

“What keeps you up at night?”

Saul Ewing Labor,
Employment and
Employee Benefits
Practice Group:

Harriet E. Cooperman
Co-Chair

Robert L. Duston
Co-Chair

U.S. Department of Labor expands non-traditional parents' entitlement to FMLA leave

By Catherine E. Walters

SUMMARY

A newly-issued Interpretation from the Department of Labor will broaden the availability of FMLA leave for a variety of nontraditional families, including those of unmarried and same-sex partners.

The United States Department of Labor (“DOL”) has issued an Interpretation of the FMLA’s definition of “son or daughter” in the context of determining whether an individual may be considered a “parent” of that individual for purposes of FMLA leave entitlement. To stand *in loco parentis* and be entitled to leave, no legal or biological parent-child relationship is necessary; likewise, there is no limit on how many “parents” may consider a child to be a “son or daughter” for purposes of leave entitlement. This Interpretation will serve to broaden the availability of FMLA leave for nontraditional families, including unmarried and same-sex partners.

WHAT HAPPENED?

On June 22, 2010, the DOL’s Wage and Hour Division issued an Administrator’s Interpretation (http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm) intended to clarify the FMLA’s definition of “son or daughter” as it applies to an employee’s right to take up to 12 weeks of FMLA leave:

- for the birth or placement of a son or daughter
- to bond with or care for a newborn or newly placed son or daughter
- to care for a son or daughter with a serious health condition

The FMLA regulations define “son or daughter” to include a biological or adopted child, as well as a foster child, stepchild, legal ward, or child of a person standing *in loco parentis*.

“What keeps you up at night?”

WHAT DOES THIS MEAN TO EMPLOYERS?

The Administrator's Interpretation acknowledges social changes and transition from traditional nuclear families to non-traditional families that might not include either or both biological parents of a child, or even a legal relationship or financial support. In a press release, the DOL touts the Interpretation as "...a victory for many non-traditional families, including families in the lesbian-gay-bisexual-transgender community, who often in the past have been denied leave to care for their loved ones."

Interestingly, the Interpretation acknowledges that the current FMLA regulations define *in loco parentis* status to include not only day-to-day responsibilities to care for a child, but also to financially support a child; however, the Administrator's Interpretation goes beyond this, indicating it is not necessary for an employee to establish that he or she provides **both** day-to-day care **and** financial support to stand *in loco parentis* to a child. The Interpretation also provides specific examples of how assumption of parenting duties would entitle an unmarried partner to care for a child with whom there is no legal or biological relationship, including raising an adopted child with a same-sex partner, regardless of whether the individual provides "both day-to-day care and financial support."

Beyond whittling down the level of responsibility necessary to establish a parental relationship, the Interpretation asserts, "Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA," and, regardless of whether a child has biological parents, it "... 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." Taken to its logical conclusion, the "no parents limit" means that regardless of financial commitment to the child, any number of individuals could be found to stand *in loco parentis* to a child and be entitled to FMLA leave. By broadening FMLA entitlement to this degree, the real question of who is indeed "responsible" for a child, regardless of the degree and level of actual parenting and/or financial support involved, may become secondary to the leave entitlement analysis.

While the administrator's action serves to enlarge the number of persons who may be deemed parents for FMLA purposes, the determination of who is a parent remains fact-specific. Nevertheless, pursuant to the new Interpretation, employers must be careful **not** to deny leave to an individual who claims to stand *in loco parentis* to a child, or to an individual who seeks leave to care for a "parent" who stood *in loco parentis* to him or her. Although employers may request reasonable evidence of the relationship, the Interpretation merely provides, "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." Of course, appropriate medical certification may still be required where leave is requested to care for an immediate family member with a "serious health condition."

For years, employers have applied the *in loco parentis* concept to FMLA leave requests if it was reasonably clear that the individual seeking leave was indeed a source of support to the child, that the child in question was dependent upon the individual and that the individual indeed exercised duties commonly associated with parenting the child. Likewise, the children of such individuals have, for years, been provided FMLA leave to care for someone who stood *in loco parentis* to them. While the concept is not new, its expansion to unlimited "parents" creates new headaches for employers. As a result, employers are advised to review their FMLA policies, procedures and training to avoid interfering with employees' rights under this ever-evolving law.

This Alert was written by Catherine E. Walters, a member of the firm's Labor, Employment and Employee Benefits Practice Group. Catherine can be reached at 717.257.7569 or cwalters@saul.com. This publication has been prepared by the Labor, Employment and Employee Benefits Practice Group for information purposes only.

The provision and receipt of the information in this publication (a) should not be considered legal advice, (b) does not create a lawyer-client relationship, and (c) should not be acted on without seeking professional counsel who have been informed of the specific facts. Under the rules of certain jurisdictions, this communication may constitute "Attorney Advertising."

© 2010 Saul Ewing LLP a Delaware Limited Liability Partnership.
ALL RIGHTS RESERVED.