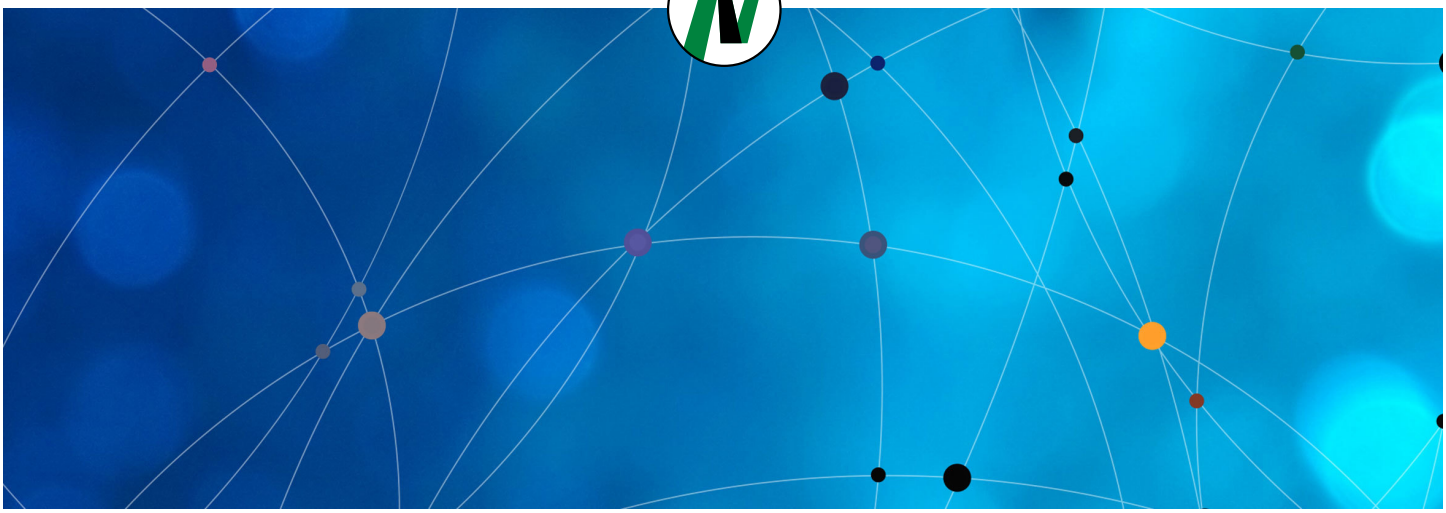

DOL Clarifies the Definition of "Son or Daughter" under the FMLA

06.29.2010

In a June 22, 2010 interpretation letter issued by the Department of Labor (Administrator's Interpretation No. 2010-3), the DOL has stated that any employee who assumes a child-caring role is entitled to parental rights to family leave under the Family and Medical Leave Act ("FMLA").

The DOL has clarified the definition of "son or daughter" as it applies to an employee taking leave under FMLA for a newborn or newly placed child, or to care for a child with a serious health condition, when there is no legal or biological parent-child relationship.

The definition of "son or daughter" under the FMLA includes not only a biological or adopted child, but also a "foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*." 29 U.S.C. § 2611(12). *See also* 29 C.F.R. §§ 825.122(c), 825.800.

The DOL has now clarified that employees who have no biological or legal relationship with a child *may* nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave. Whether an employee stands *in loco parentis* to a child will depend on the particular facts. Generally, the key in determining whether the relationship of *in loco parentis* is established is found in the intention of the person allegedly *in loco parentis* to assume the status of a parent toward the child.

The DOL has concluded that the FMLA regulations to 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 be found to stand *in loco parentis* to a child.

This means that either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child - even though there is no legal or biological relationship.

This also means that an employee will stand *in loco parentis* and be entitled to FMLA leave who shares equally in the raising of

(1) a child with the child's biological parent, or

(2) an adopted child with a same sex partner, but who does not have a legal relationship with the child.

The DOL also explained that FMLA also does not restrict the number of parents a child may have. Thus, 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. For example, a grandparent, aunt or uncle may have FMLA rights.

If 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 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. *See* 29 C.F.R. § 825.122 (j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

Courts and regulators in California often follow federal law when assessing rights under the California Family Rights Act, particularly if the law is favorable to employees. Employers in California should follow this DOL Interpretative Letter when determining whether to grant leave under FMLA/CFRA.