The U.S. Department of Labor Clarifies That Employees Taking FMLA Leave for a Child Do Not Need to Show a Legal Or Biological Relationship with the Child

Client Advisories

06.22.2010

A recent clarification issued by the Department of Labor ("DOL") with respect to the Family Medical Leave Act ("FMLA") addresses the reality that many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. The administrative interpretation letter (No. 2010-3) ("Interpretation Letter"), issued on June 22, 2010, explains that individuals who have no biological or legal relationship with a child may nonetheless be entitled to leave under the FMLA's definition of "son or daughter." The Interpretation Letter clarifies that an employee may consider a child a "son or daughter" for FMLA purposes if the employee provides either day-to-day care or financial support for the child. No legal or biological relationship is required.

Notably, the news media has been largely incorrect over the past month when they presenting this as an expansion of the FMLA, and particularly an expansion of rights of same-sex couples. Rather, the Interpretation Letter merely clarifies the interpretation of existing rules and definitions of the FMLA, and does not expand the law in any way or make new law. However, because it is only a "clarification," the DOL did not have to go through the more rigorous notice and comment process, which is why this ruling caught some by surprise.

Under the FMLA, qualifying employees have extensive rights with respect to time off for their children. Specifically, employees are entitled to twelve weeks of unpaid 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. 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." 29 U.S.C. § 2611(12). The Interpretation Letter concentrates on the inclusion of the words "in loco parentis" in this definition, which is Latin for "in the place of a parent."

Specifically, the Interpretation Letter explains “in loco parentis” under the FMLA includes those employees who: (1) financially support or (2) assume the day-to-day care of a child. So, an employee who undertakes a temporary or transient assumption of the ongoing responsibility of caring for a child, such as caring for a child while the child’s legal parents are on vacation, does not qualify for “in loco parentis” status under the FMLA. But, while some permanency is needed, a financial commitment is not required -- the Interpretation Letter states that where an employee provides day-to-day care for his or her unmarried partner’s child, employee could be considered to stand “in loco parentis” to the child and therefore be entitled to FMLA leave, even when there is legal or biological relationship and even where there is no showing that the employee provides financial support for the child.

The issue as to what this Interpretation Letter means for same-sex couples has gotten the most play in the recent news headlines; yet, the Letter in reality only mentioned that issue in passing and gave it no greater or lesser significance. That is, the Letter provides that the definition of “in loco parentis” would include either member of a same-sex partnership who raise a child together; however, this is simply because of the nature of “in loco parentis” status. Indeed, the Letter goes on to explain that the scope of “in loco parentis” can include grandparents, aunts/uncles, and any other individuals who provide financial support or day-to-day care for children.
Lastly, 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 of “in loco parentis” status. All that is required is that the child is the “son or daughter” of an employee, as those words are broadly defined by the FMLA. As strange as it may seem, neither the statute nor the FMLA regulations restrict the number of parents a child may have under the FMLA. So, an employee who will share equally in the raising of a child with the child’s biological parent would be entitled to leave for the child’s birth.

In contrast, the New Jersey Family Leave Act (“NJFLA”), New Jersey’s leave law which is substantially similar to the FMLA, does not appear to cover the vast expanse of non-traditional family relationships covered by the FMLA. The NJFLA does not have the same “in loco parentis” language. Rather, a “child” under the NJFLA is limited to a biological, adopted, or foster-child, or legal ward. Therefore, if your employee is only taking NJFLA leave (usually because he/she did not work sufficient hours to be covered by the FMLA, or because he/she has exhausted his FMLA leave), the definition of “child” is more narrow and would not allow for the expansive definition of a “son or daughter” that is set explained in the Interpretation Letter.

If you have any questions about this administrative opinion letter, or would like our assistance in providing management training with respect to the FMLA or other employment laws, please contact a member of the Archer Labor and Employment Department at (856) 795-2121.

UNDERSTANDING FMLA REGULATIONS - SEMINAR

In an effort to assist you with any questions you may have on FMLA, Archer will be offering a free seminar on September 17, 2010.

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