

FMLA Parental Leave: Legal or Biological Parent Status Not Required to Trigger FMLA Leave Entitlement

By Karen Aframe | June 30th, 2010

The U.S. Department of Labor recently issued an Administrator Interpretation of the Family and Medical Leave Act (FMLA), No. 2010-3, which states that a biological or legal relationship with a child is not a prerequisite for entitlement to FMLA leave for birth, bonding, or to care for a child (“FMLA parental leave rights”). This Interpretation is intended to insure that FMLA parental leave rights are extended to the various parenting relationships that exist today, including, but not limited to families in the lesbian-gay-bisexual-transgender community.

The FMLA provides, among other things, eligible employees of covered employers, with up to twelve (12) weeks of unpaid leave for the birth or adoption of a son or daughter, to care for a newborn or newly placed son or daughter, or to care for a son or daughter 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* . . .” 29 U.S.C. § 2611(12). See also 29 C.F.R. §§ 825.122(c), 825.800.

The FMLA regulations define “*in loco parentis*” as a person with day-to-day responsibilities to care for and financially support a child. The new DOL Administrator Interpretation clarifies that an employee may stand *in loco parentis* if he or she provides either day-to-day care or financial support for a child, regardless of his or her legal parent/guardian or a biological parent status.

Under this broadened interpretation of “*in loco parentis*”, examples of who may be eligible for FMLA leave include the following:

- Grandparent who takes care of a grandchild because the child’s parent is debilitated;
- Aunt or uncle who assumes responsibility for raising a child while the parent has been called to active military duty;
- Same-sex spouse or partner who shares equally in the raising of a child with the child’s biological or adoptive parent;
- An employee who provides day-to-day care for his or her significant others' child (with whom there is no legal or biological relationship), but does not financially support the child;
- Same-sex partner who intends to share in the parenting of a child with his or her same-sex partner;
- Step-parent who shares equally in the raising of a spouse’s biological or adoptive child.

While DOL Administrative Interpretations are not binding on the courts, they are often considered persuasive authority by the courts and reflect the position of the U.S. Department of Labor from a compliance/enforcement perspective, in DOL initiated enforcement actions.

This nuance of FMLA eligibility for FMLA parental leave is significant. Employers are encouraged to ensure that managers/supervisors and human resource staff are apprised of and understand how to administer your FMLA leave benefits in light of this DOL clarification.

If there are questions about whether an employee's relationship to a child is covered under the FMLA, the employer may require reasonable documentation or a statement of the family relationship. The Interpretation states that in situations where an individual stands *in loco parentis* where there is no legal or biological relationship to the child, the employee only needs to provide the employer with a simple statement affirming that the requisite familial relationship exists.

To avoid claims of discrimination, based on asking only certain employees (for example only unmarried persons or based on sexual orientation) to substantiate family relationship, but not others, employers should consider developing a uniform process for requesting this information in connection with all parental leave requests. This can be as simple as providing a check-off box or other affirmation provision on your leave forms for the employee to affirm that the requisite familial relationship exists. Employers should also consider updating their FMLA policies to clarify that the FMLA's parental leave rights apply to persons who have a role in the day-to-day care of a child, but do not have any legal or biological relationship to the child.

For questions or assistance with this aspect of the FLMA or other questions regarding the FMLA, please contact Karen Aframe in Bernstein Shur's Manchester Office, 603-623-8700 or kaframe@bernsteinshur.com or Pat Peard in Bernstein Shur's Portland Office, 207-228-7306 or ppeard@bernsteinshur.com