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Break Time Legislated for Nursing Mothers

Buried deep within the more than 900-page Patient Protection and Affordable Care Act ("PPACA") signed into law by President Obama on March 23, 2010, is a short section mandating reasonable break times for nursing mothers. Section 4207 of the PPACA, which amends Section 7 of the Fair Labor Standards Act ("FLSA"), requires that an employer permit an employee a reasonable break time to express breast milk for her nursing child for one year after the child's birth, each time the employee has a need to express the milk. In addition, the Section requires employers to provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, for the purpose of allowing the nursing mothers to express breast milk.

Under the amendment, the affected employer is not required to compensate the employee making use of the break time for the time spent on the breaks.

The new provisions requiring break time and space for nursing mothers do not apply to employers of less than 50 employees, but only where the requirements would impose an undue hardship, defined as causing the employer "significant delay or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." Practically speaking, given that employers are not required to pay their employees for the breaks taken for expressing breast milk, this exception will probably only permit smaller employers to avoid providing a place other than a bathroom for its employees where it is financially difficult to do so.

Stephanie S. Rojo

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Fifth Annual Thompson Coe Labor & Employment Law Seminar

October 28, 2010

Arlington Hall in Dallas

"Only One Bite at the Apple, Please"— Texas Discrimination Statute Preempts Negligence Claims

Seeking to cover all bases and frustrated by damage or other limitations and administrative prerequisites placed on many employment-related claims by statute or the courts, plaintiffs' employment lawyers frequently allege multiple types of claims based on the same set of facts. Several years ago, the Texas Supreme Court curtailed that practice somewhat by holding intentional infliction of emotional distress ("IIED") was a "gap filler" claim which could not be asserted when the plaintiff had other causes of action or other remedies available for the defendant's conduct; and an IIED claim could not be used to circumvent the administrative, damage, and other limitations contained in the Texas discrimination statute[1]. Recently, the Court by a 7-2 decision once again thwarted a plaintiff's lawyers from trying to do an end run around the Texas Labor Code by holding the Texas discrimination statute provides employees with the sole, exclusive remedy for sexual harassment claims and preempts a common law claim against the employer for negligent supervision and retention. *See Waffle House, Inc. v. Williams*, ___ S.W.3rd ___, 2010 WL 2331464 (Tex. June 11, 2010).

Cathie Williams worked as a waitress at a Waffle House restaurant from July 2001 to February 2002. She claimed during her employment she was subjected to various forms of sexual harassment by a co-worker, a cook. Specifically, she claimed the harassment included, *e.g.*, inappropriate comments made by the cook while he had his hands in his pants, showing Williams a condom and laughing, staring at Williams, approaching Williams from behind while she was waiting on customers, pressing his body against hers and saying to customers, "Isn't she great? Isn't she wonderful?" rubbing up against Williams' breasts with his arms, and cornering her in a supply room and blocking her exit. Williams claimed to have made various complaints to several managers without obtaining what she deemed to be sufficient corrective action. The cook denied the allegations. Some other employees reported Williams had told them she had an "open marriage and had engaged in extramarital relations with two men who had been in the restaurant." The company moved Williams and the cook to different shifts; but their shifts sometimes overlapped, and sometimes the cook would stay behind after his shift to eat, during which time Williams claims the harassment continued. Williams eventually quit, claiming she had been constructively discharged.[2]

Williams filed a charge of sexual harassment with the EEOC and Texas Workforce Commission ("TWFC"), obtained right-to-sue notices from both agencies, and filed suit in state court. She sued Waffle House for sexual harassment under the Tex. Labor Code and for common law negligent supervision and retention, and she sued the cook for common law assault and battery. Before trial, however, Williams dismissed the cook from the suit. The jury found Waffle House guilty of sexual harassment and found Williams had been constructively discharged. The jury also found Waffle House guilty of negligent supervision and retention. For damages, the jury assessed $425,000 in compensatory damages (*e.g.*, mental anguish, pain and suffering, *etc.*) and *punitive damages of $3.46 million*. Williams' attorneys elected to recover under her common law negligence claim rather than the statutory discrimination claim; and, after reducing the punitive damage award to $425,000 in accordance with the applicable tort damage caps,[3] the trial court entered a judgment for $850,000, plus interest and costs. The Fort Worth Court of Appeals affirmed.

On review by the Texas Supreme Court, Waffle House argued that, because the negligent supervision and retention claims were based on the same set of facts as the sexual harassment claim—Williams admitted "her two claims against Waffle House stem from the same boorish and objectionable conduct"—the Texas discrimination statute

1 *See Creditwatch, Inc. v. Jackson*, 157 S.W.3rd 814 (Tex. 2005) (reversing judgment for intentional infliction of emotional distress arising from sexual harassment); *Hoffmann-LaRoche, Inc. v. Zeltwanger*, 144 S.W.3rd 438 (Tex., 2004).

2 A constructive discharge occurs when a plaintiff proves the working conditions to which she was subjected were so difficult or unpleasant as a result of an unlawful employment policy or practice a reasonable employee in the plaintiff's shoes would have felt compelled to resign. *E.g.*, *Ward v. Bechtel Corp.*, 102 F.3rd 199, 202 (5th Cir. 1997); *Bolden v. PRC, Inc.*, 43 F.3rd 545, 552 (10th Cir. 1994), cert. denied, 516 U.S. 826, 116 S.Ct. 92, 133 L.Ed.2nd 48 (1995) ("[N]ot every unhappy employee has an actionable claim of constructive discharge. [A plaintiff must show] his resignation was the result of illegal discriminatory conduct (emphasis added)); *Eichenwald v. Krigel's*, Inc., 908 F.Supp. 1531, 1540 (D. Kan. 1995) (intolerable condition must be the result of employer's illegal discriminatory acts, and plaintiff must show causal connection between her leaving and the employer's Title VII violation).

3 *See* Tex. Civ. Prac. & Rem. Code 41.008(b)(1)(B) (exemplary damages limited to an amount equal to the amount of non-economic damages awarded by the jury, not to exceed $750,000).

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should be Williams' exclusive remedy. The Court agreed, stating "allowing Williams to recover on her tort claim would collide with the elaborately crafted statutory scheme . . . that . . . incorporates a legislative attempt to balance various interests and concerns of employees and employers." The Court viewed the common law negligence claims as fundamentally inconsistent with and, therefore, preempted by the statutory discrimination claim for a number of reasons.

- **Administrative Review:** The discrimination statute requires exhaustion of administrative remedies by filing a complaint of discrimination with the TWFC; whereas, there is no administrative exhaustion requirement for a common law claim. Additionally, the statutory administrative exhaustion requirement is not merely a meaningless hurdle an aggrieved employee needs to clear, but an integral part of a legislative preference for resolution of employment claims by means of "informal methods of conference, conciliation, and persuasion."

- **Limitations:** The discrimination statute requires a complaint of discrimination to be filed with the TWFC within 180 days of the alleged discrimination; whereas, there is a two-year statute of limitations for most employment-related common law claims. Although the statute also contains a two-year limitations period *if* the aggrieved employee has timely filed an administrative complaint, the two-year period begins to run from the date the administrative complaint is filed, not the date of the alleged discrimination.

- **Substantive Elements of the Claim:** To succeed on an unlawful harassment claim, a plaintiff is required to show conduct which is sufficiently severe and pervasive as to create a hostile and offensive working environment. Additionally, although that burden *can* be met by proof of a single egregious incident, usually, as in Williams' case, the plaintiff relies on a series of offensive incidents. In contrast, a negligent supervision or retention claim can be based on an assault claim predicated on a single, isolated instance of offensive physical contact.

- **Affirmative Defenses:** For a statutory harassment claim where the harassment is committed by a supervisor, even if unlawful harassment occurred, the employer can escape liability with the *Ellerth-Faragher*[4] affirmative defense by demonstrating (1) it has taken reasonable steps to prevent and correct unlawful harassment in the workplace by, *e.g.*, having in place an appropriate anti-harassment/discrimination policy and disseminating it to employees, *etc.*; and (2) the plaintiff unreasonably failed to take advantage of the employer's policies. No such affirmative defense exists for common law claims.

- **Remedies:** Under the Texas discrimination statute, "non economic damages," *i.e.*, damages in addition to back pay, such as mental anguish, *etc.*, *and* punitive damages are capped at between $50,000 and $300,000, depending on the number of employees employed by the defendant. Additionally, under the statute, a court has the authority to order reinstatement of a plaintiff or, in lieu of reinstatement, award "front pay." For most common law employment related claims, there is no authority to order reinstatement or award front pay; and, for most claims, there is no damage cap for non-economic damages, and punitive damages are capped based upon factors other than the number of the defendant's employees, *e.g.*, the amount of economic or non-economic damages awarded by the jury, *etc*. Accordingly, the amount of non-economic and punitive damages which could be awarded against an employer on a common law claim could be substantially greater than would be allowed under the statute. In Williams' case, the judgment awarded $850,000 in non-economic and punitive damages *was $550,000 more than the applicable $300,000 cap under the discrimination statute*.

- **Attorney Fees:** Although not mentioned by the Court, another distinguishing factor is attorney fees. A successful plaintiff is entitled to recovery of attorney fees for a statutory discrimination claim, but not for a common law claim.

Thus, the Court held where, as in Williams' case, the alleged common law claim "is rooted in facts inseparable from those underlying the alleged harassment[, w]e

[4] *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

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do not believe the Legislature's comprehensive remedial scheme allows aggrieved employees to proceed on dual tracks—one statutory and one common law, with inconsistent procedures, standards, elements, defenses, and remedies."

The Court specifically limited the decision, however, by noting the statutory discrimination remedy:

- "does not foreclose an assault-based negligence claim arising from independent facts unrelated to the sexual harassment;"
- nor does the statutory remedy bar a common law tort claim against the individual supervisor/harasser.

John L. Ross

Avoiding Claims of Unequal Pay

A recent holding in the 8th Circuit underscores the importance of being able to articulate the various reasons employees in similar positions may have different salaries. In *Drum v. Leeson Electric Corp.*, 565 F.3d 1071 (8th Cir. 2009), Tammy Drum was earning an annual salary of $41,548 as a Human Resources Manager in 2005. It is undisputed that the salary was below market value for the position, which – as we know – is a legitimate business decision. When Ms. Drum was promoted, however, her replacement Thomas Crosier received a salary of $62,500.

In a claim for unequal pay under the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), the complaining employee must establish a *prima facie* case that the employer paid different wages to men and women performing equal work.[1] In many cases, the employer may provide evidence that the work was not "equal" to defeat the *prima facie* case. If, however, the complaining employee successfully establishes a *prima facie* case, then the burden shifts to the employer to prove the pay differential was based on a factor ***other than*** gender. The EPA provides employers with the following affirmative defenses to explain the payments:

(1) a seniority system;

(2) a merit system;

(3) a system which measures earnings by quantity or quality of production; or

(4) a differential based on any other factor other than sex.

In *Drum*, the employer proffered that the salary offered to Mr. Crosier was based on current market values and was the result of a negotiation. That same argument has been successful in other 8th Circuit cases where an employee has negotiated a higher salary based on additional skills and experience he or she brought to the table.[2] Here, however, the employer failed to provide any evidence of Mr. Crosier's additional skills or experience which would explain the differential pay to Ms. Drum's in the same position. The Court reasoned that, while market value may be sufficient to justify Mr. Crosier's salary, it was insufficient to explain ***the differential*** with Ms. Drum's pay. The Court overturned the district court's summary judgment in favor of the employer and remanded the case for trial.

The *Drum* decision reinforces that employers need to remain conscientious of discrepancies in pay among its employees. For each discrepancy, the employer should be able to articulate legitimate, non-discriminatory reasons and be certain such reasons fall within one of the four affirmative defenses provided by the EPA.

Jodee K. McCallum

[1] "Equal Work" is defined in the EPA as "the performance of which is requires equal skill, effort, and responsibility, and which are performed under similar woring conditions.." 29 U.S.C. § 206(d)(1).

[2] *See, e.g. Horner v. Mary Institute*, 613 F.2d 706 (8th Cir. 1980) (holding that the employer provided sufficient evidence to demonstrate that the male's experience and ability made him "the best person for the job" and that a higher salary was necessary to hire him).

Bad News/Good News—Fifth Circuit Modifies Liability Standard in Retaliation Cases but Limits Punitive Damage Exposure

A recent 2-1 decision by a panel of the U.S. Fifth Circuit Court of Appeals, *Smith v. Xerox Corp.*, 602 F.3rd 320 (5th Cir. 2010), spells potential bad news for employers in retaliation cases, but potential good news regarding punitive damages awarded in discrimination cases.

THE FACTS:

Before being terminated in January 2006, Kim Smith worked for Xerox for 22 years as an Office Solutions Specialist, providing support for Xerox dealers or agents who placed and serviced copying equipment in north Texas. She had consistently received positive performance evaluations and just two years before her termination was named to the company's prestigious President's Club, an award reserved for the top eight performing employees in the company.

In January 2005, however, Smith was assigned a new manager, who immediately began making changes which adversely impacted Smith. Smith claimed the new manager reduced the size of her sales territory, yet at the same time increased her sales goals to unreachable levels, given the decrease in her territory. Consequently, when Smith failed to reach her sales goals, she was placed on a performance improvement plan and, when she failed to satisfactorily complete the PIP, was placed on a 60-day probation, which was to expire on December 28th.

On November 17th, Smith informed her manager she had filed a discrimination charge against the company with the EEOC. Smith's charge alleged she was being subjected to discriminatory decisions based on her age, sex, and race. When Smith did not satisfactorily reach her sales goals by the end of the probationary period, she was discharged on January 13, 2006. However:

- The company's records contained an involuntary termination request form which appeared to have been completed on November 29th, twelve days *after* Smith informed her supervisor of the EEOC charge, and a month *before* the end of the probationary period.
- In December, after receiving notice of the EEOC charge, the manager gave Smith a written warning concerning two inaccurate expense reports Smith had submitted in October and November *before* Smith had filed her charge. Additionally, *contrary to company policy*, the manager issued the written warning without first speaking with Smith to get her explanation regarding the inaccuracies in the expense reports.
- Finally, the termination documents were signed on January 4, 2006; however, evidence was presented to demonstrate quarterly financial results were usually not available for five to ten days after the close of the quarter—the inference being that the decision had been made to terminate Smith regardless of whether she achieved satisfactory sales numbers.

THE SUIT:

Smith sued Xerox for age and sex discrimination and for retaliation. The jury found in favor of Xerox on the discrimination claims but found in favor of Smith on the retaliation claim. The jury awarded $67,500 in compensatory damages and $250,000 in punitive damages, and the district court awarded attorney fees.

THE BAD NEWS—ALTHOUGH A=B AND B=C, A DOES NOT EQUAL C:

The primary issue on appeal concerned the manner in which the district court had instructed the jury regarding the retaliation claim. The court had given the jury a "mixed motives" or "motivating factor" instruction. That is, the district court had instructed the jury it could find in favor of Smith if the jury concluded retaliation was ***a*** motivating factor in the termination, even if there were other non-discriminatory reasons which also motivated the decision. Under such a "mixed motives" instruction, if a jury concludes the prohibited factor was ***a*** motivating factor, *the burden of proof shifts to the employer* to prove it would have

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taken the same adverse action even if it had not considered the prohibited factor. Xerox contended on appeal the court's instruction was improper because, in retaliation cases, a plaintiff is required to prove she

would not have been terminated "but for" retaliation; and the burden of proof never shifts to the employer. Algebraically speaking, Xerox had a pretty good argument. Unfortunately, two of the three judges on the Fifth Circuit panel were not very good at math.

A Equals B:

Xerox's argument was based on the Supreme Court's 2009 decision in *Gross v. FBL Financial Services, Inc.*, 557 U.S. ___ (2009).

- In 1989, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989), a plurality of the Supreme Court first introduced the "mixed motives" theory in discrimination cases, holding if a Title VII plaintiff presented *direct evidence* of discrimination, then the *burden of proof* shifted to the employer to prove as an affirmative defense it would have taken the same action despite consideration of the prohibited factor.

- Following *Price Waterhouse*, in 1991 Congress formally amended Title VII by providing an employee can prevail in a *discrimination* case if he proves one of the prohibited factors was ***a*** *motivating factor*. However, Congress did not make a corresponding amendment to the federal age discrimination statute.

- In *Desert Palace v. Costa*, 539 U.S. 90 (2003), the Supreme Court held the 1991 amendments to Title VII no longer required "direct evidence" in order to shift the burden of proof to the employer in Title VII *discrimination* cases. Circumstantial evidence is sufficient.

In *Gross*, the Supreme Court held the allocation of the order and burden of proof made applicable to Title VII discrimination claims by the 1991 amendments to Title VII and *Desert Palace* do not apply to age discrimination claims under the ADEA. The Court in *Gross* distinguished ADEA claims from Title VII claims, because Congress had not made amendments to the ADEA similar to those made to Title VII. Thus, the Court reasoned, the ADEA was not subject to the same burden-shifting standards as Title VII claims; and a "mixed motives" instruction is *never* proper in an age discrimination case, *even if the plaintiff presents direct evidence of age discrimination*.

Thus, A (*i.e.*, if Congress did not amend the statute to authorize mixed motives liability) equals B (*i.e.*, then mixed motives analysis is improper in an age discrimination case, and a "but for" standard applies).

B Equals C:

Retaliation under Title VII is prohibited by a separate section of the statute from race, sex, religion, and other prohibited factors. The retaliation provision of Title VII was not modified by the 1991 amendments. Additionally, the language of the Title VII retaliation provision is similar to the discrimination provision in the ADEA—both provisions prohibit adverse employment actions taken "because of" the prohibited factor, *i.e.*, retaliation or age. *Gross* had held use of "because of" language required a "but for" causation standard.

But A Does Not Equal C:

Because the retaliation provision of Title VII has not been amended and because the language of the retaliation provision was the same as the ADEA discrimination provision, Xerox argued the rationale of *Gross* prohibited the use of "mixed motives" analysis in Title VII retaliation cases. Although the Fifth Circuit majority admitted "the *Gross* reasoning could be applied in a similar manner to the instant case," using a rationale which the dissenting judge described as "a lame distinction," two of the three judges simply refused to do so. Without articulating a convincing rationale, the majority simply refused to apply *Gross* to a Title VII retaliation

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case, because *Gross* was decided under the ADEA, not Title VII. Accordingly, the majority held a "mixed motives" instruction could be proper in a Title VII retaliation case.

This portion of the decision is at odds with decisions from other circuits which have held the effect of *Gross* is that, absent statutory language indicating otherwise, the mixed motive analysis only applies to *discrimination* cases under Title VII—not to discrimination claims *under other statutes*,[1] or to *retaliation* claims, even under Title VII.[2] The majority's decision is also at odds with previous Fifth Circuit cases which had applied a "but for" standard to retaliation claims.[3] Unfortunately, Xerox did not seek rehearing by the entire Fifth Circuit—probably because the case was likely settled after appeal, once the Court tossed out the punitive damage award.

THE "GOOD NEWS"—SORT OF . . .

On the positive side, the Fifth Circuit vacated the award of punitive damages; however, its rationale for doing so may not have much application outside the context of the case.

First, punitive damages are recoverable under Title VII only if the plaintiff proves the employer acted "with malice or with reckless indifference to the federally protected rights" of the plaintiff. This, the Court noted, is a higher standard of proof than that required to prove discrimination or retaliation. Merely proving discrimination or retaliation does not, necessarily, prove malice or reckless indifference.

Second, whether an employer acted with malice or reckless indifference is a subjective inquiry; and, the Court acknowledged, "there is no 'useful litmus for marking the point at which proof of violation sufficient to impose liability becomes sufficient to also support a finding of malice or reckless indifference.'" Nevertheless, the Court then examined the evidence—although there was evidence the manager had targeted Smith for discharge after she filed the EEOC charge, there was also evidence she had been "placed in the disciplinary process long before she filed her EEOC complaint"—and simply concluded "we cannot say that the evidence supports a finding that Xerox managers acted with malice or reckless indifference[.]"

Once the $250,000 punitive damage award was tossed out, the resulting judgment was only for $67,000. Xerox did not seek review by the full Fifth Circuit. Thus, resolution of the conflict between the decision in *Smith* and other Fifth Circuit decisions on the proper liability standard in retaliation cases will have to await *en banc* review in some future case. Resolution of the conflict between the decision in *Smith* and decisions in other circuits will have to await future Supreme Court review.

John L. Ross

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[1] *E.g.*, Swertka v. Rockwell Automation, Inc., 591 F.3rd 957, 963-64 (7th Cir. 2010) ("but for" standard applies to disability discrimination claims under the ADA).

[2] *E.g.*, *Gorzinski v. Jetblue Airways Corp.*, 596 F.3rd 93 (2nd Cir. 2010) (applying "but for" standard to retaliation claim).

[3] *E.g.*, *Ameen v. Merck & Co., Inc.*, 2007 WL 1026412, at 9 n. 63 (5th Cir. Mar. 29, 2007); *Strong v. University Health Care System, L.L.C.*, 482 F.3rd 802, 806 (5th Cir. 2007); *Septimus v. University of Houston*, 399 F.3rd 601, 608-09 (5th Cir. 2005); *Pineda v. United Parcel Service, Inc.*, 360 F.3rd 483, 488-89 (5th Cir. 2004); *Vadie v. Mississippi State University*, 218 F.3rd 365, 374 (5th Cir. 2000). *See also Wooten v. Federal Express Corp.*, 2007 WL 63609, at 16 (N.D. Tex. Jan. 9, 2007); *Buxton v. Lowe's Home Center, Inc.*, 2006 WL 2285472, at 5 (N.D. Tex. Aug. 9, 2006) ("This burden is more stringent than the 'causal link' required to establish the prima facie case. . . To survive summary judgment, [plaintiff] must show a 'conflict in substantial evidence to create a jury question regarding discrimination.'" *Id.*, quoting *Shackelford [Deloitte & Touche, L.L.P.]*, 190 F.3rd [398] at 404 [(5th Cir. 1999)]); *Walker v. Norris Cylinder Co.*, 2005 WL 2278080, at 9 (N.D. Tex. Sept. 19, 2005) ("The ultimate determination in an unlawful retaliation case is whether the conduct protected by Title VII was a 'but for' cause of the adverse employment decision.") quoting *Long v. Eastfield Coll.*, 88 F.3rd 300, 305 n. 4 (5th Cir. 1996)).

DOL Opinion: FMLA Leave Available for Non-Traditional Parents

On June 22, 2010, the Deputy Wage and Hour Administrator for the Department of Labor issued an Interpretation seeking to clarify the Family & Medical Leave Act's ("FMLA") definition of "son or daughter," concluding that an "in loco parentis" relationship exists where an employee is providing either day-to-day care or financial support for a child, if the employee intends to assume the responsibilities of a parent with regard to a child. Among other groups, this Interpretation was seen as a victory for same-sex partners raising children.

Pursuant to the FMLA, eligible employees are entitled to take up to 12 workweeks of unpaid, job-protected leave, in relevant part "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter," "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care," and to care for a son or daughter with a serious health condition. 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

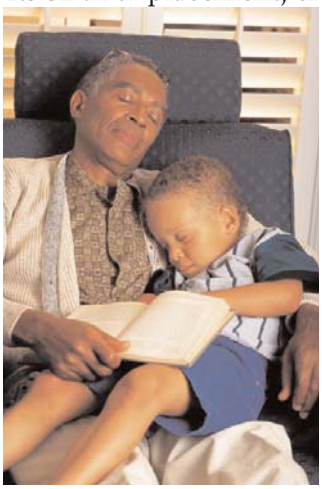
(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

According to the Interpretation, the Wage and Hour Division has received several requests for clarification as to whether employees who do not have a biological or legal relationship with a child may take FMLA leave.

In issuing her Interpretation, the Deputy Administrator found that Congress intended for 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." She further found that Congress intended the definition to be "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child."

The Deputy Administrator focused primarily on the term "in loco parentis"—literally meaning "in the place of a parent" or "instead of a parent"—within the definition, and found that it should encompass any employee with day-to-day responsibilities to care for or financially support a child, including those who have no biological or legal relationship with the child. Specific factors to consider in determining whether an individual stands in loco parentis are 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; and the extent to which duties commonly associated with parenthood are exercised.

By way of example, the Interpretation provides that an employee who provides day-to-day care for his or her unmarried partner's child (with whom there is no biological or legal relationship) could be considered to stand in loco parentis for the child, even if he or she does not financially support the child. In addition, an employee who will share equally in the raising of a child with the child's biological parent would be entitled to leave for the child's birth, because he or she will stand in loco parentis to the child. The Deputy Administrator continued by specifically identifying same-sex partners as employees who would be entitled to leave to bond with the child following its birth or placement, or to care for the child if a serious health condition exists. Grandparents are also specifically listed as examples of those who can stand in loco parentis, where the grandparent has taken in the child and assumed ongoing responsibility for raising him or her because the parents are incapable of providing care. An example of an employee not covered by the FMLA is one who is caring for a child while the child's parents are on vacation, due to the fact that they are not standing in loco parentis.



The Deputy Administrator further stated that the fact a child has a biological parent in the home, or has both a mother and father, does not prevent a finding that the child is also a "son or daughter" of an employee who lacks a legal or biological relationship with the child for purposes of the FMLA. In other words, according to the Department of Labor, there is no limit on the number of parents a child may have for purposes of taking FMLA leave.

DOL Opinion: FMLA Leave Available for Non-Traditional Parents, cont'd

Finally, to ease the burden on the employer, the Interpretation specifically permits an employer with questions about an employee's relationship to a child to require the employee to provide reasonable documentation or a statement of the family relationship. However, per the Interpretation, a "simple statement asserting that the requisite family relationship exists" is all that should be requested where there is no legal or biological relationship, thus somewhat reducing the value of this option.

Despite the fairly broad Department of Labor Interpretation, there will likely continue to be questions of fact regarding non-traditional parents' ability to take FMLA leave, as it is often unclear whether an employee has intended to assume the responsibilities of a parent and how involved they are in the child's day-to-day care or financial support. Nevertheless, the Department of Labor, at least, has made fairly clear what small steps it believes employers are permitted to take to confirm the employee's involvement. Should you find yourself in need of guidance regarding an employee's right to take FMLA leave to care for a non-biological or legal child, please do not hesitate to contact a member of the Firm's Labor and Employment Section.

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