

## First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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## U.S. Department of Labor Expands Family Leave

Late last month, the Department of Labor (“DOL”) issued an administrative opinion that greatly expanded family leave rights for certain people with parenting responsibilities. The DOL’s interpretation makes it possible for more employees to take up to 12 weeks of unpaid leave to care for a child with a serious health condition, or for the birth, adoption, foster care, or bonding with a new child.

Under the Family and Medical Leave Act (“FMLA”), eligible employees are entitled to 12 weeks of job-protected leave. FMLA defines a son or daughter as the biological child, adopted child, foster child, step-child, legal ward, or child of a person standing *in loco parentis*. The administrative interpretation issued by the DOL states that Congress intended the definition in FMLA to reflect the reality that many children do not live in a traditional, nuclear family. The DOL asserts that many employees who need job-protected leave are increasingly not the biological parent of the child being cared for. The agency also explains that Congress wanted the definition of parent to be interpreted so that the person actually responsible for day-to-day care of the child is entitled to leave, even if there is no biological or legal relationship.

The DOL was able to expand the definition in FMLA by focusing on the *in loco parentis* status of an adult providing care to a child. A person stands *in loco parentis* by assuming parental obligations without going through a formal legal adoption. Whether or not a person is *in loco parentis* depends on the facts of the situation, including the age of the child, the degree of the child’s dependency on the adult, the amount of support provided to the child, if any, and the extent to which parental duties are performed.

Interestingly, FMLA defines a person acting *in loco parentis* as someone who has day-to-day responsibilities and provides financial support to the child. But the DOL’s administrative interpretation takes a different approach, and states that it is not necessary to show the person has assumed day-to-day responsibilities and provided financial support. Instead, an employee who claims the requisite parental status can do so by showing that they perform day-to-day responsibilities, even if they provide no financial support. The employee is only required to submit a simple written statement asserting that the relationship exists.

The DOL includes examples of the types of *in loco parentis* relationships that are covered under FMLA. A same-sex partner is now explicitly entitled to job-protected leave to care for a child, as are grandparents or an aunt or uncle who assume child-rearing responsibilities. The relationship may eventually carry a formal legal status, but even without that formality, the DOL has ensured that the care-giving adult will be entitled to leave just as a biological parent would be. The DOL's interpretation has been hailed as a major milestone for same-sex partners and gay parents.

Note that under FMLA, an eligible employee may take leave to care for a sick spouse. However, the DOL did not expand FMLA to allow same-sex partners to take leave for an ill spouse or partner. This is presumably because FMLA defines a "spouse" as a husband or wife and the Defense of Marriage Act does not leave room for a more flexible interpretation.

Employers must carefully analyze any employee's leave request to determine if the employee is eligible for leave, and, if eligible, what must be provided. It's also important to keep in mind that California has its own leave laws that may or may not interact or run concurrently with federal leave laws, and it is the employer's responsibility to ensure the leave laws are being applied properly.

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