by Dena B. Calo, Esq., and James Gee, Genova, Burns & Giantomasi, Newark

FMLA eligibility: DOL expands definition of 'son and daughter'

The U.S. Department of Labor (DOL) recently clarified the definition of "son and daughter" under the FMLA, effectively requiring employers to include same-sex partners, grandparents and other nontraditional family caregivers within the universe of employees eligible for FMLA leave.

Since its inception, the FMLA has granted employees up to 12 weeks of unpaid, job protected leave because of the birth of a son or daughter, or to care for a son or daughter with a serious health condition.

New definition of parenthood

However, before the DOL's recent clarification, the FMLA was deemed to apply only to biological or adoptive parents, step-parents, court-appointed legal guardians, foster parents—essentially anyone with a legal relationship to the child.

Long ignored was a crucial phrase in the FMLA: *in loco parentis*.

While *in loco parentis* literally means someone who is standing in the place of a parent, employees were being denied FMLA leave because they had not been appointed actual legal guardianship over a sick child, or had no legal relationship to a child who was about to be born.

In loco parentis

On June 22, 2010, the DOL rectified this discrepancy by issuing Administrator's Interpretation No. 2010-3.

Recognizing the reality that "many children in the U.S. today do not live in a traditional nuclear family with their biological parent," the DOL found it necessary to give employers instruction on the breadth of the *"in loco parentis"* language.

Examples of who may now be eligible for FMLA leave

- An uncle who is caring for his young nephew whose single parent has been called to active military duty
- An employee who intends to share in the parenting of a child with his or her same-sex partner
- The live-in boyfriend or girlfriend of someone who has a child.

New DOL guidance means same-sex partners, grandparents and other nontraditional family caregivers are now eligible for FMLA leave.

In loco parentis is commonly understood to refer to a person who has put himself in the situation of a lawful parent by assuming the obligations related to a parental role without going through the formalities necessary for legal adoption. Generally, the way to determine if an employee is standing *in loco parentis* to a child involves looking at many different factors:

- The child's age
- Whether the child is dependent on the adult
- The amount of support given to the child
- How many parent-like duties the adult is performing.

The DOL's new interpretation of the FMLA extends the definition of *in loco parentis* to any employee who provides day-to-day care or financial support to a child, regardless of whether that employee has a legal relationship to the child.

What employers should do

The effect of this interpretation will be widespread. Many more employees will now be entitled to FMLA leave.

Employees who need FMLA leave because of child care responsibilities may be family members, grandparents, or any other adults who provide a child with day-to-day support.

In addition, an employee sharing in the care of a newborn with its biological parent—whether or not that employee is financially supporting the child—will also be entitled to FMLA leave under the new DOL interpretation.

But there are some limits. Family members who are simply caring for children in short-term situations—for example, when parents are away from home on vacation—are not eligible for FMLA leave under the interpretation.

Clearly, employers must now be cautious when they consider denying FMLA leave eligibility based upon the appropriate parent definition.

For example, the new DOL interpretation specifically precludes denial of leave based on the number of parents involved in the child's care. Neither the "statute nor the regulations restrict the number of parents a child may have under the FMLA." Thus, when biological parents separate from each other and then remarry, all four adults will be entitled to take FMLA leave if they all have responsibility for giving care to the children of the original marriage.

Leave administration

Employers have some remedies. If you have questions or suspicions about the child/parent relationship, you are entitled to request documentation from the employee seeking FMLA leave explaining the family relationship. However, a simple statement asserting that the requisite family relationship exists is all that is needed.

The DOL's clear message: FMLA leave should be granted to all child caregivers, no matter what their title or relationship to the child.

Dena B. Calo is an associate at Genova, Burns & Giantomasi. She can be contacted at (973) 535-7135 or dcalo@genovaburns.com. James Gee, a summer associate, assisted with the preparation of this article.