

## Clarification of “Son or Daughter” and “In Loco Parentis” Under FMLA



The U.S. Department of Labor (DOL) issued an [Administrator’s Interpretation](#) to clarify the FMLA regulation that defines “son or daughter” including in loco parentis relationships. They acknowledged that many children do not live in traditional nuclear families. As a result, additional clarification was needed on the definition of “son or daughter” as it applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition. The Administrator’s Interpretation provides guidance on when employees are entitled to take leave related to a child when there is no legal or biological parent-child relationship. The effect of the Interpretation is to broaden the number of individuals who stand in loco parentis to a child and are, therefore, eligible to take FMLA leave to care for that child.

Under Section 825.122(c)(3) of the FMLA regulations: “Persons who are in loco parentis include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child.”

In loco parentis is commonly understood to refer 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.” In the past, this relationship may have been narrowly construed under FMLA to include only those situations where the parent was absent and the child was, for example, raised by a grandparent. The Administrator’s Interpretation makes it clear that a broader construction is intended.

Employees who have no biological or legal relationship with a child may stand in loco parentis to a child and be entitled to FMLA leave. According to the Administrator’s Interpretation 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. Furthermore, “no one who steps into a parent role when that child’s biological parents are absent or incapacitated should be denied leave by an employer because he or she is not the legal guardian.”

Examples cited in the Administrator’s Interpretation demonstrate the types of relationship that will, going forward, qualify as in loco parentis for the purpose of FMLA eligibility:

- An employee who 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 may be entitled to FMLA leave to care for or bond with the child.
- An employee who will share equally in the raising of a child with the child’s biological parent is entitled to leave for the child’s birth.
- 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, is entitled to leave to bond with the child following placement, or to care for the child if the child has a serious health condition.

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 for purposes of taking FMLA leave. Neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. For example, if a child’s biological parents divorce and each parent remarries, the child is the “son or daughter” of both the biological parents and the stepparents, and all four adults have equal rights to take FMLA leave to care for the child.

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### What does this mean to employers?

Going forward employers will need to use the criteria set out in the Administrator’s Interpretation to determine whether an employee requesting leave for the birth or adoption of a child or to care for a child with a serious health condition is eligible for FMLA leave because the employee is the child’s parent or stands in loco parentis to the child.

- In loco parentis status is much broader than its previous interpretation.
- An employee requesting FMLA leave in these situations does not need to prove both day-to-day care and financial responsibility, but may simply state he or she has an in loco parentis relationship with the child.
- An employer may ask the employee for reasonable documentation or a statement of the relationship. A simple statement asserting that the required family relationship exists is all that is needed for in loco parentis situations.

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