UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

The Director

Tuesday, August 31, 2010
CPM 2010-15

MEMORANDUM FOR: Chief Human Capital Officers

FROM: John Berry, Director

Subject: Interpretation of "Son or Daughter" Under the Family and Medical Leave Act

On Tuesday, June 22, 2010, the Department of Labor (DOL) issued Administrator's Interpretation No. 2010-3, which clarifies the definition of "son or daughter" under the Family and Medical Leave Act (FMLA) as it applies to an employee standing "in loco parentis" to a child. Although this interpretation formally applies only to title I of the FMLA (which covers the non-Federal sector and only a few Federal employees), the U.S. Office of Personnel Management (OPM) is adopting this interpretation for title II of the FMLA, which covers most Federal employees.

In summary, existing FMLA regulations define in loco parentis situations to include employees with day-to-day responsibilities to care for **and** provide financial support for a child. The new interpretation includes employees with day-to-day responsibilities to care for **or** provide financial support for a child. The interpretation asserts 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, and that in all cases, whether an employee stands "in loco parentis" to a child will depend on the particular facts of the situation.

Consistent with DOL's interpretation, OPM's guidance does not address an employee's entitlement to take military FMLA leave for a son or daughter.

OPM's Current FMLA Definitions

Under the law (5 U.S.C. 6382(a)(1)(A)-(C)) and OPM regulations (5 CFR part 630, subpart L), and consistent with DOL regulations as appropriate, as required by 5 U.S.C. 6387, an employee may take up to 12 weeks of unpaid FMLA leave in a 12-month period for—

- the birth of a son or daughter of the employee;
- because of placement of a son or daughter with the employee for adoption or foster care;
- to care for the newborn or newly-placed son or daughter; or
- to care for a son or daughter with a serious health condition.

Son or daughter means a biological, adopted, or foster child; a step child; a legal ward; or a child of a person standing ***in loco parentis*** who is—

(1) Under 18 years of age; or

(2) 18 years of age or older and incapable of self-care because of a mental or physical disability. A son or daughter incapable of self-care requires active assistance or supervision to provide daily self-care in three or more of the "activities of daily living" or "instrumental activities of daily living." Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing, and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using the telephones and directories, using a post office, etc. A "physical or mental disability" refers to a physical or mental impairment that substantially limits one or more of the major life activities of an individual as defined in 29 CFR 1630.2 (h), (i) and (j).

In loco parentis refers to the situation of an individual who has day-to-day responsibility for the care and financial support of a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

Rationale for Administrator's Interpretation No. 2010-3

DOL's interpretation acknowledges that "Congress intended the definition of 'son or daughter' to reflect 'the reality that many children in the United States today do not live in a traditional 'nuclear' families with their biological father and mother." Further, "Congress stated that the definition was intended to be 'construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.'"

Based on case law, DOL states that "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 relationship without going through the formalities necessary to legal adoption." Further, "[t]he 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." In other words, the intent to assume such parental status can be inferred from the acts of the parties.

DOL also relies on case law to explain that "whether an employee stands in loco parentis to a child is a fact issue dependent on multiple factors" and that "[c]ourts have enumerated factors to be considered in determining in loco parentis status; these factors include the age of the child; the degree to which the child is dependent on the person claiming to be standing in loco parentis; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised."

Application of Administrator's Interpretation to Federal Employees

Consistent with DOL's interpretation, OPM advises the following:

I. **Requirements under *In Loco Parentis*.** Consistent with DOL's interpretation, it is OPM's interpretation that our 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 in order to be found to stand in loco parentis to a child.

Example 1: An employee provides day-to-day care for his or her domestic partner's child (with whom there is no legal or biological relationship) but does not financially support the child. The employee would be considered to stand in loco parentis to the child and therefore would be entitled to FMLA leave to care for the child if the child has a serious health condition.

Example 2: An employee who will share in the raising of a child with the child's biological parent would be entitled to leave for the child's birth to bond with the child within the first 12 months following birth because he or she will stand in loco parentis to the child.

Example 3: Similarly, an employee who will share in the raising of an adopted child with a same-sex partner, but who does not have a legal relationship with the child, would be entitled to leave to bond with the child following placement, or to care for the child if the child has a serious health condition, because the employee will stand in loco parentis to the child.

II. **Multiple Parents and Other Relationships.** OPM agrees with DOL that 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 law nor OPM regulations restrict the number of parents a child may have under the FMLA.

Example 4: If a child's parents divorce and both parents remarry, the child could be the "son or daughter" of both the biological parents and the stepparents and all four adults could have equal rights to take FMLA leave to care for the child; provided they meet the above conditions of providing day-to-day care or financially supporting the child.

Example 5: Other employees eligible for FMLA leave would include grandparents who take in a grandchild and assume ongoing responsibility for raising the child because the parents are incapable of providing care, or an aunt who assumes responsibility for raising a child after the death of the child's parents. These employees may or may not have a legal relationship with the child (adoption or legal ward), but no such relationship is required to find in loco parentis status. In contrast, an employee who cares for a child for a short period of time while the child's parents are on vacation would generally not be considered to stand in loco parentis to the child.

III. **Documentation.** Finally, where an agency has questions about whether an employee's relationship to a child is covered under FMLA, the agency 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.

Additional Information

The Administrator's Interpretation No. 2010-3, published by the U.S. Department of Labor, Wage and Hour Division, is available at www.dol.gov/whd/opinion/adminIntrprtnFMLA.htm

For additional information on OPM's HR policies, agency Chief Human Capital Officers and/or HR Directors should contact their assigned OPM Human Capital Officer. Employees should contact their agency HR offices for assistance.