MILLER CANFIELD

DOL Issues Advisory on Non-Parent FMLA Leave

June 24, 2010

The U.S. Department of Labor (DOL) issued a written advisory on June 22 to clarify when employees may take FMLA leave for children who are not their natural or legal sons or daughters.

While much of the publicity related to the advisory focuses on its application to same-sex parents, the DOL's Administrative Interpretation No. 2010-3, which cites the "in loco parentis" portion of the FMLA regulation that defines "son or daughter" for purposes of FMLA leave, is a good reminder to employers that any employee's request for leave related to a child in his home should not be automatically denied simply because the employee is not the child's natural or legal parent.

Background

An eligible employee may take FMLA leave for the birth, adoption, or foster placement of a son or daughter in his home or to care for a son or daughter with a serious health condition. FMLA regulations provide that such leave is available not just for biological, adopted, or foster children, but also for stepchildren, legal wards, and any other child for whom the employee is "standing in loco parentis." The FMLA regulations note that no biological or legal relationship between the employee and child is necessary--leave is available on an "in loco parentis" basis for any employee "with day-to-day responsibilities to care for and financially support a child."

The DOL's Administrative Interpretation

In a press release announcing the Administrative Interpretation yesterday, the DOL stated that its experience in administering the FMLA showed that employers and employees alike have been unsure of how the FMLA applies when there is no legal or biological parent-child relationship.

DOL stated that "in loco parentis"-based leave could be appropriate for employees who have day-to-day responsibilities to care for a child even if the employee does not otherwise provide direct financial support for the child. DOL noted that neither the FMLA law nor its regulations contain any restriction on the number of "parents" a child may have for FMLA leave purposes.

As further guidance, the DOL cited several examples of when "in loco parentis" FMLA leave would likely be appropriate for an employee:

- Where an employee who is a grandparent takes in the grandchild and assumes ongoing responsibility for the child's care because the parents are unable to do so;
- Where an aunt assumes responsibility for raising a child after the death of the child's parents;
- Where an employee will share equally in raising a child with a same-sex partner who is the child's biological, adoptive, or foster parent.

To provide a contrasting example, the DOL noted that an employee who is temporarily caring for a child while the child's parents are on vacation would not be considered "in loco parentis" to the child.

Guidance for Employers

No change in FMLA administration is necessary, and no new leave rights have been extended. The DOL's Administrative Interpretation (which replaces its former practice of issuing case-specific Opinion Letters) does not have the binding force of law, but instead serves as a guide to the department's current interpretation of existing regulations.

Employers should continue to evaluate FMLA leave requests by confirming (1) the employee's eligibility for leave (e.g., 12 months of employment, 1250 hours, etc.) and (2) the FMLA basis for the leave (e.g., serious health condition, birth, adoption placement, etc.). When an eligible employee requests FMLA-based leave for an unrelated child, employers should ascertain whether the employee has responsibility for the child's day-to-day care with some degree of permanence, and grant leave accordingly.

For more information, contact:

Megan Norris
313.496.7594