

Compliance Alert

DOL Clarifies FMLA Definition of a “Son or Daughter”

The Family and Medical Leave Act of 1993 (“FMLA”) requires certain employers to permit eligible employees to take up to 12 weeks of unpaid, job-protected leave each year, in relevant part:

- because of the birth of a son or daughter of the employee and in order to care for such a son or daughter,
- because of the placement of a son or daughter with the employee for adoption or foster care, and
- to care for a son or daughter with a serious health condition.

FMLA defines a *son or daughter*¹ 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. The FMLA regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child.

The DOL issued an Interpretation on June 22, 2010, indicating that either day-to-day care or financial support (not both) may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard 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 determination of whether an employee stands *in loco parentis* to a child will depend on the particular facts and circumstances of a specific situation.

When an employer has questions about whether an employee’s relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or a 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; no such relationship is required to find *in loco parentis* status.

The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the “son or daughter” of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. For example, where a child’s biological parents divorce, and each parent remarries, the child will be the “son or daughter” of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child.

Examples of situations in which an *in loco parentis* relationship may be found include where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care or where an aunt assumes responsibility for raising a child after the death of the child’s parents.

¹ This does not address an employee’s entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions.

For a copy of the Interpretation, visit:

http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf.



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