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Department of Labor issues guidance on definition of son or daughter under the Family and Medical Leave Act.

The Family and Medical Leave Act (“FMLA”) entitles eligible employees to take up to twelve weeks of unpaid leave for the birth of a child; the placement of a child for adoption or foster care; and/or to care for a child with a serious health condition. The Act further defines a son or daughter as a “biological, adopted, or foster child, a step-child, a legal ward, or a child of a person standing in loco parentis ...” In response to a number of inquiries from employers seeking clarification of the term in loco parentis for the purpose of employees who care for a child with whom they have no biological or legal relationship, the Department of Labor has issued guidance on this issue.

The term in loco parentis refers to a person who has assumed the obligations of a parent without going through the legal formalities of adopting or otherwise becoming legally responsible for the child. Courts have found that the key in determining whether an individual is, in fact, in loco parentis is the intention of that individual, which is assessed by a number of factors including things such as the age of the child, the degree of support, and the extent of the parental duties the individual assumes. However, employers and employees alike have expressed confusion about the term as it applies to individuals who care for and/or financially support a child with whom they have no legal or biological relationship. Specifically, employers have questioned whether such employees are entitled to FMLA leave to care for children to whom they are not legally or biologically related.

In response to these concerns, The Department of Labor has stated in its recently-issued guidance that employees who are not biologically or legally related to a child may still be entitled to FMLA leave to care for, or bond with, that child. In support of this statement, the DOL recognized that Congress intended the FMLA to “reflect ‘the reality that many children in the United States today do not live in traditional ‘nuclear’ families with their biological parents” and that, consequently, employees who are otherwise eligible for FMLA leave may need to use such leave to care for a child who is not biologically or legally related, but for whom that employee has the day-to-day responsibility for caring for the child and/or financially supporting the child. The DOL offered as an example a situation where an employee provides day-to-day care for his or her unmarried partner’s child. While not specifically enumerated, such care might consist of helping the child get dressed or ready for bed, feeding the child, driving the child to school and other activities and appointments, and attending functions for the child. It also extended this example to include an employee who “will share equally in the raising of an adopted child with a same sex partner.”

The DOL expressly stated that the FMLA does not require an individual to establish that he or she provides both day-to-day care and financial support in order to be entitled to FMLA leave. An employee need only to establish the he or she cares for the child or supports the child financially in order to be eligible for the leave.

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Employers who receive a request for FMLA leave for an employee to care for a child who is not legally or biologically related to the employee may require the employee to provide documentation of the family relationship. However, the DOL states that a “simple statement asserting that the requisite family relationship exists” will suffice. Moreover, the DOL reiterated that the FMLA and its regulations do not place a cap on the number of parents a child may have under the Act. It is

not illogical for a child to have four parents (two biological parents and two step-parents) all with equal rights under the FMLA as they pertain to child care.

While the DOL’s guidance is, in many ways, instructive, it is advisable for employers faced with a request for leave to care for an unrelated child to consult with employment counsel in order to assure that the proper steps are taken to determine eligibility under the FMLA.