

Impact of the Department of Labor's Administrator's Interpretation No. 2010-3: Clarification of the definition of "son or daughter" in relation to an employee standing "in loco parentis" to a child under the FMLA

Background

The Department of Labor has made updating FMLA regulations a priority for this year. Aside from the new regulations regarding the military family leave provisions expected in November, the DOL has also issued a new Administrator's Interpretation relating to the definition of "son and daughter" under the existing FMLA regulations, specifically the interpretation of "in loco parentis." According to the Administrator's Interpretation, "based on the Wage and Hour Division's experience in administering the FMLA, it is evident that many employees and employers are unsure of how the FMLA applies when there is no legal or biological parent-child relationship. The Administrator is issuing this interpretation to provide needed guidance on this important area of law."

Provisions

- The FMLA entitles certain employees to 12 workweeks of unpaid leave for the birth or placement of a son or daughter, to bond with a newborn or newly placed son or daughter, or to care for a son or daughter with a "serious health condition."
 - The definition of "son or daughter" under the FMLA includes a "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis," in addition to a biological or adopted son or daughter.
- Citing the *Black's Law Dictionary* definition of in loco parentis, "in the place of a parent" (*Black's Law Dictionary* 803 (8th ed. 2004)), the Interpretation states: "The key in determining whether the relationship of in loco parentis is established is found in the *intention* of the person allegedly in loco parentis to assume the status of a parent toward the child. The intent to assume such parental status can be inferred from the acts of the parties."
- The FMLA regulations currently define in loco parentis as including those with day-to-day responsibilities to care for AND financially support a child.
 - It is the Administrator's interpretation that the regulations do 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.
- The Administrator'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.
 - In all cases, the Interpretation states, whether an employee stands in loco parentis to a child will depend on the particular facts.
- In order to document an in loco parentis relationship, all that is needed is a simple statement asserting that the requisite family relationship exists.
- This Administrator's Interpretation does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions.

Practitioner Impact

The Administrator's interpretation may create some additional challenges for employers in managing and documenting FMLA absences.

It will be important to maintain accurate records and documentation of leaves of absence and to update any written policies and procedural items regarding qualifying absences for FMLA leaves, specifically if in documents the definition of son or daughter is currently spelled out.

It is important to work with others colleagues in HR/TR and specifically line managers and supervisors, and others charged with Leave administration to ensure they are aware of these clarified interpretations. It is always important to keep documentation on specific leave request, approvals, denials, and other similar company leaves decisions to ensure compliance with the law.

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