

Administrator's Interpretation No. 2013-1

January 14, 2013

Issued by ACTING DEPUTY ADMINISTRATOR MARY BETH MAXWELL

SUBJECT: Clarification of the definition of "son or daughter" under Section 101(12) of the Family and Medical Leave Act as it applies to an individual 18 years of age or older and incapable of self-care because of a mental or physical disability.

The Administrator has determined that additional guidance is needed regarding the definition of "son or daughter" as it applies to an employee seeking to take leave under the Family and Medical Leave Act ("FMLA") to care for a son or daughter with a disability who is 18 years of age or older. This Administrator's Interpretation clarifies that the age of a son or daughter at the onset of a disability is not relevant in determining a parent's entitlement to FMLA leave. In addition, this interpretation provides guidance on the impact of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"), Pub. L. No. 110-325, 122 Stat. 3553, signed into law on September 25, 2008, on a parent's ability to take FMLA leave to care for an adult son or daughter with a disability. The ADAAA made significant changes to the definition of the term "disability" under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, which is administered by the Equal Employment Opportunity Commission ("EEOC"). Since the passage of the ADAAA, the Wage and Hour Division ("WHD") has received requests for guidance regarding the impact of the ADAAA on determinations of whether a parent may take leave under the FMLA to care for a son or daughter 18 years of age or older with a disability. Finally, this interpretation discusses the impact of this guidance on the availability of FMLA leave for parents to care for a son or daughter who becomes disabled during military service.

Background

The FMLA entitles an eligible employee to take up to 12 workweeks of unpaid, job-protected leave during a 12-month period to care for a son or daughter with a serious health condition. *See* 29 U.S.C. § 2612(a)(1)(C). 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—(A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." *Id.* at § 2611(12); *See* 29 C.F.R. § 825.122(c).¹ The FMLA does not require that a biological or legal relationship exist between the employee and the child. *See* 29 C.F.R. § 825.122(c)(3). The FMLA definition of "son or daughter" therefore includes a child of a person standing in loco parentis—those with day-to-day responsibilities to care for or financially support a child. *Id.*²

A child under 18 years of age is a "son or daughter" under the FMLA without regard to whether or not the child has a disability. An eligible employee requesting FMLA leave to care for a son or daughter under 18 years of age must only show a need to care for the child due to a serious health condition.

However, in order to meet the FMLA's definition of a "son or daughter," an adult child (i.e., one who is 18 years of age or older) must have a mental or physical disability and be incapable of self-care because of that disability. The FMLA regulations adopt the ADA's definition of "disability" as a physical or mental impairment that substantially limits a major life activity (as interpreted by the EEOC) to define "physical or mental disability." 29 C.F.R. § 825.122(c)(2). The FMLA regulations define "incapable of self-care because of mental or physical disability" as when an adult son or daughter "requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)." *Id.* at § 825.122(c)(1). A parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter:

- (1) has a disability as defined by the ADA;
- (2) is incapable of self-care due to that disability;
- (3) has a serious health condition; and
- (4) is in need of care due to the serious health condition

It is only when all four requirements are met that an eligible employee is entitled to FMLA-protected leave to care for his or her adult son or daughter. ³

Impact of Age of Onset of Disability on FMLA Definition of Son or Daughter

The FMLA regulations define a “son or daughter” 18 years of age or older as one who is “incapable of self-care because of a mental or physical disability” at the time that FMLA leave is to commence.” 29 C.F.R. § 825.122(c). The regulations, however, do not explicitly address whether it is relevant if the disability occurs before or after the son or daughter turns 18 years old. It is the Administrator’s interpretation that the age of the onset of the disability is irrelevant to the determination of whether an individual is considered a “son or daughter” under the FMLA.

The legislative history of the FMLA provides support for this position. The U.S. Senate Committee on Labor and Human Resources (“Committee”) reported:

The term “son or daughter” is further defined in section 101(12) to include not only children under 18 years of age, but also a son or daughter who is 18 years old or older if he or she is “incapable of self-care because of a mental or physical disability.” The bill thus recognizes that in special circumstances, where a child has a mental or physical disability, a child’s need for parental care may not end when he or she reaches 18 years of age. In such circumstances, parents may continue to have an active role in caring for the son or daughter. An adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition.

S. REP. NO. 103-3, at 22 (1993). ⁴ The FMLA’s legislative history thus reflects two important points with respect to parental leave to care for an adult son or daughter. First, Congress recognized that a disabled child’s need for care from a parent may not end when the child reaches the age of 18. *Id.* Second, Congress recognized that adults who are unable to care for themselves because of a disability have “the *same* compelling need for parental care” as children under the age of 18. *Id.* (emphasis added).

WHD has emphasized each of these points separately in different opinion letters, leading to some confusion as to whether an adult son or daughter’s disability must have existed before the age of 18 or whether such a disability could have first occurred in adulthood for purposes of determining whether the individual is a “son or daughter” under the FMLA. *Compare* Wage and Hour Opinion Letter FMLA-51 (Nov. 28, 1994) (stating that “[t]he age on which the child became disabled is not a factor for determining an eligible employee’s entitlement to FMLA leave”) *with* Wage and Hour Opinion Letter FMLA2003-2 (June 30, 2003) (emphasizing a child with a disability has a *continued* need for care in adulthood).

WHD most recently addressed this issue in the preamble to the 2008 FMLA Final Rule, where it stated that a child whose disability did not commence until adulthood could qualify as a “son or daughter” under the FMLA. *See* 73 Fed. Reg. 67934, 67951-52 (Nov. 17, 2008). In the preamble, WHD provided an example of a 25-year-old son who suffered a stroke that left him with substantial and permanent mobility impairments and indicated that his parent would be able to take FMLA leave to provide care after the stroke because he would be incapable of self-care due to a physical disability that was also a serious health condition necessitating care. *Id.*

Based on the purpose of the FMLA, the legislative history of the definition of “son or daughter,” and WHD’s enforcement experience, as well as the example in the preamble to the 2008 FMLA Final Rule, it is the Administrator’s interpretation that the age of onset of a disability is irrelevant in determining whether an individual is a “son or daughter” under the FMLA. An employee is entitled to take FMLA leave to care for a son

or daughter with a serious health condition who is 18 years of age or older and incapable of self-care because of a disability regardless of when the disability commenced.

Impact of the ADAAA on the FMLA Definition of Son or Daughter

The Department has adopted the ADA's definition of disability to define "mental or physical disability" for purposes of defining a son or daughter 18 years of age or older under the FMLA since the 1993 Interim Final Rule. *See* 58 Fed. Reg. 31794, 31799 (June 4, 1993). The FMLA regulations at 29 C.F.R. § 825.122(c)(2) define a physical or mental disability as "a physical or mental impairment that substantially limits one or more of the major life activities of an individual," as these terms are defined by the ADA's implementing regulations issued by the EEOC at 29 C.F.R. §§ 1630.2(h), (i), and (j). In the 2008 FMLA Final Rule, the Department explicitly incorporated the ADAAA's changes to the ADA's definition of disability into the FMLA regulations. *See* 73 Fed. Reg. 68040 (Nov. 17, 2008).

1) Definition of "Disability"

Because the FMLA's definition of an adult "son or daughter" looks to the ADA's definition of "disability" as interpreted by the EEOC, any changes to the definition of "disability" in the ADA will affect the ability of an employee to take FMLA leave to care for an adult "son or daughter", as defined in the FMLA. 29 U.S.C. § 2611(12). In considering an employee's request for FMLA leave to care for an adult child because of that child's serious health condition, the employer must first consider if the son or daughter, in fact, has a disability as defined in the ADA. Pursuant to the clear language of the ADAAA, the definition of disability "shall be construed in favor of broad coverage," 42 U.S.C. § 12102(4), and the EEOC has made clear that the issue of disability "should not demand extensive analysis." 29 C.F.R. § 1630.1(c)(4). The ADA defines "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. *See* 42 U.S.C. § 12102(1). The ADAAA made a number of significant changes that broadened the scope of this definition under the ADA.

The ADAAA expanded the ADA's definition of "disability" by broadening the definition of "major life activities." The ADAAA includes examples of many kinds of major life activities that the EEOC and courts recognized prior to enactment of the ADAAA, such as caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. *See* 42 U.S.C. § 12102(2)(A). The expanded definition also includes "operation of a major bodily function," such as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* at § 12102(2)(B). It should be noted that the examples provided in the statute are illustrative and do not constitute an exhaustive list of activities or functions that fit under the expanded definition of "major life activities." *Id.* at § 12102(2)(A)-(B).

The ADAAA also provides that the definition of "substantially limited" does not require that the impairment prevent, or severely or significantly restrict, performing a major life activity. This reflects Congress' clear intent that the definition of disability is to be construed in favor of broad coverage to the maximum extent permitted by the ADA. 42 U.S.C. § 12102(4). In determining whether an individual is substantially limited in the major life activity, the use of mitigating measures to ameliorate the effects of an impairment may not be considered, other than ordinary eyeglasses or contact lenses. *See* 42 U.S.C. § 12102(4)(e).

Additionally, pursuant to the ADAAA, an impairment that is "episodic or in remission" is a disability if, when active, the impairment would substantially limit a major life activity. 42 U.S.C. § 12102(4)(D). Thus, cancer in remission or a condition with episodic periods of illness, such as multiple sclerosis, asthma, epilepsy, diabetes, lupus, or post-traumatic stress disorder, would still be considered a disability even when the symptoms of the condition are not currently manifesting. *See* 29 C.F.R. pt. 1630, App. § 1630.2(j)(1)(vii). There is also no minimum duration required for an impairment to be a disability under 42 U.S.C. § 12102(1)(A). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of the ADA. *See Id.* at § 1630.2(j)(1)(ix). Additionally, while pregnancy itself is not a disability under

the ADA, pregnancy-related impairments, such as gestational diabetes, may be disabilities within the meaning of the ADA if they substantially limit a major life activity. *See Id.* at pt. 1630, App. § 1630.2(h).

The EEOC's implementing regulations for the ADAAA provide additional guidance on the scope of coverage by observing that some impairments will virtually always qualify as disabilities because, by their very nature, they substantially limit at least one major life activity. *See* 29 C.F.R. §§ 1630.2(j)(3)(i)-(iii). Impairments that "should easily be concluded" to be substantially limiting include deafness, blindness, intellectual disability, missing limbs or mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, Human Immunodeficiency Virus ("HIV") infection, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. *Id.*

2) Incapable of Self-Care due to a Disability

Even where the employer determines that an adult son or daughter's condition qualifies as a disability under the broader definition of the ADAAA, as discussed above, other FMLA requirements must also be met in order for a parent to take FMLA leave.

The FMLA requires that the adult child must be "incapable of self-care" because of his or her disability in order to meet the definition of a "son or daughter." 29 U.S.C. § 2611(12). The FMLA regulations define "incapable of self-care" to mean that "the individual requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' (IADLs)." 29 C.F.R. § 825.122(c)(1). Activities of daily living include "adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc." *Id.* The list of ADLs and IADLs in the regulations is not exhaustive, and additional activities such as assistance with medication management, should also be considered in determining whether an adult son or daughter is incapable of self-care because of a disability. The determination of whether an adult son or daughter is incapable of self-care due to a disability under the FMLA is a fact-specific determination that must be made based on the individual's condition at the time of the requested leave. Such a determination must focus on whether the individual currently needs active assistance or supervision in performing three or more ADLs or IADLs. The determination must be based on all relevant factors that might impact the ability of the individual to perform ADLs or IADLs without active assistance or supervision, including, for example, the current effect of any episodic impairment.

While the term "disability" must be interpreted broadly so as not to unduly restrict the number of individuals determined to have a disability as required under the ADAAA, in order to qualify as an adult "son or daughter" for purposes of the FMLA, an individual must also be "incapable of self-care" because of the disability. If an adult child is determined to have a disability and to be incapable of self-care because of that disability, he or she will qualify as a "son or daughter" under the FMLA.

3) Serious Health Condition

In order for a parent to take FMLA-protected leave to care for his or her adult child, the son or daughter also must be determined to have a "serious health condition," as defined by the FMLA. *See* 29 C.F.R. §§ 825.100(a), 825.112(a)(3). Under the FMLA, a serious health condition is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider. *Id.* at § 825.113(a). For practical purposes, many impairments will satisfy both the ADAAA's expanded definition of "disability" and the definition of "serious health condition," even though the statutory tests are different.

4) Needed to Care

Finally, in order for a parent to take FMLA leave to care for an adult son or daughter, the parent must be "needed to care" for that son or daughter due to the serious health condition. 29 C.F.R. §§ 825.112(a)(3),

825.124. The parent may be needed to care for his or her adult son or daughter if, for example, because of the serious health condition the adult child is “unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor.” *Id.* at § 825.124(a). The term “needed to care” also includes providing psychological comfort and reassurance that would be beneficial to a son or daughter with a serious health condition who is receiving inpatient or home care. *Id.*

5) Examples

Therefore, for a parent to take FMLA leave for an adult child, the son or daughter must not only be incapable of self-care due to a disability but must also need care due to a condition that qualifies as a serious health condition under the FMLA regulations. While the adult son or daughter’s serious health condition need not be directly related to his or her disability, the same condition may satisfy both the ADA definition of disability and the FMLA definition of serious health condition

Example 1: An employee’s 37-year old daughter suffers a shattered pelvis in a car accident which substantially limits her in a number of major life activities (i.e., walking standing, sitting, etc.). As a result of this injury, the daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although she is expected to recover, she will be substantially limited in walking for six months. If she needs assistance in three or more activities of daily living such as bathing, dressing, and maintaining a residence, she will qualify as an adult “daughter” under the FMLA as she is incapable of self-care because of a disability. The daughter’s shattered pelvis would also be a serious health condition under the FMLA and her parent would be entitled to take FMLA-protected leave to provide care for her immediately and throughout the time that she continues to be incapable of self-care because of the disability.

Example 2: An employee’s 25-year old son has diabetes but lives independently and does not need assistance with any ADLs or IADLs. Although the young man’s diabetes qualifies as a disability under the ADA because it substantially limits a major life activity (i.e., endocrine function), he will not be considered an adult “son” for purposes of the FMLA because he is capable of providing daily self-care without assistance or supervision. Therefore, if the son is admitted to a hospital overnight for observation due to a skiing accident that does not render him disabled, his parent will not be entitled to take FMLA leave to care for him because he is over the age of 18 and not incapable of self-care due to a mental or physical disability.

If the son later becomes unable to walk and is also unable to care for his own hygiene, dress himself, and bathe due to complications of his diabetes, he will be considered an adult “son” as he is incapable of self-care due to a disability. The son’s diabetes will be both a disability under the ADA and a chronic serious health condition under the FMLA because his condition requires continuing treatment by a doctor (e.g., regular kidney dialysis appointments). If his parent is needed to care for him, his parent may therefore take FMLA-protected leave to do so.

It is the Administrator’s interpretation that the ADA’s broad definition of “disability” will therefore increase the number of adult children with disabilities for whom parents may take FMLA-protected leave if the adult son or daughter is incapable of self-care because of the disability and in need of care due to a serious health condition.

Impact on FMLA Leave to Care for Adult Children Wounded in Military Service

This Administrator’s Interpretation may affect employees needing leave to care for adult children who have been wounded or sustained an injury or illness in military service. The expanded definition of a disability under the ADA, as well as the clarification that when an adult son or daughter’s disability commences is not determinative of whether he or she qualifies as a “son or daughter” under the FMLA, may allow parents of adult children who have been wounded or sustained an injury or illness in military service to take FMLA leave beyond that provided under the special military caregiver leave provision of the statute.⁵ Under the military caregiver provision, a parent of a covered servicemember who sustained a serious injury or illness is entitled to up to 26 workweeks of FMLA leave in a single 12-month period if all other requirements are met. The servicemember’s injury, however, may have an impact that lasts beyond the single 12-month period covered by the military caregiver leave entitlement. Thus, this interpretation clarifies that the servicemember’s parent

can take FMLA leave to care for a son or daughter in subsequent years due to the adult child's serious health condition, as long as all other FMLA requirements are met.

Example: A father has exhausted his 26 workweeks of military caregiver leave to care for his 20-year old son, a returning servicemember who sustained extensive burn injuries to his arms and torso. In the next FMLA leave year, the father seeks leave from his employer to care for his son as he undergoes and recovers from additional surgeries and skin graft procedures. The father will be entitled to take up to 12 workweeks of FMLA-protected leave to care for his son because his son's burn injuries that substantially limit his ability to perform manual tasks constitute a disability under the ADA, the son is incapable of self-care due to a disability (*i.e.*, he needs active assistance or supervision in bathing, dressing, and eating), the son's burn injuries are a serious health condition because they require continuing treatment by a health care provider, and the father is "needed to care" for the son.

Conclusion

Based on this analysis and a thorough examination of the relevant factors, it is the Administrator's interpretation that the disability of a son or daughter may occur or manifest at any age for purposes of coverage as a "son or daughter" 18 years of age or older under the FMLA. Moreover, because the FMLA's definition of an adult "son or daughter" relies upon the ADA's definition of "disability" as interpreted by the EEOC, the broad changes to the definition of "disability" set forth in the ADAAA and its implementing regulations are applicable to the definition of an adult son or daughter under the FMLA. The ADAAA's expanded definition of the term "disability" will enable more parents to take FMLA-protected leave to care for their adult sons and daughters with disabilities provided that such adult children are incapable of self-care due to their disability and their parents are needed to care for them due to their serious health condition.

¹ This Administrator's Interpretation does not apply to an employee's entitlement to take FMLA military family leave for a son or daughter. The FMLA's implementing regulations set forth separate definitions of "son or daughter on active duty or call to active duty status" and "son or daughter of a covered servicemember" that apply to the military family leave provisions. 29 C.F.R. §§ 825.122(g)-(h), 825.126(b)(1), 825.127(b)(1). Unlike the FMLA's general definition of "son or daughter," the definitions applicable to the FMLA's military family leave provisions are not restricted by age. *Id.*; 73 Fed. Reg. 67956, 67965-66 (Nov. 17, 2008).

² See Wage and Hour Administrator's Interpretation No. 2010-3 (June 22, 2010).

³ Because this interpretation focuses solely on the issue of whether an individual 18 years of age or over qualifies as a "son or daughter" for purposes of FMLA leave, the discussion assumes that the other applicable requirements for the parent to take FMLA leave to care for a child are met (e.g., employer coverage, employee eligibility, notice, certification).

⁴ The House Report, dated February 2, 1993, contains nearly identical language. See H.R. REP. NO. 103-8, pt. 1, at 34 (1993).

⁵ The FMLA military caregiver leave provision entitles an eligible employee who is the spouse, son, daughter, or parent, or next of kin of a covered servicemember with a serious injury or illness incurred or aggravated in the line of duty on active duty to take up to 26 workweeks of leave to care for the servicemember in a single 12-month period. If the same servicemember receives a subsequent serious injury or illness (for example, on a subsequent deployment), or subsequently manifests a separate serious injury or illness based on the same service (for example, is subsequently diagnosed with post-traumatic stress disorder), the covered family member would be entitled to another 26 workweek period of military caregiver leave in a separate single 12-month period. See 29 U.S.C. § 2612(a)(3); 29 C.F.R. § 825.127.

