

COMPLIANCE OVERVIEW

Provided by BBG, Inc.

FMLA Rights for Nontraditional Families

The federal Family and Medical Leave Act (FMLA) gives eligible employees the right to take unpaid, job-protected leave each year in certain situations, including:

- ✓ For the birth, adoption or foster care placement of a child;
- ✓ To care for a newborn or newly placed child; or
- ✓ To care for a family member with a serious health condition.

The Department of Labor (DOL) has issued guidance on how these FMLA rights extend to nontraditional families.

Employers should review their FMLA policies and actual practices to ensure that they are in compliance with the leave rights for nontraditional families. Employers may require employees to provide reasonable documentation if there is a question about whether the relationship is covered under the FMLA. However, a simple statement asserting that the requisite family relationship exists is all that is needed to confirm a family relationship.

LINKS AND RESOURCES

- DOL [Administrator's Interpretation Letter](#) from 2010 regarding the *in loco parentis* standard
- [The Employer's Guide to the FMLA](#), a publication of the DOL's Wage and Hour Division

HIGHLIGHTS

IN LOCO PARENTIS

- An individual stands *in loco parentis* if he or she has day-to-day responsibilities to care for or financially support a child.
- No biological or legal relationship with the child is required.
- The *in loco parentis* relationship exists when an individual intends to take on the role of a parent.

SAME-SEX SPOUSES

- Same-sex spouses have the same leave rights under the FMLA as opposite-sex spouses.
- For example, an eligible employee may take FMLA leave to care for his or her same-sex spouse with a serious health condition.

FMLA LEAVE RIGHTS FOR PARENTS

In general, the FMLA allows workers to take up to 12 weeks of unpaid leave during any 12-month period to care for a son or daughter with a serious health condition or to take time off from work for the birth, adoption or foster care placement of a son or daughter.

As family dynamics continue to change, many employees and employers may be unsure of how the FMLA applies when there is no legal or biological parent-child relationship. This uncertainty led the DOL to issue an interpretation letter in 2010 to clarify the definition of "son or daughter" and the application of the "*in loco parentis*" standard. According to the DOL, these clarifications were designed to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of the legal or biological relationship.

In Loco Parentis Standard

According to the DOL, Congress intended the FMLA's definition of "son or daughter" to reflect the reality that many children do not live in traditional nuclear families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodations for their child care responsibilities are not the biological parents of the children they care for, but their adoptive, step or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults.

The FMLA regulations define "*in loco parentis*" as including those individuals with day-to-day responsibilities to care for and financially support a child. 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. Whether an employee stands *in loco parentis* to a child will depend on the particular facts—no specific set of factors will be used to determine *in loco parentis* status.

An employee who intends to assume the responsibilities of a parent does not have to provide both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child.

Examples

- 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 does not 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 has a serious health condition.
- An employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth because he or she will stand *in loco parentis* to the child.

Who is considered a son or daughter under the FMLA?

The FMLA defines a son or daughter as a "biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is under 18 years of age or incapable of self-care because of a mental or physical disability."

The term "*in loco parentis*" generally means "in the place of a parent."

- An employee who will share equally 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 had a serious health condition, because the employee stands *in loco parentis* to the child.
- A grandparent who takes in a grandchild and assumes 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, can have an *in loco parentis* relationship with the child. These situations may or may not ultimately lead to a legal relationship with the child (adoption or legal ward), but no legal relationship is required to find *in loco parentis* status.
- An employee who cares for a child while the child's parents are on vacation would not be considered to be *in loco parentis* to the child.

PROTECTIONS FOR SAME-SEX SPOUSES

In 2013, the U.S. Supreme Court ruled that the federal Defense of Marriage Act's (DOMA) ban on federal recognition of same-sex marriages was unconstitutional. Due to the Supreme Court's DOMA decision, eligible employees in legal same-sex marriages are entitled to take FMLA leave to care for their spouses or family members. Eligible employees may take:

- Leave to care for their same-sex spouse with a serious health condition;
- Qualifying exigency leave due to their same-sex spouse's covered military service; or
- Military caregiver leave for their same-sex spouse.

Eligible employees in same-sex marriages are also entitled to take FMLA leave to care for:

- Their stepchild (the child of the employee's same-sex spouse) even if the *in loco parentis* requirement of providing day-to-day care or financial support for the child is not met; or
- A stepparent who is the same-sex spouse of the employee's parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

DOCUMENTING THE FAMILY RELATIONSHIP

An employer may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation, such as a child's birth certificate or a court document. It is the **employee's choice** whether to provide a simple statement or other documentation. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee's exercise or attempt to exercise his or her FMLA rights.

Source: U.S. Department of Labor, Wage and Hour Division