U.S. Department of Labor
Wage and Hour Division
Washington, DC 20210

Administrator's Interpretation No. 2010-3

June 22, 2010

Issued by DEPUTY ADMINISTRATOR NANCY J. LEPPINK

SUBJECT: Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child.

The Administrator has determined that additional clarification is needed on the definition of "son or daughter" as it applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. Based on the Wage and Hour Division's experience in administering the FMLA, it is evident that many employees and employers are unsure of how the FMLA applies when there is no legal or biological parent-child relationship. The Administrator is issuing this interpretation to provide needed guidance on this important area of law.

Background

The FMLA entitles an eligible employee to take up to 12 workweeks of job-protected leave, in relevant part, "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and to care for a son or daughter with a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(A) - (C); 29 C.F.R. § 825.200. The FMLA defines a "son or daughter" 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." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.[1]

The Wage and Hour Division has received several requests for additional guidance regarding whether employees who do not have a biological or legal relationship with a child may take FMLA leave for birth, bonding, and to care for the child.

In Loco Parentis

The FMLA entitles an employee to 12 workweeks 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. § 2612(a)(1)(A) - (C). The definition of "son or daughter" under the FMLA includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.

[1] This Administrator's Interpretation does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions. *See* 29 C.F.R. § 825.122(g), (h).

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 of 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* S. Rep. No. 103-3, at 22. Congress stated that the definition was intended to be "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." *Id.*

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 incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." *Niewiadomski v. U.S.,* 159 F.2d 683, 686 (6th Cir. 1947) (quotations omitted). *Black's Law Dictionary* defines the term in loco parentis as "in the place of a parent." *Black's Law Dictionary* 803 (8th ed. 2004). "The key in determining whether the relationship of in loco parentis is established is found in the *intention* of the person allegedly in loco parentis to assume the status of a parent toward the child. The intent to assume such parental status can be inferred from the acts of the parties." *Dillon v. Maryland-National Capital Park and Planning Comm'n*, 382 F. Supp. 2d 777, 787 (D. Md. 2005), *aff'd* 258 Fed. Appx. 577 (4th Cir. 2007) (citations omitted; emphasis in original).

Whether an employee stands in loco parentis to a child is a fact issue dependent on multiple factors. *Megonnell v. Infotech Solutions, Inc*., 2009 WL 3857451, *9 (M.D. Pa. 2009). Courts have enumerated factors to be considered in determining in loco parentis status; these factors include the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised. *Dillon*, 382 F. Supp. 2d 777, 786 -787 (D. Md. 2005).[2]

The FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child. 29 C.F.R. § 825.122(c)(3). Employees who have no biological or legal relationship with a child may nonetheless stand in loco parentis to the child and be entitled to FMLA leave. *Id*. It is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand in loco parentis to a child. For example, where an employee 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, 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. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement. For instance, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand in loco parentis to the child. Similarly, an employee who will share equally in the raising of an adopted child with a same sex partner, but who

[2] There is no specific set of factors that, if present, will be considered to be dispositive in determining in loco parentis status. *See e.g., Martin v. Brevard County Public Schools*, 543 F.3d 1261 (11th Cir. 2008) (fact issue whether employee stood "in loco parentis" to his granddaughter, though the employee provided financial support, shelter, food and health insurance); *Dillon,* 382 F. Supp. 2d at 787 (genuine issue of material fact as to whether grandmother stood *in loco parentis* to employee, although grandmother had provided a home and financial support); *Brehmer v. Xcel Energy, Inc.,* No. 06-3294, 2008 WL 3166265, at *7 (D. Minn. 2008) (finding genuine issue of material fact on *in loco parentis* issue where employee helped his girlfriend's son eat, dress, get ready for bed, took child to doctor appointments and to school, went to child's softball games, and contributed more than half of child's financial support).

does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands in loco parentis to the child.

It should be noted that the fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent a finding that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. For example, 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. Where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. 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* 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

Examples of situations in which an in loco parentis relationship may be found include where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care, or where an aunt assumes responsibility for raising a child after the death of the child's parents. Such situations may, or may not, ultimately lead to a legal relationship with the child (adoption or legal ward), but no such relationship is required to find in loco parentis status. In contrast, an employee who cares for a child while the child's parents are on vacation would not be considered to be in loco parentis to the child.

Conclusion

Based upon a thorough examination of the relevant factors, it is the Administrator's interpretation that either day-to-day care or financial support may establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands in loco parentis to a child will depend on the particular facts.