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Opening the Door to New "Family"

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The federal Family and Medical Leave Act (FMLA) causes confusion and consternation for many employers. This is understandable, considering the recent changes to the FMLA regulations and the current administration's efforts to expand FMLA coverage. The fact is, while most employers accept their legal obligation to provide FMLA benefits to eligible employees, they often are frustrated by (1) the complexity involved in navigating and administering an FMLA leave; and (2) the relative ease with which employees abuse the law. Given the numerous regulations, statutory provisions and case law, a veritable minefield awaits even the most experienced leave administrators.

On June 22, 2010, the U.S. Department of Labor (DOL) issued Administrator's Interpretation No. 2010-3. The DOL's stated intention was merely to "clarify" the definition of "son and daughter" under the FMLA. In reality, though, the DOL opened the FMLA benefits door to new "family members," further complicating the application of the law.

The Department of Labor's "Administrator Interpretations"

How did the DOL accomplish the most recent change to the FMLA? The mechanics of the process and the trend it represents are potentially more significant than the substance of the Interpretation.

On March 24, 2010, the DOL announced it would no longer issue Opinion Letters. This change comes at a time when the DOL has also announced a significant increase in its enforcement efforts. The budget for fiscal year 2011 includes increased funding and staffing for the Wage and Hour Division, which has already grown from 731 investigators in 2009 to 894 investigators through the first quarter of 2010. In place of Opinion Letters, the DOL will issue "Administrator Interpretations."

The DOL will issue Administrator Interpretations when "further clarity regarding the proper interpretation of a statutory or regulatory issue is appropriate." The Interpretations, unlike Opinion Letters, will not apply the law to a particular set of facts. Rather, the Interpretations will provide an overview of a legal principle. The DOL will respond to requests for Opinion Letters only with references to relevant statutes, regulations and cases without applying them to the facts presented. It will also analyze the types of requests received to determine the areas in which interpretative guidance may be useful. The DOL believes employers will find general guidance more useful than specific application of the law.

According to the DOL, Administrator Interpretations are not supposed to expand or create law. However, Secretary of Labor Hilda Solis recently acknowledged that is exactly what happened with Administrator's Interpretation No. 2010-3. In her June 25, 2010, Huffington Post article entitled "Sometimes It Takes An Interpretation," Secretary of Labor Solis expressly stated, "we have expanded FMLA protections" when describing Administrator's Interpretation No. 2010-3.

"In Loco Parentis" Under the FMLA

Stated simply, the FMLA allows eligible employees to take up to 12 workweeks of unpaid and job-protected leave in any 12-month period for qualified reasons. A private-sector employee is "eligible" if: (1) the employee works for a business with 50 or more employees within a 75-mile radius of the employee's worksite; (2) the employee has at least 12 months of service with the employer (not necessarily consecutive); and (3) the employee has physically worked at least 1,250 hours for the employer within the last 12 months.

Eligible employees may take FMLA leave for, among other reasons, the birth of a "son or daughter," to bond with a newborn or newly placed child, or to care for a "son or daughter" afflicted with a serious health condition. The FMLA regulations define a "son or daughter" as a biological, adopted or foster child, a step child, a legal ward, or a child of a person standing in loco parentis, literally in the place of a parent, if that child is either under 18 years old, or is 18 years or older and incapable of self care because of a mental or physical disability.

To qualify for the "in loco parentis" classification under the regulations, the employee need not have either a biological or legal relationship with the child. However, the regulations expressly require that the employee

has day-to-day responsibilities to provide both care and financial support to the child.

The DOL Redefines "In Loco Parentis" Through Administrator's Interpretation No. 2010-3

Though Administrator Interpretation No. 2010-3, the DOL redefined "in loco parentis." Despite the DOL's acknowledgement in the Interpretation that the "FMLA regulations define in loco parentis as including those with day-to-day responsibilities to care for and financially support a child" (emphasis added), the Interpretation abandons this requirement. Under the Interpretation, an employee can qualify as in loco parentis to a "son or daughter" without providing both day-to-day care and financial support. Specifically, the DOL stated:

[W]here 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 . . . either day-to-day care or financial support . . . In departing from the actual FMLA regulations, the DOL has expanded the protection for employees who are entitled to FMLA leave to care for a "son or daughter." In fact, the DOL stated that a "son or daughter" can have many "parents":

[T]he 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.

As a practical matter, this means virtually anyone with a significant other who has a child may seek job-protected leave to care for that child. Employer groups have raised concerns that although they support protection for non-traditional families, the new Interpretation could lead to more abuse of the FMLA.

Moreover, an employer is limited in its ability to verify the parental relationship. According Administrative Interpretation No. 2010-3:

Where an employer has questions about whether an employee's relationship to a child is covered under FMLA . . . [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.

Of course, for employers that already take a broad view of what constitutes a familial relationship, this new interpretation will not change their practices or procedures. For other employers, however, Administrator's Interpretation No, 2010-3 will significantly affect their administration of FMLA leave related to employees' needs to care for children.

Practical Recommendations

Employers subject to the FMLA should review their FMLA policies, handbooks and related communications to confirm they do not conflict with the DOL's position, particularly with respect to the documentation requested to establish the parental relationship.

Also, California employers should recognize that as a result of Administrator's Interpretation No. 2010-3, parental leave in certain circumstances may qualify under the FMLA, but not under the California Family Rights Act (which allows time off to care for a registered domestic partner's child, but does not go as far as the Interpretation in defining the parental relationship).

Finally, all employers should "stay tuned" for additional Administrator Interpretations from the DOL. A lapse in attention may result in costly litigation.

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