Employment Edge 112th Edition—Department of Labor Clarifies the FMLA's Definition of "Son or Daughter"

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On June 22, 2010, the Wage & Hour Division of the Department of Labor issued an Administrator's Interpretation, Administrator's Interpretation No. 2010-3, clarifying that the Family and Medical Leave Act (FMLA) leave entitlement for birth, bonding following adoption or foster care placement, or to care for a "son or daughter" with a serious health condition extends to non-traditional family arrangements, including same-sex couples.

The FMLA provides for up to 12 weeks of unpaid leave for birth, bonding, or to care for a "son or daughter" with a serious health condition. 29 U.S.C. § 2612(a)(1)(A)-(C). The FMLA defines "son or daughter" 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." 29 U.S.C. § 2611(12). Many employers have struggled to define whether an employee's circumstances are such that they stand "in loco parentis."

The Administrator's Interpretation states that an employee who either bears day-to-day responsibility for care or financially supports the child stands in loco parentis under the FMLA. The Interpretation also states that a lack of a legal or biological relationship with the child, the presence of a biological parent in the home, or the existence of a biological mother and father will not necessarily defeat a finding that an employee stands in loco parentis with the child. As a result, the Interpretation concludes that same-sex partners who will share in the raising of a child both stand in loco parentis. Similarly, relatives such as grandparents and aunts who assume ongoing responsibility of the child will be considered to stand in loco parentis.

The Administrator's Interpretation states that "where an employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or [a] statement of the family relationship. 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."

In light of the new Administrator's Interpretation, employers should review their FMLA policies and practices to ensure that they are consistent with the recent Department of Labor guidance. If you have any questions about FMLA leave, or other employment law issues, please contact Carl Crosby Lehmann or another

member of the Gray Plant Mooty Employment and Labor Law practice group.

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