

DEPARTMENT OF LABOR'S FMLA CLARIFICATION WILL LEAD TO EMPLOYER HEADACHES

Sarah S. Pillen, Esq.
Rembolt Ludtke LLP

The U.S. Department of Labor ("DOL") recently issued an interpretation on the definition of "son or daughter" under the Family and Medical Leave Act ("FMLA") to ensure that an employee who assumes the role of caring for a child receives parental rights to family leave regardless of whether a legal or biological relationship exists. The FMLA allows employees to take up to 12 weeks of unpaid leave during any 12-month period for a number of reasons, including the adoption or the birth of a child or to care for a son or daughter with a "serious health condition." The FMLA defines "son or daughter" to include a biological or adopted child, and a "foster child, stepchild, legal ward, or a child of a person standing *in loco parentis*."

The interpretation issued by DOL broadens the definition of persons who stand *in loco parentis* so as to include employees in non-traditional relationships with a child. The FMLA interpretation provides that "*in loco parentis*" shall include those with day-to-day responsibilities to care for a child or those who financially support a child. This means that employees with no biological or legal relationship with a child may stand *in loco parentis* and be eligible for FMLA-protected leave.

The interpretation finds that whether an employee stands *in loco parentis* to a child is not based upon whether that child has both biological parents but depends on several factors. As the interpretation makes clear, an uncle who is caring for his young niece and nephew when their single parent has been called to active military duty may exercise his right to family leave. Likewise, a grandmother who assumes responsibility for her sick grandchild when her own child is debilitated will be able to seek family and medical leave from her employer. Moreover, an employee who intends to share in the parenting of a child with his or her same sex partner will be able to exercise the right to FMLA leave to bond with that child.

This interpretation attempts to address the changing dynamics of the American family, but simultaneously creates headaches for employers attempting to comply. Employers should review their FMLA policies to ensure that they do not conflict with this new interpretation. In addition, employers should review their medical certification forms, as the interpretation provides that only a "simple statement" on a family relationship is all that is required to establish *in loco parentis*.

Sarah Pillen is an associate with the Lincoln-based law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or spillen@remboltludtke.com. This article is provided for general information purposes only and should not be construed as legal advice. Those requiring legal advice are encouraged to consult with their attorney.

Employment/Labor Law Practice Group

David J. A. Bargaen
dbargaen@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt | Ludtke LLP
Attorneys at Law

MAIN OFFICE

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

BRANCH OFFICES

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

3280 Woodridge Boulevard
Suite 160
Grand Island, NE 68801
308 / 384-6888

skillful counsel | successful clients

We Find the Way[®]

remboltludtke.com