

## New Guidance on the FMLA

The United States Department of Labor (DOL) has just issued guidance that significantly expands the coverage of the federal Family and Medical Leave Act (FMLA).

The FMLA, among other things, requires covered employers to permit an employee to take up to twelve weeks of paid or unpaid leave in connection with the birth, adoption or placement of a son or daughter, or to care for a son or daughter with a serious health condition. Under the former guidance, employers typically required that an employee seeking FMLA leave establish that he/she had a legal relationship with the child. The new interpretation suggests that this legal relationship is not required before FMLA protections kick in.

The DOL's guidance, dated June 23, 2010, recognizes that there are situations where a person other than a biological parent or legal guardian stands *in loco parentis* for a child. It concludes that in these situations the person who intends to stand *in loco parentis* is entitled to the protections of the FMLA whether or not that person provides day-to-day care for the child or has financial responsibilities for the support of the child. Among other situations where the employee may be found to be *in loco parentis*, even though he/she does not provide financial support and/or day-to-day care, the agency cites:

- Employee provides day-to-day care for his/her unmarried partner's child even though the employee has no legal or biological relationship with the child and no legal obligation to provide for the child.
- An employee shares equally in the raising of an adopted child with a same sex partner, but who does not have a legal relationship with the child or any duty to support the child.

The fact that a child has a biological parent in the home or has both a mother and father also 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 example, when a child's parents are divorced parents and remarried, both the custodial and non-custodial parents and the spouses of those parents may stand *in loco parentis* to the child. Similarly a grandparent or other relative who takes in a child because the child's parents are dead or incapable of caring for the child will also be considered to be *in loco parentis* and therefore entitled to leave under the FMLA.

The DOL opines that where an employer has questions about whether an employee's relationship to a child is covered under the FLMA, 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 between the employee and the child.

The FMLA covers all governmental employers and employers who have fifty (50) or more employees within a 75 mile radius. Because employers face significant fines for violation of the law, they are strongly encouraged to consult legal counsel if there is any questions as to whether or not FMLA leave should be permitted.