



## **Family Medical Leave Act Interpretation – *In Loco Parentis* Clarification**

**By Trisha Olson**

On June 22, 2010, the U.S. Department of Labor (“DOL”) issued an interpretation of the *Family and Medical Leave Act* (“FMLA”) to clarify when an employee who does not have a biological or legal relationship with a child may take FMLA leave for the birth, adoption or placement of a child or to care for a child with a serious health condition. Generally, the FMLA provides 12 workweeks of job protected, unpaid leave during any 12-month period, for eligible employees to care for a son or daughter with a serious health condition, for the birth and care of a newborn, for the adoption of a child, or placement of a child from foster care in the employee’s home within the first 12 months following birth or placement.

The recent DOL interpretation clarifies the definition of “son or daughter” as used in the FMLA. The current definition includes a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under age 18, or age 18 or older and is incapable of self-care because of a mental or physical disability. The term *in loco parentis* generally refers to an individual who puts him or herself in the position of a parent by assuming certain day-to-day or financial obligations of a child. The DOL interpretation clarifies that employees who have no biological or legal relationship with a child may stand *in loco parentis* to a child. For example, where an employee provides day-to-day care for his or her unmarried partner’s child, but does not financially support the child, the employee could be considered to stand *in loco parentis* to the child and therefore be entitled to FMLA leave to care for the child if the child has a serious health condition. Likewise, a domestic/same-sex partner who is not the biological or adoptive parent of a child may stand *in loco parentis* to the child and 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.

The DOL interpretation states that a person is not required to provide both financial support and day-to-day care of a child in order to stand *in loco parentis* to the child. For instance, an employee who provides significant financial support for a grandchild, but who does not provide day-to-day care, may stand *in loco parentis*.

Further, the fact that a child has a biological or legal parent in the home does not prevent another person from standing *in loco parentis* for purposes of taking FMLA leave. In fact, the interpretation provides that when a child’s biological parents take subsequent spouses, all four parents (biological and step-parents/partners) could be entitled to FMLA leave for the child.

Significantly, other FMLA provisions are unaffected by this interpretation. For example, the new interpretation does not require employers to provide FMLA leave to employees seeking time to care for their unmarried or domestic/same-sex partners. However, because the DOL interpretation regarding *in loco parentis* is applicable immediately, employers should promptly review their FMLA policies, procedures and practices to ensure that they are consistent with the DOL interpretation.

Employers who have questions about an employee’s relationship to a child for FMLA purposes may require the employee to provide reasonable documentation or a statement of the family relationship. The DOL interpretation states that “a simple statement asserting that the requisite family relationship exists” is all that

is required to establish an employee's relationship.

In all cases, whether an employee stands *in loco parentis* to a child will depend on the particular facts. Accordingly, if you have questions regarding whether an employee is entitled to FMLA leave, please contact us.

---

The information herein was prepared by Scariano, Himes and Petrarca, Chtd. to provide general guidance on issues affecting educators. This publication is not intended to provide specific legal advice or to create an attorney-client relationship. We are pleased to provide legal assistance to you on the subjects addressed in this communication or on other subjects. Reproduction is permitted with credit to Scariano, Himes & Petrarca, Chtd.

Scariano, Himes and Petrarca, Chtd., represents more than 100 school districts, special education cooperatives and vocational education cooperatives. Our attorneys have expertise in all areas of education law and practice in three locations to more readily serve our clients:

**CHICAGO OFFICE**

Two Prudential Plaza  
180 N. Stetson, Suite 3100  
Chicago, Illinois 60601-6702  
Phone 312.565.3100 / Fax 312.565.0000

**CHICAGO HEIGHTS OFFICE**

1450 Aberdeen  
Chicago Heights, Illinois 60411  
Phone 708.755.1900 / Fax 708.755.0000

**WAUKEGAN OFFICE**

209 W. Madison Street  
Waukegan, Illinois 60085  
Phone 847.662.5800 / Fax 847.662.6813

[CLICK here](#) to remove your email address from our list.

State and federal law require that this document be designated as advertising material.

© 2010 Scariano, Himes & Petrarca, Chtd.