

FMLA Leave is Available to Same-Sex Domestic Partners Standing *In Loco Parentis* to a Child

On June 22, 2010, the U.S. Department of Labor clarified that individuals who act as parents of a child may take protected leave under the Family and Medical Leave Act to care for the child for qualifying reasons - even in the absence of any biological or legal relationship with the child. The DOL's position is outlined in Administrator's Interpretation No. 2010-3, available at http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm.

The FMLA entitles an eligible employee, in part, to take up to twelve weeks of unpaid leave for certain qualifying reasons, including for the birth of 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. The statute defines "son or daughter" to include a child of a person standing *in loco parentis* to the child (meaning "in the place of a parent"). Congress' stated intent in including the *in loco parentis* provision was "to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child." S. Rep. No. 103-3, at 22. Accordingly, the FMLA regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child - even in the absence of a biological or legal relationship. See 29 C.F.R. § 825.122(c)(3). The DOL's stated position in the Interpretation is that an employee need not establish *both* day-to-day responsibilities *and* financial support for the child; that one of the two will suffice.

In providing examples of how the *in loco parentis* definition should be applied, the Interpretation expressly states that an employee who will share equally in the raising of an adopted child with a same-sex domestic partner would be considered to stand *in loco parentis* to the child, and would therefore be entitled to FMLA leave under qualifying circumstances.

It is important to note that the Interpretation does not change the FMLA or its regulations. It is simply a clarification of the DOL's position as to application of the *in loco parentis* doctrine. At the same time, however, it is now very clear that the DOL views same-sex domestic partners as eligible for FMLA leave to care for a child as to whom they stand *in loco parentis*. Employers should be aware of the Interpretation and respond to requests for FMLA leave appropriately, keeping in mind that no legal or biological relationship with the child is necessary for FMLA leave in appropriate circumstances. Where an employer has questions about whether an employee stands *in loco parentis* to a child, the DOL's position is that the employer may require the employee to provide reasonable documentation or a statement of the family relationship. In such cases, however, the Interpretation and the FMLA regulations state that a simple statement asserting that the requisite family relationship exists is all that is needed. See 29 C.F.R. § 825.122(j).

If you have any questions or comments about this E-Flash, please contact Post & Schell, P.C. Labor and Employment Attorney Robert Toy. Bob can be reached at rtoy@postschell.com or 215-587-1091.

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