

Department of Labor clarifies definition of “son or daughter” in FMLA

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What you need to know:

Under the Department of Labor’s recently issued administrative interpretation, same-sex couples, extended relatives or employees with other, non-traditional, non-legal and non-biological relationships may be eligible to take FMLA leave to care for a child if the employee is *either* responsible for the day-to-day care of the child *or* financially responsible for the child, with eased requirements for documentation substantiating the nature of the relationship.

What you need to do:

Employers are advised to consult their attorneys if they have any questions regarding the eligibility of an employee for FMLA leave and to ensure that their FMLA policy is up to date.

The US Department of Labor has issued an administrative interpretation, clarifying that an eligible employee with no biological or legal relationship to a child is entitled to take leave under the Family and Medical Leave Act to care for a sick, newborn or newly adopted child when that employee is either responsible for the day-to-day care of the child or financially responsible for the child.

FMLA generally

As a general matter, the FMLA applies to employers with 50 or more employees within a 75-mile radius. Employees are eligible for FMLA leave where they have worked for the employer for at least 12 months, and for at least 1,250 hours in the last 12 months. Eligible employees are typically entitled to up to 12 weeks of leave within a 12-month period for, among other reasons, the birth or placement of a son or daughter, as well as to care for a son or daughter with a serious health condition. Married couples working for the same employer may be restricted to 12 total weeks of combined leave, except in cases of certain serious health conditions. When an employer has a question regarding whether an employee’s relationship to a child is covered under the FMLA, the employer may require the employee to provide reasonable documentation or statement of such relationship.

DOL broadly interprets the concept of parents under the FMLA

The FMLA defines “son or daughter” as a biological, adoptive or foster child, stepchild, legal ward or “a child of a person standing in loco parentis” who is under 18, or else 18 or older but incapable of self-care due to mental or physical disability. In the past, “in loco parentis” has typically been interpreted as requiring that the employee be both responsible for the day-to-day care of the child *and* be financially responsible for the child. However, now the employee must only be one *or* the other.

The effect of this administrative interpretation is to ensure same-sex parents the same right to FMLA leave as married parents. In fact, same-sex parents who work for the same employer may be entitled to more leave than married parents who work for the same employer, since married employees are sometimes restricted. Additionally, more non-traditional caregivers may also be eligible for FMLA leave to care for a child, such as grandparents and more extended relatives.

Importantly, the DOL noted in its administrative interpretation that there is no limit to the number of parents a child can have under the FMLA. Further, if the employer has a question regarding whether the employee's relationship to the child is covered under the FMLA, the employee need only submit a "simple statement asserting that the requisite family relationship exists."

For more information, please contact your lawyer at Choate or one of the following members of the Labor, Employment & Benefits Group:

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