PLUNKETT COONEY

# U.S. Department of Labor Provides FMLA Rights to Gay Employees Co-Parenting With Their Life Partners

July 7, 2010

The U.S. Department of Labor (DOL) – Wage and Hour Division recently issued an administrator's interpretation of the Family and Medical Leave Act (FMLA). Specifically, Administrative Interpretation No. 2010-3 states that same sex couples have all FMLA rights provided to heterosexual persons standing *in loco parentis* with a child.

By way of background, FMLA provides certain leave rights to employees of companies with 50 or more employees within 75 miles of their worksite. Among the reasons employees can take FMLA leave are to care for a "son or daughter" with a serious health condition, or for foster child placement or adoption, or to bond with such children or a newborn within the first 12 months of placement or birth.

The definition of "son or daughter" includes a "biological, adopted or foster child, a stepchild, a legal ward or a child of a person standing *in loco parentis*." The DOL's interpretation focuses on the latter status.

*In loco parentis* refers to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." The focus is on the intent of the person to assume parental status as inferred by their actions.

Whether a person is *in loco parentis* depends on such factors as the age of the child, the child's dependence on the employee, amount of financial support, if any, and parental duties rendered. However, to be *in loco parentis* does not require both childcare and financial support.

The DOL's interpretation specifically provides that "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, but the employee stands *in loco parentis* to the child." Therefore, it does not matter whether the individual is homosexual or heterosexual for purposes of *in loco parentis* status.

Moreover, "the 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…"

Employers, questioning the *in loco parentis* status, are entitled to reasonable documentation or a statement of the family relationship. However, "[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."

While DOL administrator interpretations are not binding on courts, they are persuasive and generally followed. Interpretations also instruct federal Wage and Hour investigators reviewing complaints filed against employers.

Therefore, employers should not ignore the above guidance as they implement their FMLA leave policy. Given the complexities of FMLA, policies should be drafted by experienced employment attorneys.

Should you have any questions about FMLA, please feel free to contact the author Claudia D. Orr or any member of Plunkett Cooney's Labor and Employment Practice Group. To review a practice group directory click here or call Labor and Employment Practice Group Co-Leader Courtney L. Nichols at (248) 594-6360.