

Labor & Employment Client Service Group

To: Our Clients and Friends

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Department of Labor Clarifies FMLA Definition of “Son or Daughter,” Confirming Benefit Eligibility of Non-Traditional Families

Under the Family and Medical Leave Act (the “FMLA”), eligible employees may take up to 12 weeks of job-protected leave upon the birth of a son or daughter, the placement of a son or daughter for adoption or foster care, or to care for a son or daughter with a serious health condition. Pursuant to the statute, the term “son or daughter” not only includes children with whom a parent has a biological or legal relationship, but the children of individuals standing “*in loco parentis*,” i.e., “in the place of a parent.”

On June 22, 2010, the U.S. Department of Labor issued an Administrator’s Interpretation (the “Interpretation”) clarifying the definition of the term “son or daughter” as it applies to employees standing *in loco parentis* relative to a child. Issued in recognition of “the reality that many children in the United States today do not live in traditional ‘nuclear’ families with their biological father and mother,” the Interpretation explicitly clarifies that individuals who assume the responsibilities of a parent with regard to a child, but who do not have a legal or biological parent-child relationship with the child, may nonetheless be entitled to FMLA leave.

To this end, the Interpretation acknowledges that, increasingly, those who need workplace accommodations in order to care for a child are, in fact, relatives, guardians, or other adults who take on the day-to-day responsibilities of caring for a child, but actually have no legal or biological relationship to that child. For example, the Interpretation notes that the following potential “*in loco parentis*” relationships may render an employee eligible for FMLA leave: (1) an employee raising a child with a same-sex partner; (2) a grandmother who undertakes the responsibility of caring for a grandchild where the child’s parents are incapable of providing care; and (3) an aunt who assumes responsibility for raising a child after the death of the child’s parents.

The hallmark of these relationships is that the employee has day-to-day responsibility for the care and well-being of the child. The Interpretation explains that the question of whether an employee stands

in loco parentis to a child is a question of fact that depends on many considerations. These factors may include the age of the child, the degree to which the child is dependent upon the person claiming to be standing *in loco parentis*, the extent to which the general duties of parenthood are being exercised, and the amount of support, if any, that is being provided. In this regard, the Interpretation states that an employee may be found to stand *in loco parentis* even if the employee does not provide financial support to the child. This assertion arguably expands the category of people entitled to take leave to care for a child, as the FMLA's implementing Regulations (and prior opinion letters) state that an employee must have day-to-day responsibilities of caring for *and* financially supporting a child.

In order to determine whether an employee stands *in loco parentis* relative to a child, it may sometimes be appropriate for employers to request that the employee provide "reasonable documentation" evidencing the relationship or a statement of the family relationship, which the Interpretation indicates can include a simple statement asserting that the requisite family relationship exists.

The Interpretation expressly states that it applies only to situations in which an employee is seeking FMLA 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, and that it does *not* address an employee's entitlement to take military FMLA leave for a son or daughter. Nonetheless, a statement issued by the Department of Labor indicates that the Interpretation "makes clear" that 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.

In sum, although the scope - and validity - of the Interpretation will need to be determined by the courts, it is critical for employers to remember that eligibility for FMLA leave in relation to a "son or daughter" is not limited to the biological or legal parents of a child.

Bryan Cave lawyers are ready to provide assistance in determining whether employees qualify for FMLA leave, whether based on an *in loco parentis* relationship or otherwise. Please feel free to contact us if you have questions about the Department of Labor's new Interpretation.

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