

DEPARTMENT OF LABOR EXPANDS FMLA LEAVE RIGHTS TO INCLUDE
“NON-TRADITIONAL PARENTS”

On June 22nd, the Department of Labor issued an Administrator’s Interpretation to clarify the definition of “son or daughter” under the Family and Medical Leave Act (FMLA). The Interpretation effectively expands the definition, and thereby grants leave rights to all individuals providing day-to-day care or financial support to a child, regardless of biological or legal relationships.

The FMLA entitles eligible employees to twelve weeks of unpaid leave during any twelve-month period for various reasons, including (1) the birth of a child, (2) the placement of a child with the employee for adoption or foster care, or (3) caring for a child with a serious health condition. For leave to apply, the FMLA requires that the child be a “son or daughter” of the employee.

Under existing FMLA regulations, the definition of “son or daughter” includes biological and adoptive parents, as well as step children, foster children, legal wards and persons standing “in loco parentis.” FMLA regulations define “in loco parentis” persons as “those with day-to-day responsibilities to care for and financially support a child.” The regulations also state that a “biological or legal relationship is not necessary.”

The Administrator’s Interpretation makes two important points with respect to these definitions. First, it re-emphasizes that a biological or legal relationship between the employee and child is not necessary. Second, it expands the phrase “in loco parentis” by reading the word “and” out of the regulatory definition. The Interpretation states that an employee need only provide day-to-day care or financial support, not both. To be clear, the Interpretation does not have the binding force of a statute or court opinion. However, agency opinions like this one typically receive deference from courts, and employers should give them careful consideration in structuring FMLA policies.

Examples of covered employees are provided in the Interpretation. For instance, an employee raising an adopted child with a same-sex partner would be covered. The Interpretation expressly extended coverage to gay and lesbian families, even where the state in which the employer is located does not legally recognize such relationships. Additionally, the Interpretation explained that, “where a child’s biological parents divorce, and each parent remarries, the child will be the ‘son or daughter’ of both biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child.” Further, the Interpretation is intended to extend leave rights to individuals—like grandparents and other relatives—who provide day-to-day care for child when biological parents are incapacitated or absent.

In light of the new Interpretation, more employees may be entitled to FMLA leave. If a non-traditional parent requests leave, an employer may require that the employee provide “reasonable” documentation or a statement regarding the relationship. However, the Department of Labor made it clear that 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.”

eLABORate

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