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A PUBLICATION OF JONES, SKELTON & HOCHULI, P.L.C. | JULY 2010

DOL Clarifies FMLA Definition of "In Loco Parentis"

By Barry H. Uhrman

The U.S. Department of Labor ("DOL") recently issued Administrator's Interpretation No. 2010-3, which discusses "*in loco parentis*" as part of the Family and Medical Leave Act's ("FMLA") definition of "son or daughter." The DOL clarified that under the FMLA, an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

The FMLA entitles an eligible employee to take up to 12 work weeks of job-protected leave, in relevant part, because of the birth of a son or daughter of the employee and in order to care for such son or daughter; because 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. 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."

In loco parentis embodies the two ideas of assuming the parental status and discharging the parental duties. Employees who have no biological or legal relationship with a child may still stand *in loco parentis* to the child and be entitled to FMLA leave. Section 825.122(c)(3) of the FMLA Regulations defines "*in loco parentis*" as including "those with day-to-day responsibilities to care for and financially support a child." According to Administrator's Interpretation No. 2010-3, however, the word "and" should be interpreted to mean "or" in Section 825.122(c)(3). In other words, 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.

The DOL also acknowledged that an eligible employee who will share equally in parenting responsibilities with a same-sex partner is entitled to leave under the *in loco parentis* regulation. The new interpretation does not apply to the military FMLA leave provisions, however, as they have their own definitions of "son or daughter."

The new federal guidance confirms that employers should make a determination of whether someone *stands in loco parentis* on a case-by-case basis. Employees do not need to establish that they will provide *both* day-to-day care and financial support to be found to stand *in loco parentis* to a child. Rather, employers must look to the specific, day-to-day responsibilities of the person requesting the leave with respect to the child in question. ◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning employment law. Please feel free to contact Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding these important developments.

About The Author

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Mr. Uhrman joined Jones, Skelton & Hochuli in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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