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Department of Labor Extends Family Medical Leave Act Coverage to Same-Sex, Non-Traditional Parents

On June 22, 2010, the U.S. Department of Labor issued a clarification of definitions under Section 101(12) of the Family and Medical Leave Act (FMLA) designed to ensure all employees who care for children are eligible for parental rights to leave under the Act—even when the employee lacks a legal or biological relationship to the child. The change requires employers to provide FMLA leave to employees caring for children who were previously uncovered by the Act, particularly gay and lesbian parents and "non-traditional" parents who care for children but are not those children's legal stepparents or guardians. The change is a clarification from the Department about its new interpretation of the FMLA, rather than a statutory or regulatory change to the law. Nevertheless, all employers should take note of the Department's new guidelines with an eye towards compliance.

The administrative interpretation clarifies the Department's reading of the terms "son or daughter" as used in the FMLA. The current definition includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2612(a)(1)(A) - (C). The new interpretation relies on an expansive reading of "in loco parentis." In short, a person standing in loco parentis means he or she is acting in place of the child's biological or legal parents. Whereas courts have held that a finding of in loco parentis requires some demonstration of day-to-day care and financial support, the Department's reading of the term will not require such a showing. Instead, the Department will look to either day-to-day care *or* financial support as a way to show employees are actually acting as parents to children. Employers who have questions about whether their employees stand in loco parentis to the children they seek leave to care for may require documentation of the family relationship. The Department has stated that that "a simple statement asserting that the requisite family relationship exists is all that is needed" to establish in loco parentis status. *See* 29. C.F.R. § 725.122 (j). Additionally, the Department takes care to note that the presence of another adult in a child's home who is the child's legal or biological parent does not prevent an employee from accessing FMLA for birth, adoption, or care of that same child.

FMLA provides eligible employees twelve workweeks of unpaid leave per year to employees to attend to family-related needs, including birth and care of a newborn, the adoption of a child or placement of a child from foster care in the employee's home, or to care for an immediate family member with a serious health condition. This administrative definition only changes the interpretation of the terms "son or daughter," however, so employees will only be eligible to access FMLA provisions for child-related concerns. The changes ensure eligible employees who seek to be caregivers for a child in any of the above circumstances can take leave.

Notably, the change in interpretation does not apply to the recently enacted provisions in the law that allow parents to access FMLA leave due to issues arising from the employee's son's or daughter's deployment (or impending deployment) in the Armed Forces or from the child's injuries sustained while he or she is on active duty. Though they also cover people standing "in loco parentis" to a servicemember, the definitions of "son and daughter" in the military related provisions are contained in different sections of the law than the family related provisions, and are different in that they apply to children "of any age." 29 C.F.R. § 822.122(g), (h). The Department has not stated why it has chosen to limit its new interpretation to the non-military context. Please see our previous blog posting for more information on employee eligibility to access military FMLA leave.

Employers should note that under the new interpretations, employers will still not be required to provide FMLA leave to employees seeking time to care for their unmarried or same-sex partners, as those individuals are not included under the term "spouse" in the Act. However, particular states—like California, for example—may have requirements that employers provide similar leave to employees in same-sex marriages or registered domestic partnerships. Employers who offer leave above and beyond the federal or state requirements can of course continue to do so.

The rest of the FMLA's provisions are unaffected by this change. Accordingly, an employer refusing leave to employees newly covered by the Act could be subject to enforcement of the Act's provision by the Secretary of Labor, or potentially

be liable to employees who pursue civil action. *See* 29 U.S.C. § 2617. Coverage by the Act of employees or employers is unchanged as well, so limitations of employee eligibility (must have been employed for at least a year and provided 1,250 hours of service) and employer eligibility (must have employed fifty or more employees for twenty or more workweeks) remain.

Pursuant to the new administrative interpretation, employers should change their policies and forms to reflect the changes and act in good faith in providing leave under these new circumstances.