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Legal Update

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PARENTAL LEAVE: WHO IS A PARENT?

By Orley Moskovits Desser

The Department of Labor ("DOL") recently broadened the parental leave provisions of the Family and Medical Leave Act ("FMLA") to cover nontraditional families, including same-sex partners. Under the DOL's Administrator's interpretation letter ("Interpretation"), an employee who has no biological or legal relationship to a child may be entitled to 12 weeks of unpaid FMLA leave for a birth or adoption, or for care of a child with a serious health condition. Employees responsible for *either* the day-to-day care *or* financial support for a child are also entitled to the leave; satisfying both requirements is not necessary. Such employees are considered to be standing "in loco parentis" – "in the place of the parent" – and are therefore entitled to the parental leave.

In general, the FMLA covers employers with 50 or more employees and provides eligible employees with up to 12 weeks of "job protected" unpaid 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 FMLA defines 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 either under the age of 18 or 18 and older if such child is disabled. The DOL's Interpretation grants to an employee who assumes the status of a parent toward a child parental leave rights. The Interpretation, however, does not address an employee's entitlement to the FMLA military-related leave provisions.

Whether a person stands "in loco parentis" is a question of fact and depends on various factors such as the child's age, the degree to which the child is dependent, the amount of support provided, and the extent of "parental duties." Under the Interpretation, employees who may stand "in loco parentis" to a child include a grandparent who assumes ongoing responsibility for a grandchild because the parents are incapable of providing care, an employee who has no legal or biological relationship to, but provides care for the child of the employee's same-sex partner, or an uncle who raises his nephew after the death of the child's biological parents. According to the DOL, an employee who cares for a child while the child's parents are on vacation *does not* stand "in loco parentis" to the child.

If the employer is not sure whether the "in loco parentis" relationship exists, the employer may require that the employee present proof establishing such a relationship. The Interpretation states that the employee's "proof" of an "in loco parentis" relationship can be in the form of either reasonable documentation *or* a statement asserting the requisite family relationship by the employee. Given the relatively simple standard for proving an "in loco parentis" relationship, employers must be careful not to deny parental leave solely because of a lack of biological or legal relationship to the child. Employers covered by FMLA should be mindful of the DOL's liberal approach to parental leave and ensure that their

FMLA policies comply with the Interpretation. Thus, for example, employers should revise their handbooks if FMLA eligibility is so narrowly defined that it excludes "in loco parentis" relationships. Employers should consult with counsel in making such determinations.

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