



## FMLA Update: Clarification of “*In Loco Parentis*” Status and the Definition of “Son or Daughter”

On June 22, 2010 Deputy Administrator Leppink of the U.S. Department of Labor, Wage and Hour Division, issued Interpretation No. 2010-3, clarifying the definition of “son or daughter” under Section 101(12) of the Family and Medical Leave Act (FMLA). Specifically, the Interpretation explains when an employee qualifies as standing in “*loco parentis*” to a child for purposes of FMLA leave.

The DOL determined that additional clarification was needed on the FMLA’s definition of “son or daughter.” Apparently, many employees and employers had questioned how the FMLA applies when there is no legal or biological parent-child relationship.

### Background

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave 1) “because of the birth of a son or daughter of the employee and in order to care for such son or daughter,” 2) “[b]ecause of the placement of a son or daughter with the employee for adoption or foster care,” and 3) to care for a son or daughter with a serious health condition. 29 U.S.C. § 2612(a)(1)(A)-(C); 29 C.F.R. § 825.200. A “son or daughter” is defined by the FMLA as a “biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability.” 29 U.S.C. § 2611(12).

### Standing *In Loco Parentis*

According to the Administrator, Congress intended the definition of “son or daughter” to reflect the “reality that many children in the United States today do not live in ‘nuclear’ families with their biological father and mother. Increasingly, those that find themselves in need of workplace accommodations of their childcare responsibilities are not the biological parent of the children they care for, but the adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults.” Citing S. Rep. No. 103-3. These caregivers often stand *in loco parentis* which refers 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 parenting duties.” *Niewiadomski v. U.S.*, 159 F.2d 683, 686 (6<sup>th</sup> Cir. 1947).

Courts have held that whether an employee stands *in loco parentis* to a child is a fact issue dependent on multiple factors. FMLA regulations define *in loco parentis* as including those with day-to-day responsibility to care for and financially support a child. 29 C.F.R. § 825.122(c)(3). The Administrator’s Interpretation clarifies that the FMLA regulations do not require an employee to prove that he or she provides *both*: 1) day-to-day care and 2) financial support in order



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to stand *in loco parentis* to a child. For example, an employee who provides daily care for an unmarried partner's child (with whom there is no legal or biological relationship) but who does not financially support the child could be considered to stand *in loco parentis* to the child and therefore would be entitled to FMLA leave to care for the child if the child had a serious health condition. Similar principles apply to leave requested for the birth of a child and to bond with a child within the first twelve (12) months of placement.

Another example given by the Administrator involved an employee who will share equally in the raising of an adopted child with a same-sex partner who does not have a legal relationship with the child. Pursuant to the Interpretation, such an employee 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.

The Administrator's Interpretation noted 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. Neither the FMLA statutes nor its regulations restrict the number of "parents" a child may have under the Act. Therefore, if 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. All four adults have equal right to take FMLA leave to care for the child. 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 in the absence of the child's parents. Whether or not the

grandparent or aunt/uncle adopt or assume legal responsibility for the child is not determinative of whether they stand *in loco parentis* for purposes of the FMLA. In contrast, an employee who cares for a child while the child's parents are on vacation cannot meet the test for *in loco parentis* status.

### Steps Employers Should Take Now

Given the Administrator's expansive interpretation of 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, employers should review their FMLA policies to ensure they accurately reflect the law and employees will understand when they are eligible for leave. Employers may need to develop a process to determine how eligible employees establish an "*in loco parentis*" relationship with regard a child. An employer may require an employee to provide reasonable documentation or statement of the family relationship. According to the Administrator, "[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." See 29 C.F.R. § 825.122(j).

If you would like a copy of Administrator's Interpretation No. 2010-3 or if you have other employment law questions, please contact Kimberly W. Daniel at (804) 967-9604 or [kdaniel@hdjn.com](mailto:kdaniel@hdjn.com).



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| <b>Richmond</b><br>4701 Cox Road<br>Suite 400<br>Glen Allen, VA 23060<br>PO Box 72050<br>Richmond, VA 23255-2050<br>○ (804) 967-9604 | <b>Fairfax</b><br>3975 Fair Ridge Road<br>Suite 475 South<br>Fairfax, VA 22033<br>○ (703) 591-3440                                  |
| <b>Harrisonburg</b><br>3210 Peoples Drive<br>Harrisonburg, VA 22801<br>○ (866) 967-9604  | <b>Virginia Beach</b><br>One Columbus Center<br>283 Constitution Drive<br>Suite 301<br>Virginia Beach, VA 23462<br>○ (757) 321-6555 |
| <b>Lewisburg, WV</b><br>111 North Jefferson Street<br>Lewisburg, WV 24901<br>○ (866) 967-9604  | <b>Franklin, TN</b><br>725 Cool Springs Blvd.<br>Suite 600<br>Franklin, TN 37067<br>○ (866) 967-9604                                |

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