LawTrends

A publication of Eastman & Smith Ltd.

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ATTORNEYS AT LAW
Established 1844

September 2010
Employment Special Issue Vol. 2, No. 2

Expanded Right to Take Leave and What Could be in Store for Employers Under FMLA

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The U.S. Department of Labor (DOL) made headlines early this summer when it issued its June 22, 2010, Administrator's Interpretation of the FMLA. While the media emphasized the effect of this interpretation as expanding FMLA leave to allow same-sex partners to take FMLA leave for birth, placement, bonding and to care for a child with a serious health condition, the Administrator's Interpretation actually has potentially broader implications. The practical effect of DOL's interpretation is that the DOL now takes the position that any employee who assumes the role of caring for a child can receive parental rights to family leave, regardless of that person's legal or biological relationship to the child.

The FMLA defines 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, 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." The FMLA regulations define in loco parentis as including individuals with day-to-day responsibilities to care for and financially support a child. The DOL's Administrator's Interpretation clarifies DOL's

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position 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 have in loco parentis status with the child.

Determining whether an employee stands in loco parentis is still a factual issue that depends on a number of factors and considerations, such as the age of the child; the dependency of the child on the person in question; the amount of support provided to the child; and the extent to which the person in question engages in duties commonly associated with parenting. However, under DOL's interpretation, more employees may to assert that a sufficient relationship exists. While employers may request "reasonable documentation" or a statement of the family relationship, DOL will only require a "simple statement asserting that the requisite family relationship exists" to establish that an employee stands in loco parentis to a child.

According to the interpretation, DOL would consider the following employees entitled to take FMLA leave:

- an employee who provides day-to-day care for his or her unmarried partner's child, but does not financially support the child;
- an employee who is raising a child with the child's biological parent;
- an employee who is raising a child who was adopted by the employee's same sex partner, even though the employee has no legal relationship with the child;
- a grandparent who takes in a grandchild and assumes responsibility for raising the child because the parents are incapable of providing care; and
- an aunt who takes responsibility for raising a child after the death of a child's parents.

According to DOL, all of these situations satisfy the in loco parentis designation, even if no legal relationship exists.

DOL also notes that neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. Therefore, if a child's parents divorce and both remarry, DOL's view is that all four adults may take FMLA leave to care for the child.

DOL explains that this interpretation only applies in the situation of caring for a son or daughter – it does not expand any interpretation of the law to permit an employee to take FMLA leave to care for a same-sex partner. Moreover, the DOL makes clear that its interpretation does not apply to an employee's entitlement to take military FMLA leave.

This Interpretation does not have the force of law, but a court may find it persuasive if a case involving in loco parentis relationships and the FMLA were to come before it. However, legislation is pending that would, if passed, expand the scope of the law and would create additional legal obligations for employers. Some legislation to watch :

- Family and Medical Leave Enhancement Act, H.R. 824, introduced February 3, 2009. This legislation would amend FMLA to include employees at worksites with only 25 employees within 75 miles (reduced from the current requirement of 50). The legislation also expands the FMLA to permit "parental involvement leave," which would allow an employee to take four hours of leave in a 30 day period or 24 hours of leave in a 12 month period to participate in or attend school or community activities which are attended by a child or grandchild. This "parental involvement leave" also could be used for routine family medical care needs – such as medical and dental appointments for an employee, spouse, child or grandchild – and to care for the needs of related elderly individuals.
- Family and Medical Leave Inclusion Act, H.R. 2132, introduced April 28, 2009; S. 3680, introduced July 30, 2010. This law would expand FMLA to permit employees to take leave to care for a broader range of individuals, including a same sex spouse (as determined under applicable state law), domestic partner, parent-in-law, adult child, sibling or grandparent.

- Family and Medical Leave Restoration Act, H.R. 2161, introduced April 29, 2009. This Act would nullify certain of FMLA regulations promulgated on November 17, 2008. Under this law, re-certification of a medical condition only could be done after the expiration of the original certification or one year (the current regulations permit re-certification after six months). The law also would remove the specific number of visits to a health care provider for a chronic or serious health condition, and instead require only that the individual receive the treatment that the health care provider deems proper.

- Domestic Violence Leave Act, H.R. 2515, introduced May 20, 2009. If this legislation is enacted into law, the FMLA would be amended to permit victims of domestic violence, sexual assault and stalking and their family members to take leave as a result of the violence. Employees would be permitted to take leave to seek medical attention, legal assistance or psychological counseling, to attend support groups or to participate in safety planning or other activities necessitated by domestic violence, sexual assault or stalking. Notably, this law also would expand the definition of spouse of family member in FMLA to include same sex spouses and domestic partners.

- Balancing Act of 2009, H.R. 3047, introduced June 25, 2009. This comprehensive Act includes several of the amendments discussed above, including the Family and Medical Leave Enhancement Act of 2009 and the Domestic Violence Leave Act. It also includes the Healthy Families Act, which requires certain employers to provide paid sick time to their employees.

Employers always have been free to adopt an FMLA policy that is broader than that required by law. For example, many employers already permit employees to take leave for various types of in loco parentis relationships. In any event, employers may wish to review their FMLA policies and consider the effect that the new Administrator's Interpretation and the pending legislation may have on their business and workforce. The labor and employment attorneys of Eastman & Smith Ltd. are available to assist with any questions or to discuss strategies for addressing any policy revisions.

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