



# HR & BENEFITS UPDATE

## **Labor Department FMLA Guidance Adopts Broad Interpretation, Employer Care Needed Determining Who Qualifies As Child**

July 19, 2010

Employers deciding whether to approve the request of an employee for leave under the Family and Medical Leave Act (FMLA) due to the serious illness, birth, adoption or placement of a child with no legal or biological relationship with the employee should not underestimate the scope of the FMLA's reach based on recent guidance. Employers also need to be sure that their policies are properly drafted to apply appropriate definition of child based on the category of leave requested as the family-status-relevant definitions under the FMLA and other laws continue to proliferate.

Recent Department of Labor Wage & Hour Division Wage and Hour Division (WHD) guidance reveals the WHD adopts a very broad view of the circumstances under which a when a child with no legal or biological relationship to an employee can qualify as a "son or daughter" for purposes of determining the eligibility of the employee for leave under the FMLA based on the birth, adoption, placement for adoption or need to care for the child during a serious illness and a narrow view of the documentation that an employer may require an employee to provide to demonstrate the existence of such a relationship.<sup>i</sup>

### **Background**

The FMLA entitles an employee to 12 workweeks of 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.<sup>ii</sup>

The definition of "son or daughter" under the FMLA 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" who is either:

- Under 18 years of age; or
- 18 years of age or older and incapable of self-care because of a mental or physical disability.<sup>iii</sup>

### **In Loco Parentis**

The FMLA regulations define in loco parentis as including those relationships between an employee and a child where the facts and circumstances show that the employee has undertaken day-to-day responsibilities to care for and financially support a child.<sup>iv</sup>

Administrator's Interpretation No. 2010-3 (June 22, 2010) (WHD Interpretation) clarifies the definition of "son or daughter" under Section 101(12) of the FMLA as it applies to an employee standing "in loco parentis" to a child taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. The WHD Interpretation does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions.

The WHD Interpretation states that the FMLA 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.

According to the WHD Interpretation, the determination of when an employee has an in loco parentis relationship with a child is fact specific question based on the facts and circumstances with no particular factor being dispositive. . The WHD Interpretation adds that the fact that a child has a biological parent in the home, or has both a mother and a father, 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.

“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” taking into account a variety of factors including the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised.

Noting Congress intended the phrase “in loco parentis” 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, the WHD Interpretation states the phrase is commonly understood to refer 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. It embodies the two ideas of assuming the parental status and discharging the parental duties.”

Applying these principles, the WHD Interpretation identifies various situations where the WHD perceives that relationship in loco parentis might exist for purposes of the FMLA based on the assumption of the employee of either responsibility to care for a child or financial responsibility for the child in the absence of a biological or legal relationship including:

- 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;
- Where an employee who will share equally in the raising of a newborn or adopted child with the child’s biological parent;
- Where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care,;
- Where an aunt assumes responsibility for raising a child after the death of the child’s parents.

In contrast, the WHD Interpretation notes that an employee who cares for a child while the child’s parents are on vacation would not be considered to be in loco parentis to the child.

When determining whether to approve a FMLA Leave request of an employee seeking time off due to the birth, adoption, placement for adoption or serious illness of a child with whom the employee has no biological or legal relationship, the WHD Interpretation makes clear that the WHD construes the phrase “in loco parentis” broadly. Furthermore, the WHD Interpretation also signals the need for employers to exercise caution when requiring documentation of the existence of such a claimed relationship. While acknowledging that the FMLA allows an employer to require an employee claiming a relationship in loco parentis with child to require the employee to provide reasonable documentation or statement of the family relationship, the WHD Interpretation raises questions about the degree of documentation that the employer may require. According to the WHD Interpretation, “[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.”<sup>v</sup>

### **Using the Right Standard for the Right Circumstances**

When drafting and applying FMLA and other legally mandated policies, it's important that employers, employee benefit plan sponsors and administrators and others use the correct standard for the circumstance prevented. The FMLA definition of child from the WHD Interpretation applies only to determinations of the status of a person as a son or daughter for purposes of the FMLA's leave provisions regarding leaves requested due to the serious illness, birth or adoption of a child of an employee and not for military related FMLA leaves. Different standards apply for military related FMLA leaves. Similarly, the standards used to determine who qualifies as a child for purposes of FMLA may not necessarily be the same as legally required to decide when an individual qualifies as a child for other legal purposes. For instance, recent changes to federal health plan rules enacted as part of the Patient Protection & Affordable Care Act may require that group health plans and insurers use different standards to decide when an individual qualifies for enrollment as the child of an employee in dependent coverage beyond those applicable under the FMLA. It is highly advisable that employers and employee benefit plan sponsors and administrators carefully review and update their existing policies, plan documents and practices for compliance with the appropriate and currently applicable standards and exercise care in the administration of these practices to avoid costly mistakes .

### **About the Author**

Board Certified in Labor & Employment Law by the Texas Board of Legal Specialization, management attorney and consultant Ms. Stamer has more than 23 years experience working with employers, professional employment organizations, employee benefit plan sponsors and administrators and others on a wide range of labor and employment, employee benefits, and other management matters. The Chair of the American Bar Association (ABA) RPTE Employee Benefits & Other Compensation Committee, a Council Representative on the ABA Joint Committee on Employee Benefits, Government Affairs Committee Legislative Chair for the Dallas Human Resources Management Association, the editor of [Solutions Law Press HR & Benefits Update](#) and, Ms. Stamer also is recognized for her publications, industry leadership, workshops and presentations on these and other health industry and human resources concerns. She regularly speaks and conducts training for the ABA, Institute of Internal Auditors, Society for Professional Benefits Administrators, Southwest Benefits Association and many other organizations. Publishers of her many highly regarded writings on health industry and human resources matters include the Bureau of National Affairs, Aspen Publishers, ABA, AHLA, Aspen Publishers, Schneider Publications, Spencer Publications, World At Work, SHRM, HCCA, State Bar of Texas, Business Insurance, James Publishing and many others. You can review other highlights of Ms. Stamer's experience [here](#).

If you need help with human resources or other management, concerns, wish to ask about compliance, risk management or training, or need legal representation on other matters please contact Cynthia Marcotte Stamer [here](#) or (469)767-8872.

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<sup>i</sup> See 29 C.F.R. § 825.122(g), (h).

<sup>ii</sup> See 29 U.S.C. § 2612(a)(1)(A) - (C); 29 C.F.R. § 825.200.

<sup>iii</sup> 29 U.S.C. § 2611(12). See also 29 C.F.R. §§ 825.122(c), 825.800.

<sup>iv</sup> 29 C.F.R. § 825.122(c)(3).

<sup>v</sup> See 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).