CLIENT ALERT: Department of Labor Clarifies Definition of "Son or Daughter" Under the FMLA and Expands Leave Protections for Employees with an In Loco Parentis Relationship

On June 22, 2010, the Wage and Hour Division of the U.S. Department of Labor ("WHD") issued Administrator's Interpretation No. 2010-3 ("Interpretation"), in which it explained and clarified the circumstances under which a person stands "*in loco parentis*" to a child for purposes of the Family and Medical Leave Act ("FMLA"). The Interpretation creates a wider range of situations in which an employee may be entitled to FMLA leave.

The FMLA entitles eligible employees to take leave for, among other reasons, the birth of a son or daughter of an employee, the placement of a son or daughter with an employee for foster care or adoption, or to care for a son or daughter with a serious health condition. "Son or daughter" is defined to include not only biological or adopted children, but also foster children, legal wards, and children of persons who are *in loco parentis*. The applicable FMLA regulation provides that persons who are *in loco parentis* include those with "day to day responsibilities to care for *and* financially support a child." (emphasis added). The regulation further states that a biological or legal relationship is not necessary.

Notwithstanding its own regulation, in the Interpretation, the WHD stated that the relevant regulations do not require both day-to-day care and financial support to establish an *in loco parentis* relationship. Instead, the WHD's position is that an employee is *in loco parentis* to the child if he or she provides either day-to-day care *or* financial support. The Interpretation provides several examples of situations in which an *in loco parentis* relationship may be found:

- 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.
- Where an employee will share equally in the raising of a child with the child's biological parent.
- Where an employee 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.
- Where a grandparent takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable of providing care.
- Where an aunt assumes responsibility for raising the child after the death of the child's parents.

In contrast, according to the Interpretation, an employee who cares for a child while the child's parents are on vacation would not be considered *in loco parentis* to the child. Ultimately, however, whether an *in loco parentis* relationship exists is a case specific inquiry. Employers may seek reasonable documentation or a statement of the family relationship, but, under the existing regulations, "a simple statement asserting that the requisite family relationship exists is all that is needed."

While it remains to be seen whether courts will agree with the WHD's Interpretation, employers should consider the Interpretation when addressing issues of employee FMLA leave related to a child. If there is any question regarding whether an employee has the required *in loco parentis* relationship, employers are well-advised to consult with counsel.

The WHD's Interpretation can be accessed through the following link:

http://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.htm

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This alert was prepared on July 9, 2010.