DOL'S INTERPRETATION OF "SON OR DAUGHTER" BROADENS EMPLOYEE PROTECTIONS UNDER THE FMLA

by Joseph C. DeBlasio and Sarah J. Somerset

On June 22, 2010, the U.S. Department of Labor (DOL) issued an administrator's interpretation addressing the definition of "son or daughter" as it applies to an employee taking protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child with a serious health condition under the Family and Medical Leave Act (FMLA).[1] The interpretation seemingly overrides the federal regulation defining "son or daughter," and lessens the prerequisites for establishing *in loco parentis* status.

Under the FMLA, an eligible employee may take up to 12 workweeks of job-protected leave in a 12-month period for reasons such as the birth of a son or daughter of the employee, the care of that son or daughter, the placement of a son or daughter with the employee for adoption or foster care, and to care for a son or daughter with a serious health condition.[2]

The FMLA defines "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 18 years of age or older and incapable of self-care because of a mental or physical disability."[3] Federal regulations interpret the *in loco parentis* relationship as requiring that an employee have responsibilities for day-to-day care of the child *and* financial support of the child.[4] However, according to the interpretation, the employee need only provide one or the other to establish qualification for leave; *either* that the employee provides day-to-day care, *or* financial support, so long as the employee intends to assume parental responsibilities toward the child.

The interpretation makes clear that intent is the key to establishing *in loco parentis* status. In fact, the interpretation expressly provides that any employee who *will* share equally in the raising of a child will be entitled to leave for the child's birth, under the premise that the employee *will* stand *in loco parentis* to the child once born.

The interpretation appears to be an effort by the DOL to ensure that non-traditional parents enjoy the same rights as traditional parents to care for a child whom they treat, or intend to treat, as their own. Examples cited by the interpretation as persons who may qualify for leave on the basis of an *in loco parentis* relationship include same-sex parents, a grandmother who is caring for children whose own parents cannot care for them, and an aunt who raises a sibling's children after the sibling's death. According to the interpretation, while any of these situations could ultimately lead to a legal relationship with the child, no such relationship is required to find *in loco parentis* status.

While the examples set forth in the interpretation are necessarily limited, the real world applicability is not. Considering the breadth of the interpretation, it is easy to imagine non-married partners, same-sex or not, who are neither biologically nor legally related to a child, applying for leave. In essence, so long as the partner intends to act as a parent to the child, the partner will be entitled to leave for a covered event. Significantly, an employee's right to leave is not limited by the fact that a child may already have two biological or legal parents, as the interpretation states that a child can have an unlimited number of "parents" for purpose of FMLA leave.

Under the New Jersey Family Leave Act (NJFLA), an eligible employee may take up to 12 workweeks of job-protected leave in a 24-month period for reasons such as the birth or adoption of a child, or the serious illness of a child.[5] The statute defines "child" as a biological, adopted, or resource family child, stepchild, legal ward, or child of a parent who is under 18 years of age; or 18 years of age or older but incapable of self-care because of a mental or physical impairment.[6] The regulations implementing the NJFLA interpret the definition of "child" to include "to whom such employee is a biological parent, adoptive parent, foster parent, step-parent, or legal guardian, or has a 'parent-child relationship' with a child as defined by law, or has sole or joint legal or physical custody, care, guardianship or visitation with a child."[7]

While there is a dearth of definitive guidance clarifying what exactly the regulations mean by a "parent-child relationship as defined by law," it seems reasonable to assume NJFLA leave, like FMLA leave, applies to employees standing *in loco parentis* to a child, as New Jersey courts have recognized that persons who are not biological or legal parents to a child may still have responsibilities to the child, such as financial support, on the basis of an *in loco parentis* relationship.[8] Accordingly, an employee arguing for eligibility of leave under the NJFLA based upon an *in loco parentis* relationship may make a strong case for entitlement.

However, despite the close relationship between the FMLA and the NJFLA, and contrary to what many employers may be naturally inclined to believe, the interpretation has no controlling impact on the rights afforded to

employees under the NJFLA. The FMLA and the NJFLA do not offer identical leave rights to employees, and lawmakers have chosen to describe the relationships that qualify for leave under the federal and state statutes differently. Therefore, an employee applying for leave based upon *in loco parentis* status under the NJFLA would necessarily need to establish such a relationship within the meaning of state law, and not federal regulations.

Despite the attention to the interpretation, it remains uncertain whether the propositions set forth in the interpretation will even withstand judicial scrutiny with regard to FMLA leave rights. For now, however, it appears a safe bet for employers to interpret *in loco parentis* relationships under the FMLA broadly, as the administrative interpretations will likely be held to qualify as the type of "administrative interpretations" that offer relying employers a good-faith defense.[9] Similarly, the chances of an employer obtaining summary judgment by narrowly construing the *in loco parentis* relationship will become even slimmer. ■

Endnotes

1. Administrative Interpretation, No.2010-3 (Dept. of Labor June 22, 2010).
2. 29 U.S.C. §2612(a)(1)(A)-(C); 29 C.F.R. §825.200.
3. 29 U.S.C. §2611(12).
4. 29 C.F.R. §825.122(c)(3).
5. N.J.S.A. 34:11B-3(i).
6. N.J.S.A. 34:11B-3(a).
7. N.J.A.C. 13:14-1.2.
8. *Ross v. Ross*, 126 N.J. Super. 394 (J. & D.R. Ct. 1972) (holding on the basis of equitable estoppel that persons who are not natural parents may have an obligation to support those children as to which they are *in loco parentis*); *Savoie v. Savoie,* 245 N.J. Super. 1 (App. Div. 1990) (affirming on the basis of an *in loco parentis* relationship that a grandfather was equitably estopped from denying his obligations to his grandchild).
9. *See* 29 U.S.C. 259.

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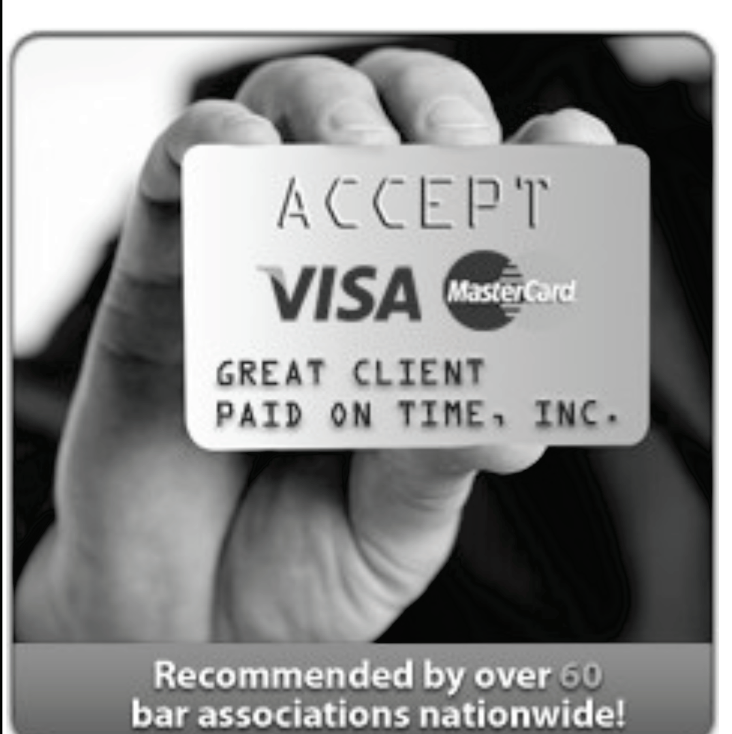

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