



**EMPLOYMENT, LABOR
& BENEFITS LEGAL UPDATE**

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June 25, 2010

DOL Opinion Expands FMLA Leave Rights

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The Federal Family Medical Leave Act entitles an employee up to 12 weeks of leave for the birth or adoption of a son or daughter, or to care for a son or daughter with a serious health condition. The definition of a “son or daughter” includes not only a biological or adopted child, but also a foster child, a stepchild, a legal ward, or a child of a person standing in “loco parentis.” In a June 22, 2010, opinion, the Deputy Administrator (“Administrator”) for the U.S. Department of Labor (“DOL”) clarified these terms.

In her opinion, the Administrator stated that Congress intended the definition of “son or daughter” 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.” The Administrator noted that increasingly those who find themselves in need of workplace accommodation for their child care responsibilities are not the biological parent of the children they care for but their adoptive, step, or foster parents, their guardians, or sometimes their grandparents or other relatives or adults. The Administrator stated that Congress’s intention was to ensure that an employee who actually has day-to-day responsibility for caring for a child is provided leave even if the employee does not have a biological or legal relationship to the child.

With that background established, the Administrator went on to conclude that employees who have no biological or legal relationship with a child may nonetheless stand in “loco parentis” to the child and, therefore, be entitled to FMLA leave. The Administrator stated:

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. For example, where an employee provides day-to-day care for his or her unmarried partner’s child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand in loco parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child’s biological parent would be entitled to leave for the child’s birth because he or she will stand in loco parentis to the child. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who does have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.

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The Administrator went on to explain that even if a child had a biological parent in the home, or had both biological parents in the home, such a situation would not prevent a finding that the child was the “son or daughter” of another person for purposes of taking FMLA leave. The Administrator stated that neither the federal FMLA statute nor the DOL regulations limited the number of parents that a child could have for FMLA leave purposes. The Administrator provided the following example:

For example, where a child’s biological parents divorce, and each parent remarries, the child will be the “son or daughter” of both the biological parents and the stepparents and all four adults would have equal rights to take FMLA leave to care for the child.

The Administrator noted that if an employer had questions about whether an employee’s relationship to a child was covered under the FMLA, the employer could require the employee to provide reasonable documentation or a statement of the family relationship. The Administrator further noted that a simple statement asserting that the requisite family relationship existed was all that was needed in loco parentis situations where there is no legal or biological relationship.

The Administrator’s opinion has been hailed by certain groups as a victory for nontraditional families as it makes it easier for employees, such as same-sex partners, boyfriends and girlfriends, grandparents, step-parents, aunts, and uncles, to take leave under the FMLA to care for children in which they stand in loco parentis. However, remember that the opinion is just that – the opinion of the Administrator the DOL. In the past, the federal courts have been willing to strike down DOL regulations that the courts have found were contrary to legislative enactments of Congress. With respect to the Administrator’s recent opinion, it is unclear whether the courts will defer to the Administrator or not.

In any event, you should keep the Administrator’s opinion in mind in case you are confronted with a situation where an employee requests FMLA leave to provide care or bond with a child, and the employee is not the biological or adoptive parent of the child.

If you have questions regarding the above, please contact Jeff Jones, the author of this article, or any of the attorneys in the Employment, Labor & Benefits Practice Group of Ruder Ware: Ron Rutlin, Dean Dietrich, Mary Ellen Schill, Chris Toner, or Sara Ackermann.



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