Department of Labor Interpretation Expands Availability of FMLA Leave for the Care of Children of Domestic Partners and Others

The U.S. Department of Labor (DOL) has issued an administrator's interpretation that expands the universe of individuals who may take leave under the Family and Medical Leave Act (FMLA) to take care of a son or daugter.[1] Notably, the guidance allows an employee to take FMLA leave to care for the child of a domestic partner, as well as for a grandchild or a nephew or niece whose single parent has been called to active military duty. The interpretation does not change the fact that an employee may not take FMLA leave to care for a same-sex domestic partner or spouse.[2]

One of the reasons for which FMLA leave may be taken is to care for a "son or daughter." FMLA regulations define a "son or daughter" to include the child of a person who stands *"in loco parentis"* to the child. Because the FMLA regulations further explain that an individual is considered to stand *in loco parentis* if the individual assumes the day today responsibilities to care for and financially support a child, the DOL has administratively concluded that an employee who has no biological or legal relationship with a child may still be entitled to FMLA leave to care for the child. The new guidance further indicates that it is the administrator's interpretation that the FMLA regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be eligible for FMLA leave. This interpretation appears to be inconsistent with the DOL's regulations, which require an employee to have day-to-day care *and* financial support responsibilities in order to stand *in loco parentis*. Accordingly, the new interpretation could be subject to legal challenge.

Under the new administrator's interpretation an employee is entitled to FMLA leave for the care of a child *even if* the child has a father and a mother, and the employee does not have a biological or legal relationship to the child. If an employer has questions about whether an employee's relationship to a child meets the FMLA's requirements for *in loco parentis*, the interpretation allows an employer to require the employee to provide "reasonable" documentation or a statement of the family relationship. A simple statement asserting that the requisite family relationship exists is sufficient.

Endnotes

1 The FMLA applies to employers that have 50 or more employees within a 75-mile radius.

2 The Federal Defense of Marriage Act currently prohibits the recognition of same-sex marital relationships for purposes of Federal law, such as the FMLA. Although Representative Carolyn Maloney introduced a bill to amend the FMLA to allow employees to take FMLA leave to care for a same-sex spouse or domestic partner (and others), there has been no action on the bill since June 2009.

If you would like more information about this alert, please contact one of the following attorneys

Ellen M. Martin	212.336.2860	emmartin@pbwt.com
Lisa E. Cleary	212.336.2159	lecleary@pbwt.com
Carrie L. Mitnick	212.336.2415	cmitnick@pbwt.com