

SAME-SEX PARENTS QUALIFY FOR BENEFITS UNDER FMLA

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On June 22, 2010, the United States Department of Labor (DOL) issued an Administrative Interpretation allowing employees in a same-sex relationship to care for the child of his or her partner under the 1993 Family and Medical Leave Act (FMLA). The FMLA remains inapplicable to same-sex couples for purposes of caring for one another.

BACKGROUND

The FMLA allows employees to take job-protected, unpaid leave for up to 12 work weeks in any 12-month period for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son or daughter, or parent who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Under the FMLA, "son or daughter" is defined 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."

ADMINISTRATIVE INTERPRETATION

The DOL Interpretation clarifies the definition of "son or daughter" as it applies to an employee standing "in loco parentis to a child." The DOL emphasized that "[t]he key in determining whether the relationship of in loco parentis is established is found in the *intention* of the person alleging in loco parentis to assume the status of a parent toward a child." The DOL further noted that courts have enumerated several factors to be considered in determining in loco parentis status, including 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 provided, and the extent to which duties commonly associated with parenthood are exercised. Upon review of the FMLA and relevant court decisions, the DOL concluded that either day-to-day care or financial support for a child could establish an in loco parentis relationship where the employee intends to assume the responsibilities of a parent with regard to a child.

HYPOTHETICALS

The DOL also provides the following three hypothetical situations to illustrate its interpretations of the FMLA as applied to same-sex parents:

- 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;
- 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; and
- an employee who will share equally in the raising of an adopted child with a same-sex partner, but who 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.

RECOMMENDATIONS

Employers should update their FMLA leave policies to reflect this latest FMLA guidance. Employers should likewise conduct training seminars with managers and supervisors on the new requirement. We will continue to update our current and prospective clients of further developments. Please contact **Nancy Conrad** (610.782.4909; conradn@whiteandwilliams.com), **George Morrison** (610.782.4911; morrisong@whiteandwilliams.com) or any member of our Employment Law Group for assistance with the review, development or revision of a FMLA policy for your company.

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