited to a combined total of 12 weeks leave, as those limitations apply only to a husband and wife working for the same employer.

Further, employers may require employees to provide reasonable documentation or statement of the family relationship, if there is a question about its existence. However, a simple statement asserting that the requisite family relationship exists is all that is needed in situations such as in loco parentis where there is no legal or biological relationship.

FAS-EBA, Inc. will keep on top of developments regarding this and other Administrator Interpretations and will work to keep you informed.

This FAS-EBA, Inc. Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

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