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DOL ISSUES NEW ADMINISTRATIVE INTERPRETATION OF “IN LOCO PARENTIS” UNDER THE FAMILY AND MEDICAL LEAVE ACT

by: Sarah R. Marmor

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On June 22, 2010, the Deputy Wage Hour Administrator at the United States Department of Labor issued a new interpretation of “in loco parentis” for purposes of granting leave under the Family and Medical Leave Act (“FMLA”).

http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf The interpretation adopts a broader reading of the term “in loco parentis” under the FMLA, making it easier for a non-family member to qualify for leave to care for a child. As a result of the Administrator’s Interpretation (“AI”), employers likely will have to take a more liberal approach to granting family and medical leave to non-parents.

“In loco parentis” means “in place of a parent” or “instead of a parent.” The Administrator determined that “additional clarification” of the term “son or daughter” was needed under section 101(12) of the FMLA as it applies to an employee standing “in loco parentis” to a child. The FMLA permits an employee to take up to 12 weeks of unpaid, job-protected leave (1) because of the birth of a son or daughter and in order to care for the child; (2) because of the placement with the employee of a son or daughter for adoption or foster care; (3) and to care for a son or daughter with a serious health condition. The FMLA defines a “son or daughter” to include, among other things, “a child of a person standing in loco parentis” and who is under 18 or over 18 but mentally or physically disabled.

The FMLA regulations define “in loco parentis” as someone who has day-to-day responsibilities to care for **and** financially support a child. The new AI now allows for an in loco parentis relationship

If you have questions regarding the subject matter of this alert, please contact:

Sarah R. Marmor

212.661.5030

www.schoeman.com

if the person seeking leave has day-to-day responsibilities to care for **or** financially support a child. Whether the in loco parentis relationship ultimately exists will depend on a review of the particular facts presented by the employee. If an employer questions the existence of the in loco parentis relationship, it can ask the employee for reasonable documentation or a statement of the family relationship. However, according to the AI, "a simple statement asserting that the requisite family relationship exists is all that is needed."

The determination of in loco parentis status will be fact specific and case-by-case. The regulation still requires that the employee have a real, de facto parental role in the child's life, however. An aunt who is genuinely responsible for a niece or nephew (e.g. is in effect the legal guardian) would qualify; but an aunt who merely sometimes takes care of a child would not. Some of the factors that an employer may consider in determining whether an in loco parentis relationship exists are (1) the age of the child; (2) the degree to which the child is dependent upon the person claiming to stand in loco parentis; (3) the amount of support, if any, provided; and (4) the extent to which duties commonly associated with parenthood are exercised.

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New York : 60 East 42nd Street , New York NY 10165

Chicago : 333 West Wacker Drive , Chicago IL 60606

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