



## DOL Interprets Leave Rights Under the Family and Medical Leave Act

*The DOL's Wage and Hour Division has clarified who stands "in loco parentis" to a child for purposes of job-protected leave under the federal Family and Medical Leave Act (FMLA). In a broad Interpretation of the term, the DOL extends FMLA protections to employees who assume the role of caring for a child regardless of their legal or biological relationship.*

### Background

FMLA entitles eligible employees to take up to 12 weeks of job-protected leave during any 12-month period for the birth or adoption of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. FMLA defines a child as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is – (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." In [Administrator's Interpretation No. 2010-3](#), the DOL seeks to clarify who stands in loco parentis for purposes of a FMLA leave entitlement.

### The DOL Interpretation

Whether an employee stands in loco parentis to a child is dependent on his or her particular situation and multiple factors. Among relevant factors to consider are the child's age and dependency on the employee claiming in loco parentis status, the amount of support he or she provides, and the extent to which the employee exercises parental duties.

Although applicable regulations define individuals in loco parentis as including those with day-to-day responsibilities to care for and financially support a child, the DOL says that either day-to-day care or financial support may establish an in loco parentis relationship as long as the employee intends to assume parental responsibilities with respect to the child. Thus, for example, in loco parentis status could be found when an employee –

- provides day-to-day care but no financial support for his or her unmarried partner's child (with whom there is no legal or biological relationship)
- will share equally in raising a child with the child's biological parent
- will share equally in raising an adopted child with a same-sex partner without a legal relationship to the child

- takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of caring for the child
- assumes responsibility for raising a niece or nephew after the death of the child's parents.

**BUCK COMMENT.** *Although the DOL interprets in loco parentis to entitle same-sex partners to FMLA leave to care for a partner's child, its interpretation would not entitle a same-sex partner to FMLA leave to care for his or her partner with a serious health condition.*

The DOL notes that there is no limit on the number of parents a child may have under FMLA. Thus, a child with one or both biological parents can still be considered for FMLA purposes as the son or daughter of an employee who has neither a biological nor legal relationship with the child.

Although the regulations allow employers to require reasonable documentation of the family relationship to substantiate FMLA leave, the DOL now says that a simple statement that the necessary relationship exists is all that is needed to substantiate in loco parentis situations.

## Conclusion

The DOL's new interpretation of FMLA rules clarifies the extent to which FMLA leave may be available to many non-traditional families and may impact existing employment and leave management policies. It makes it easier for employees to claim FMLA leave, and more difficult for employers to determine whether they are entitled to it. It remains to be seen whether the DOL's actions will have a spill-over effect on interpreting similar state leave laws.

At this juncture, employers should review their existing leave policies and practices, forms and employee handbooks, and consider making adjustments to reflect the DOL's interpretation of FMLA entitlements.

Buck's consultants would be pleased to discuss the impact of this latest development on your employment practices, and to assist you in updating your leave policies, forms and related employee communications.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*