Note to employers: FMLA scope has expanded

The Department of Labor has issued a broader interpretation of the Family and Medical Leave Act

Jeffrey Mullins

B2BExpert

Employers must be cautious when determining whether to grant or deny Family and Medical Leave Act (FMLA) leave, as more employees will now qualify for leave. On June 22, 2010, the Department of Labor (DOL), now under the direction of Secretary Hilda L. Solis, President Obama's appointment to the secretary of labor position, issued an administrative interpretation of the definition of "son or daughter" under the FMLA, which allows persons who have no legal or biological parent-child relationship to take FMLA leave for birth, bonding, or to care for a child. This interpretation expands the scope of FMLA leave to allow same-sex domestic partners to take FMLA leave so long as the person has either day-to-day responsibility for caring for the child or provides financial support for the child. Some commentators have identified this change in the FMLA regulations as the first step toward increased protections, pursuant to Federal law, for same-sex domestic partners.

Under the FMLA, an employee can take up to 12 workweeks of FMLA leave (1) because of the birth of a son or daughter, (2) because of the placement of a son or daughter for foster care or adoption, or (3) to care for a son or daughter with a serious health condition. The FMLA's definition of "son or daughter" includes a biological or adopted child, a "foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis."

The DOL's progressive interpretation hinges upon the "in loco parentis" portion of the FMLA's definition. The new interpretation bases "in loco parentis" status on four factors.

1. The age of the child.
2. The degree to which the child is dependent upon the person claiming to be standing "in loco parentis."
3. The amount of support, if any, provided.
4. The extent to which duties commonly associated with parenthood are exercised.

The FMLA regulations define "in loco parentis" as including "those with day-to-day responsibilities to care for and financially support a child." The new interpretation changes this definition by not requiring the employee to show both day-to-day care and financial support, rather, they must only show either of the two requirements. Furthermore, the interpretation does not restrict the number of parents that a child may have. If a child's parents divorce and remarry, or divorce and enter a same-sex domestic partnership, all four of the individuals may now qualify as the parents of the son or daughter.

Employers must consider this new expanded definition of "in loco parentis" when determining whether to grant FMLA leave. The employer may require the employee to provide reasonable documentation or a statement of the family relationship, but a simple statement that meets the new expanded definition of the requisite family relationship is all that is needed. Such an inquiry involves evaluating particular facts that may change depending upon each circumstance. Going forward, employers must be aware of the expanded definition in order to maintain compliance with the FMLA.

Jeff Mullins is an attorney in the Labor and Employment Group in the Dayton office of Taft Stettinius & Hollister LLP. Jeff can be reached at mullins@taftlaw.com or at 937-641-1725.