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## The GSH 60-Second Memo

June 30, 2010

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### DOL Explicitly Declares FMLA Protections Apply to LGBT and Other Non-Traditional Families

By Jill Pedigo Hall, Esq.

On June 22, 2010, the Department of Labor ("DOL") issued an administrative interpretation broadening non-traditional families' access to Family and Medical Leave Act ("FMLA" or "Act") protections. In issuing Administrative Interpretation No. 2010-3 ("the interpretation"), Secretary of Labor Hilde Solis declared, "The Labor Department's action today sends a clear message to workers and employers alike: All families, including LGBT [lesbian, gay, bisexual, and transgendered] families, are protected by the FMLA."

#### Defining the in loco parentis Son or Daughter

The interpretation provides a broadened definition of an employee's "son or daughter" under the Act. The FMLA allows an eligible employee to take 12 workweeks of job-protected leave for the birth or placement of a son or daughter, to bond with a newborn or newly-placed son or daughter, or to care for a son or daughter with a serious health condition. 29 U.S.C. 2612(a)(1)(A)-(C). Under the Act, a "son or daughter" includes not only a biological or legally recognized child, but also -- and most pertinent to the new interpretation -- "a child of a person standing in loco parentis."

With the interpretation, the DOL for the first time provides its interpretation of "in loco parentis" status. In doing so, the DOL explicitly expands the definition of "in loco parentis" that it provided in its 2009 regulations. Those regulations state that, "Persons who are 'in loco parentis' include those with day-to-day responsibilities to care for *and* financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is

not necessary." 29 C.F.R. § 825.122(c) (3) (Emphasis added.) Despite the clear conjunctive wording of the regulation, the interpretation declares that, to be found to stand in loco parentis to a child, an employee needs to establish only *one* of the two identified criteria - the employee must either assume day-to-day responsibilities to care for the child or, alternatively, provide financial support for the child. In the interpretation, the Administrator went on to cite examples of hypothetical employees who would qualify under the new "in loco parentis" standard, including an employee who shares equally in the raising of an adopted child with a same sex partner, a grandparent raising a grandchild when the parents are incapable of providing care, or an aunt assuming responsibility for raising a child after the death of the child's parents.

The DOL interpretation is not surprising, as it is consistent with previously-expressed Congressional intent to ensure inclusion of children in FMLA protections. The Senate report, quoted in the interpretation, states, "Congress intended the definition of 'son or daughter' to reflect 'the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent 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.' See S. Rep. No. 103-3, at 22."

#### **Legal Effect of the Interpretation**

The interpretation states that when an employer questions whether an employee's relationship with the child in question is covered by the FMLA, "a simple statement asserting the family relationship" between the employee and child should be sufficient. While this may cause concern for employers, the interpretation also goes on to say that every determination will depend on the facts presented, implying that an employer need not rely solely upon a statement by an employee without other supporting facts. The interpretation favorably cites some of the relatively few court decisions focusing on the practical analysis of whether such "in loco parentis" status can be inferred from the acts of the parties. See, e.g. *Dillon v. Maryland-National Capital Park and Planning Comm'n*, 382 F. Supp. 2d 777,787 (D. Md. 2005); *Megonnell v. Infotech Solutions, Inc.*, 2009 WL 3857451 (M.D. Pa. 2009). Factors courts will consider in a practical analysis of "in loco parentis" status include the age of the child, the degree to which the child is dependent on the person claiming to be standing in loco parentis, the amount of support, if any, provided by the person, and the extent to which the person exercises duties commonly associated with parenthood. *Dillon*, supra, at 786-787.

#### **What This Means for Employers**

Ultimately, the issue of whether the DOL's interpretation is valid will be decided by the courts. Meanwhile, employers should rely upon and consider the interpretation to be immediately effective. Even if the interpretation is eventually declared invalid

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because it conflicts with the regulations or for some other reason, an employer's good faith adherence to the interpretation can be considered a defense under 29 U.S.C. Section 259.

Further, because of the instant effect of the ruling, employers should immediately review their policies and practices to ensure no employees acting in loco parentis are excluded from the Act's protections. No employee should be automatically excluded from FMLA coverage related to care for a child based solely upon biological or legal status. It is recommended that FMLA policy and procedure require any employee seeking "in loco parentis" status related to a child to submit a statement which identifies factors upon which the employer can make a determination of the qualifying status. For assistance in reviewing and revising your FMLA policies, procedures and forms or for assistance with any leave-related issues, please contact your legal counsel. As always, Gonzalez Saggio & Harlan LLP stands ready to assist clients with FMLA compliance and to answer any questions employers may have regarding the new interpretation.

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