By Anthony P. Curatola, Editor

FMLA and a Qualifying Child

The Department of Labor has provided clarification regarding the definition of a "son or daughter" as it pertains to the Family and Medical Leave Act (FMLA). Eligible employees can take FMLA leave to care for a foster child, stepchild, legal ward, or child of which the employee stands in loco parentis.

The Family and Medical Leave Act of 1993 (FMLA) was signed into law with the intention of providing eligible employees with up to 12 workweeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons. For an employee to be eligible for FMLA leave, he or she must have a qualifying reason. As found in the Department of Labor (DOL) literature, qualifying reasons under the FMLA provision include birth and care of the employee's child, placement for adoption or foster care of a child with the employee, care of an immediate family member (spouse, child, or parent) who has a serious health condition, or care of the employee's own serious health condition.

Even to the casual observer, it's easy to see that FMLA is intended to provide leave so that an employee can attend to family responsibilities under difficult situations without loss of job or benefits. But one question that consistently arises is whether an employee who doesn't have a biological or legal relationship with a child qualifies for FMLA leave.

Background Information

For an employee to be eligible for FMLA leave, he or she must satisfy three conditions. First, the employee must be employed by a covered employer and work at a worksite whereby the employer employs at least 50 people. Second, the employee must have worked at least 12 months (need not be consecutive) for the employer. Third, the employee must have worked at least 1,250 hours during the 12 months immediately before beginning FMLA leave.

In addition, FMLA leave may be taken "intermittently or on a reduced leave schedule" under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced-leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek or hours per workday.

It's important to note that there's no restriction on the size of a leave increment when an employee takes intermittent leave or is on a reduced-leave schedule. An employer may, however, limit leave increments to the shortest period that the employer's payroll system uses to account for absences or use of leave, provided it's one hour or less. For example, an employee might take two hours off for a medical appointment or might work a reduced day of four hours over a period of several weeks while recuperating from an illness.

The employer also has some rights or protection under the FMLA provisions. In the case where both spouses are employed by the same employer, the couple may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employees' son or daughter or to care for the child after birth, for placement of a son or daughter with the employees for adoption or foster care, to care for the child after placement, or to care for an employee's parent with a serious health condition.

Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for one of those purposes, each

spouse would be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for a purpose other than one initially used (29 CFR §825.201(b)).

When the need for leave is foreseeable, an employee is expected to give the employer at least 30 days' notice or as much notice as is practical (for example, if the need for the leave is based on the birth of a child). If 30 days' notice isn't practical—due to, for example, a lack of knowledge of approximately when the leave will be required to begin, a change in circumstances, or a medical emergency—notice must be given as soon as practical. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child (29 CFR §825.302).

Administrator's Interpretation No. 2010-3

On June 22, 2010, the U.S. Department of Labor issued Administrator's Interpretation No. 2010-3 to provide additional clarification on the definition of "son or daughter" as it applies to an employee's request for leave under the FMLA. Pursuant to 29 CFR §825.122(c), the FMLA defines a "son or daughter" to include 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*" [emphasis added].

The FMLA regulations define "in loco parentis" as including those with day-to-day responsibilities to care for and financially support a child. A biological or legal relationship isn't necessary (29 CFR §825.122(c)(3)). Therefore, 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. It's the Administrator's interpretation that the regulations don't require an employee who intends to assume the responsibilities of a parent to establish

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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. As illustrated in the interpretation, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but doesn't 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 had a serious health condition.

It should be noted that the fact that a child has a biological parent in the home, or has both a mother and a father, doesn't prevent a finding for purposes of taking FMLA leave that the child is the "son or daughter" of an employee who lacks a biological or legal relationship with the child. Even more important, the interpretation goes on to say that neither the statute nor the regulations restrict the number of parents a child may have under the FMLA. Thus, where a child's biological parents divorce, and each parent remarries, the child will be the "son or daughter" of both the biological parents and the stepparents, and all four adults would have equal rights to take FMLA leave to care for the child.

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 statement of the family relationship. A simple statement made by the employee asserting that the requisite family relationship exists is all that's needed in situations such as in loco parentis where there's no legal or biological relationship (29 C.F.R. § 825.122(j)).

Review Company Rules

Employers will need to exercise particular attention to the broadness of the definition given to a "son or daughter" of an employee when the employee requests FMLA leave and the child isn't the employee's biological child. In fact, this may be a good time to review your employee handbook to ensure compliance with FMLA rules and, in particular, newly issued Interpretation 2010-3. **SF**

Anthony P. Curatola is the Joseph F. Ford Professor of Accounting at Drexel University in Philadelphia, Pa., and a member of IMA's Greater Philadelphia Chapter. You can reach Tony at (215) 895-1453 or curatola@drexel.edu.