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## Redefining the Family and Medical Leave Act

By Brandon D. Saxon

**T**he U.S. Department of Labor, Wage and Hour Division recently issued an interpretation letter (No. 2010-3) providing an explanation of the Department's position regarding the definition of "son or daughter" under the Family and Medical Leave Act (FMLA). The FMLA applies to employers who have 50 or more employees working within a 75-mile radius of the worksite. In short, the Department concluded that the term "*In Loco Parentis*" found in the language of the FMLA statute itself, can include an adult with no legal or biological relationship to a child, when that adult provides either day-to-day care, responsi-



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bilities, or financial support. As a result, such a person may be entitled to up to 12 weeks of FMLA leave from their employer. Relying significantly on the language of the FMLA, Congress' intent in enacting the statute, and relevant case law, the Department determined that the "son or daughter" designation is broad enough to include a variety of minors and incapacitated adult children.

Generally, the FMLA entitles an employee to up to 12 weeks of 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. 29 U.S.C. Section 2612(a)(1)(A) — (C). The definition of "son or daughter" under the FMLA also includes "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis." 29 U.S.C. Section 2611(12). See also 29 C.F.R. Sections 825.122(c), 825.800. The Department, quoting from the legislative history of FMLA, determined that "Congress intended the definition of 'son or daughter' to reflect the reality that many children in the United States today do not live in traditional nuclear families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation for their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults." See U.S. Dept. Labor Interp. Ltr No. 2010-3, quoting S. Rep. No. 103-3, at 22. Congress concluded that the statute is "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child."

The Department used the example of an "employee who provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, explaining that the employee could be considered to stand in loco

parentis to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition." See U.S. Dept. Labor Interp. Ltr No. 2010-3. The Department went one step further to conclude that there is no reasonable limit for the number of individuals who could be eligible to take FMLA leave for a child. Specifically, the interpretation letter stated, "where 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 and all four adults would have equal rights to take FMLA leave to care for the child."

The procedure for an employer to verify an employee's relationship with a child after the employee has requested FMLA protected leave remains unchanged. As provided by the statute, an employer can require the employee to provide "reasonable documentation" or simply a "statement of the family relationship." See 29 C.F.R. Section 825.122(j). Per the FMLA language, "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 U.S. Dept. Labor Interp. Ltr No. 2010-3.

This interpretation letter should serve as a warning to employers

that the reach of the FMLA is broad enough to encompass a wide array of minors, not previously understood to be part of the FMLA umbrella. As a result of the Department's interpretation, employers should be cautious when deciding whether to grant an employee's FMLA leave request, and consult an attorney for guidance when faced with these issues.



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