

COMPLIANCE OVERVIEW

Provided by Better Business Planning, Inc.

FMLA Rights for Nontraditional Families

The federal Family and Medical Leave Act (FMLA) gives eligible employees the right to take unpaid, job-protected leave each year in certain situations, including:

- ✓ For the birth, adoption or foster care placement of a child;
- ✓ To care for a newborn or newly placed child; or
- ✓ To care for a family member with a serious health condition.

The Department of Labor (DOL) has issued guidance on how these FMLA rights extend to nontraditional families.

Employers should review their FMLA policies and actual practices to ensure that they are in compliance with the leave rights for nontraditional families. Employers may require employees to provide reasonable documentation if there is a question about whether the relationship is covered under the FMLA. However, a simple statement asserting that the requisite family relationship exists is all that is needed to confirm a family relationship.

LINKS AND RESOURCES

- DOL [Interpretation Letter](#) regarding the *in loco parentis* standard
- [The Employer's Guide to the FMLA](#), a publication of the DOL's Wage and Hour Division
- DOL Fact Sheets [#28B](#) and [#28C](#) regarding in loco parentis standard for parents and children

HIGHLIGHTS

IN LOCO PARENTIS

- An individual stands *in loco parentis* if he or she has day-to-day responsibilities to care for or financially support a child.
- No biological or legal relationship with the child is required.
- The *in loco parentis* relationship exists when an individual intends to take on the role of a parent.

SAME-SEX SPOUSES

- Same-sex spouses have the same leave rights under the FMLA as opposite-sex spouses.
- For example, an eligible employee may take FMLA leave to care for his or her same-sex spouse with a serious health condition.

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.



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FMLA RIGHTS – LEAVE FOR CHILDREN

The FMLA entitles an eligible employee to take up to 12 weeks of job-protected unpaid 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.

Definition of Son or Daughter

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*. According to the DOL, this broad definition is intended to reflect the reality that many children in the United States live with a parent other than their biological father and mother.

In Loco Parentis Standard

In loco parentis refers to a relationship in which a person puts himself or herself in the situation of a parent by assuming and discharging the obligations of a parent to a child. The *in loco parentis* relationship exists when an individual intends to take on the role of a parent to a child who is under 18 or 18 years of age or older and incapable of self-care because of a mental or physical disability.

Although no legal or biological relationship is necessary, grandparents or other relatives, such as siblings, may stand *in loco parentis* to a child under the FMLA as long as the relative satisfies the *in loco parentis* requirements.

Under the FMLA, persons who are *in loco parentis* include those with **day-to-day responsibilities to care for or financially support a child**. Courts have indicated some factors to be considered in determining *in loco parentis* status include:

- The age of the child;
- The degree to which the child is dependent on the person;
- The amount of financial support, if any, provided; and
- The extent to which duties commonly associated with parenthood are exercised.

The fact that a child has a biological parent in the home, or has both a mother and a father, does not prevent an employee from standing *in loco parentis* to that child. The FMLA does not restrict the number of parents a child may have. The specific facts of each situation will determine whether an employee stands *in loco parentis* to a child.

Examples

Examples of situations in which FMLA leave may be based on an *in loco parentis* relationship include:

Under the FMLA, an employee who actually has day-to-day responsibility for caring for a child may be entitled to leave even if the employee does not have a biological or legal relationship to the child.

- ✓ A grandfather may take leave to care for a grandchild whom he has assumed ongoing responsibility for raising if the child has a serious health condition.
- ✓ An aunt who assumes responsibility for caring for a child after the death of the child's parents may take leave to care for the child if the child has a serious health condition.
- ✓ A person who will co-parent a same-sex partner's biological child may take leave for the birth of the child and for bonding.

FMLA RIGHTS – LEAVE FOR PARENTS

The FMLA entitles an eligible employee to take up to 12 weeks of job-protected unpaid leave to care for a spouse, son, daughter or parent with a serious health condition.

Definition of Parent

For FMLA leave purposes, a “parent” is defined broadly as the biological, adoptive, step or foster parent of an employee or an individual who stood *in loco parentis* to the employee when the employee was a son or daughter. Parent does not include the employee's parents-in-law.

In Loco Parentis

An eligible employee is entitled to take FMLA leave to care for a person who provided such care to the employee when the employee was a child. If the individual stood *in loco parentis* to the employee when the employee was a child, the employee may be entitled to take FMLA leave even if he or she also has a biological, step, foster or other parent, provided that the *in loco parentis* relationship existed between the employee and the individual when the employee met the FMLA's definition of a son or daughter. Although no legal or biological relationship is necessary, grandparents or other relatives, such as siblings, may stand *in loco parentis* to a child under the FMLA as long as the relative satisfies the *in loco parentis* requirements.

Examples

An eligible employee may take leave to care for any individual who stood *in loco parentis* to the employee when the employee was a child regardless of any biological relationship of the two people. For example:

- ✓ An employee may take leave to care for his aunt with a serious health condition, if the aunt stood *in loco parentis* to him when he was a son or daughter.
- ✓ An employee may take leave to care for her grandmother with a serious health condition if the grandmother stood *in loco parentis* to her when she was a son or daughter.
- ✓ A son or daughter of a same-sex partnership may take leave to care for the non-adoptive or non-biological partner who stood *in loco parentis*.

Unless an *in loco parentis* relationship existed when the employee was a son or daughter, an employee is not entitled to take FMLA leave to care for a grandparent or an aunt with a serious health condition.

FMLA RIGHTS – LEAVE FOR SAME-SEX SPOUSES

The FMLA entitles an eligible employee to take job-protected unpaid leave for a spouse in the following situations:

- To care for a spouse with a serious health condition;
- To address qualifying exigencies related to a spouse’s covered military service; or
- To care for a spouse who is a covered service member with a serious injury or illness (military caregiver leave).

Under the FMLA, a “spouse” means a husband or wife as defined or recognized in the state where the individual was married, **including in a common law marriage or same-sex marriage**. Spouse also includes a husband or wife in a marriage that was validly entered into outside of the United States, if the marriage could have been entered into in at least one state.

The FMLA’s definition of spouse does not include domestic partners, which means that an employee is not entitled to take FMLA leave to care for a domestic partner with a serious health condition.

Eligible employees in same-sex marriages are also entitled to take FMLA leave to care for:

- Their stepchild (the child of the employee’s same-sex spouse) even if the *in loco parentis* requirement of providing day-to-day care or financial support for the child is not met; or
- A stepparent who is the same-sex spouse of the employee’s parent, regardless of whether the stepparent ever stood *in loco parentis* to the employee.

DOCUMENTING THE FAMILY RELATIONSHIP

An employer may, but is not required to, request that an employee provide reasonable documentation of the qualifying family relationship. An employee may satisfy this requirement by providing either a simple statement asserting that the requisite family relationship exists, or other documentation, such as a child’s birth certificate or a court document. It is the **employee’s choice** whether to provide a simple statement or other documentation. Employers may not use a request for confirmation of a family relationship in a manner that interferes with an employee’s exercise or attempt to exercise his or her FMLA rights.

Source: U.S. Department of Labor, Wage and Hour Division