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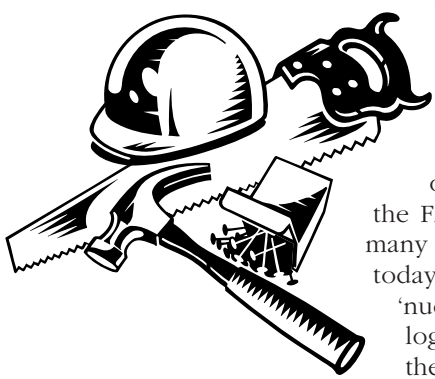
Redefining "Sons" and "Daughters" Under the Family and Medical Leave Act: In Loco Parentis

In a day and age in which the structure of relationships and families has evolved tremendously from even just decades ago, it has become increasingly important for laws to recognize and react to the growth of the "nontraditional" family. Even though the Family and Medical Leave Act (FMLA) was enacted in 1993, it is an evolving document that works to continually promote the spirit with which the law was drafted. Thus, on June 22, 2010, the U.S. Department of Labor (DOL) clarified the definition of "son" and "daughter" under the FMLA as it applies to an employee standing in loco parentis to a child.[1] This month's column provides an overview of that clarification.

The FMLA allows workers in a company that has 50 or more employees to take up to 12 weeks of unpaid leave during any 12-month period in order to care for an immediate family member (spouse, child, or parent) or themselves or for the adoption or birth of a child.[2] The DOL clarification focuses on the FMLA's definition of a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*" who is under 18 or incapable of self-care.[3] This clarification provides guidance as to whether a biological or legal relationship with a child is required for leave under the FMLA, as well as what constitutes "in loco parentis."



Congress has always intended for the definition of "son or daughter" under the FMLA to reflect "the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother."[4] Thus, the definition has been construed "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."[5] The case law interprets "in loco parentis" as a term that refers to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption."[6] Thus, the key in determining whether an in loco parentis relationship exists lies in "the *intention* of the person allegedly *in loco parentis* to assume the status of a parent toward the child."[7]

"The intent to assume such parental status can be inferred from the acts of the parties."[8] Therefore, whether the relationship of in loco parentis exists "is a fact issue dependent on multiple factors,"[9] including the age of the child, the degree to which the child is dependent on the person claiming to be in loco parentis, the amount of support the child receives, and the extent to which common parental duties are exercised.[10] The DOL's interpretation, which coincides with congressional intent and current case law, provides guidance to employers and employees by clarifying that qualifying "parent and child" relationships extend beyond biological relations and legal guardianships.

This recent clarification ensures that any employee who takes on the role of caring for a child will be eligible for "parental" rights to family leave.[11] According to Nancy J. Leppink, deputy administrator of the DOL's Wage and Hour Division, "This is a critical step in ensuring that children have the support and care they need from persons who have assumed the responsibility," including domestic partners, grandparents, or other family members.[12] This clarification makes it clear that an employee who assumes parental responsibilities for a child who is not that employee's biological child or legal dependent will be entitled to FMLA leave.

It is important to note that the DOL's interpretation "does not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child."[13] For example, an employee who provides day-to-day care of her unmarried child but does not financially support the child, or an employee who shares equally in raising an adopted child with a partner of the same sex, but does not have a legal relationship with the child, can both be eligible for FMLA leave. Moreover, as the DOL notes, "neither the statute nor the regulations restrict

the number of parents a child may have under the FMLA."[14] Thus, if a child's biological parents divorce and remarry, all four potential parents (biological parents and step-parents) are presumably eligible for FMLA leave related to the child.

In the event that the employer questions whether an employee's relationship to a child is covered by the FMLA, "the employer may require the employee to provide reasonable documentation or statement of the family relationship."[15] In a situation such as an in loco parentis relationship in which there is no legal or biological tie, a basic statement asserting that the requisite family relationship exists should suffice.[16] Even though the DOL's interpretation is that "either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child," whether or not a specific relationship qualifies an employee to have standing in loco parentis will ultimately depend on the particular facts of that relationship.[17]

As a consequence of the DOL's recent clarification, many employers may need to adjust their FMLA policies to reflect the broader definition of "in loco parentis." Employers will still have to take steps to ensure that their staff is trained to recognize who will qualify as an employee's son or daughter for the purposes of leave under FMLA, even if employers do not need to revise their current policies. Employers should be particularly careful to ensure that their leave policies are applied fairly and consistently to all individuals who may qualify—including, but not limited, to domestic partners, grandparents, relatives, and other individuals who have no legal or biological relationship with a child who needs care. The consequences of the DOL's recent clarification may be farreaching as the definition of "family" continues to evolve.[18] **TFL**

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Endnotes

[1]U.S. Department of Labor Wage and Hour Division (WHD) News Release, *U.S. Department of Labor Clarifies FMLA Definition of "Son and Daughter"* (June 22, 2010).

[2]*See* 29 U.S.C. § 2612(a)(1)(A)–(C); 29 C.F.R. § 825.200.

[3]29 U.S.C. § 2611(12); *see also* 29 C.F.R. §§ 825.122(c), 825.800.

[4]*See* S. Rep. No. 103-3, at 22.

[5]*Id*.

[6]*Niewiadomski v. U.S.*, 159 F.2d 683, 686 (6th Cir. 1947).

[7]*Dillon v. Maryland, National Capital Park and Planning Comm'n*, 382 F. Supp. 2d 777, 787 (D. Md. 2005), *aff'd* 258 Fed. Appx. 577 (4th Cir. 2007) (emphasis in original).

[8]*Dillon,* 382 F. Supp. 2d at 787 (citing *Proof of Facts* 28 Am. Jur.2d 545, § 2).

[9]*Megonnell v. Infotech Solutions Inc.*, No. 1:07-cv-02339, 2009 U.S. Dist. LEXIS 107677, at *26 (M.D. Pa. Nov. 18, 2009).

[10]*Dillon*, 382 F. Supp. 2d at 786–87.

[11]WHD News Release, *supra* note 2, at 1.

[12]*Id*.

[13]U.S. Department of Labor, Wage and Hour Division, *Administrator's Interpretation No. 2010-3* (June 22, 2010).

[14]*Id*.

[15]*Id*.

[16]*See* 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

[17]DOL, *Administrator's Interpretation, supra* note 13, at 1.

[18]*See* Robert Pear, *Gay Workers Will Get Time to Care for Partner's Sick Child*, N.Y. Times, at A13 (June 22, 2010).

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