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DOL Creates Additional Obligations, Questions Under FMLA

The U.S. Department of Labor's (DOL) wage and hour administrator publicly clarified this week the definition of "child" as it relates to FMLA rights where no biological or legal relationship to the employee exists. In short, the DOL has now expanded the FMLA definition of child to include "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. (emphasis added)

The DOL stated that for FMLA purposes, a person can hold *in loco parentis* status over a child if that person provides day-to-day care *or* financial support for the child, so long as the person's intent is to assume the responsibilities of a parent with regard to that child. This definition applies to a child who is either under 18 years of age or 18 years of age or older and incapable of self-care because of a mental or physical disability.

The DOL did not do employers any favors, stating that the determination of whether such a relationship exists will depend on the circumstances of each case. The DOL did provide several examples of what it would consider to be and not to be *in loco parentis*. According to the DOL, *in loco parentis* status could apply in the following situations: to an employee who lives, unmarried, with his or her partner and provides day-to-day care for the partner's child, with whom there is no legal or biological relationship, but does not financially support the child; to an employee who intends to co-parent another person's biological child who lives with the biological parent; to an employee who will co-parent the adopted child of that employee's same sex partner; or to grandparents who care for their grandchild because the parents are incapable. Conversely, *in loco parentis* status would not apply to employees who are caring for a child temporarily while the parents are away on vacation.

Further, there is no limit to how many parents can care for a child for purposes of *in loco parentis* status. An employee can, for example, claim *in loco parentis* status of a child even if that child lives with a biological parent and/or is cared for by the other biological parent and/or a stepparent. The administrator explained that "[n]either the statute nor the regulations restrict the number of parents a child may have under the FMLA."

Finally, while employers do have the general right to seek reasonable documentation for providing their employees FMLA rights, where no legal or biological relationship exists, only a "simple statement asserting that the requisite family relationship exists" is needed. *See* 29 C.F.R. § 825.122(j).

In short, the ultimate determination of whether an employee stands *in loco parentis* will depend on the specific facts of each situation, and employers are largely left to rely on the representations of



their employees that the employees do, in fact, have *in loco parentis* status. Because the DOL's examples are not exhaustive, employers should approach each *in loco parentis* leave request carefully and should not hesitate to contact their employment law counsel for guidance.

FOR MORE INFORMATION

For more information, contact any Thompson Hine **Labor & Employment** lawyer.

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