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DOL Clarifies Definition of "son or daughter" in FMLA

On June 22, 2010, the U.S. Department of Labor clarified the definition of "son or daughter" under the Family and Medical Leave Act (FMLA) to ensure that an employee who intends to assume the responsibilities of a parent—either day-to-day care or financial support—may be entitled to FMLA leave for the birth of, bonding with, or caring for a child with whom the employee does not have a biological or legal relationship. The DOL's position is a victory for the lesbian-gay-bisexual-transgender community, who in the past may have experienced difficulty obtaining FMLA leave for children with whom they did not have a biological or legal relationship.

WHAT'S THE BACKSTORY?

The FMLA entitles an eligible employee to take up to 12 weeks of job-protected leave for the birth or placement for adoption or foster care 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 FMLA defines a "son or daughter" to include 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." The last element of the definition—"a person standing in loco parentis"—is the subject of the DOL's latest Administrator's Interpretation and the first issued under the FMLA.

WHAT'S "IN LOCO PARENTIS"?

An FMLA regulation already defines persons who are "in loco parentis" as those with day-to-day responsibilities to care for and financially support a child and notes that a biological or legal relationship is not necessary for one to stand in loco parentis. The Administrator's Interpretation clarified that employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave where the employee provides (or intends to provide) either day-to-day care or financial support for the child.

Thus, where an employee provides day-to-day care for his or her unmarried partner's child (with whom the employee has no biological or legal relationship) but does not provide financial support, the employee could be considered to stand in loco parentis and be eligible for FMLA leave with respect to the child. Similarly, an employee who will share equally in the raising of a child with the child's biological parent or in the raising of a child adopted by the employee's same-sex partner would be eligible for FMLA leave with respect to the child even though the employee has no biological or legal relationship to the child.

The in loco parentis relationship is not limited to live-in or same-sex relationships where one partner does not have a biological or legal relationship to the child. Examples of other situations in which an in loco parentis relationship may be found include:

- where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care, or
- where an aunt assumes responsibility for raising a child after the death of the child's parents.

What Type of Proof is Required?

An existing regulation allows an employer to require that an employee present reasonable documentation or a statement of family relationship. The Administrator's Interpretation notes that "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."

A Note About Administrator's Interpretations.

This is the third Administrator's Interpretation issued by the DOL's Wage and Hour Division. The first, FLSA 2010-1, concluded that employees who perform the "typical" duties of a mortgage loan officer do not qualify as exempt administrative employees under the FLSA, rejecting two Bush-era opinion letters to the contrary. The second, FLSA 2010-2, concluded that protective clothing is not "clothes" for purposes of an exclusion from compensable time under the FLSA and that noncompensable clothes changing may be integral and indispensable to a principal duty under the Portal-to-Portal Act rendering all subsequent work activity compensable under the FLSA, again rejecting two Bush-era opinion letters to the contrary.

The issuance of "Administrator's Interpretations" based on a general interpretation of a statutory or regulatory issue of widespread applicability is a departure from the Wage and Hour Division's longstanding practice of providing opinion letters tailored to specific compliance questions from employers, employees, or employee representatives. Although Administrator's Interpretations likely will be entitled to no more judicial deference than opinion letters, employers will lose the principal benefit of obtaining a favorable opinion letter—avoiding back pay liability by relying on a fact-specific opinion letter. And whatever the merits of the DOL's stated rationale for abandoning the practice of issuing opinion letters, what is plain is the powerful tool Administrator's Interpretations offer to an activist DOL.

Questions?

Thompson & Knight's Labor and Employment Law attorneys are dedicated to updating clients about developments in labor and employment law. If you have questions or need additional information about this Client Alert or any other legal matters, please contact the Thompson & Knight attorney with whom you regularly work or one of the attorneys listed below.

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