

Clarification of who may stand *in loco parentis* of a child under the Family and Medical Leave Act (FMLA)

This document provides detailed information about the administration of the Federal and Wisconsin Family and Medical Leave Acts (FMLA and WFMLA) relative to employees who consider themselves in a parental relationship with a child but who have no legal or biological relationship to the child. Domestic partners, extended family members and those with no legal or biological relationship to a child may be eligible to take a FMLA leave after the birth or adoption of a child or to care for a child who has a serious health condition.

The following topics are addressed in this document:

- Summary of interpretation of *in loco parentis* relationship under FMLA
- Definition of *in loco parentis* relationship
- Examples of situations in which an *in loco parentis* relationship may be found
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- Coordination with Wisconsin FMLA (WFMLA)
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Summary of interpretation of *in loco parentis* relationship under FMLA

Effective June 22, 2010, employees who consider themselves to have a parental relationship with a child to whom the employee has no legal or biological relationship, are eligible to take up to 12 weeks of job-protected leave under FMLA to bond with the child after birth or placement for adoption and/or to care for the child if the child has a serious health condition; provided the employee qualifies for coverage under FMLA.

UW System Administration, pursuant to its authority under Wis. Stat. § 103.10(2)(a), has also decided to expand its administration of Wisconsin FMLA to include the *in loco parentis* relationship for UW System employees.

Any UW System employee who stands *in loco parentis* to a child will be treated as a biological, adoptive or step-parent under both FMLA and WFMLA.

Definition of *in loco parentis* relationship

Under federal FMLA, covered employees are eligible to take up 12 weeks per year of job-protected leave to care for his or her child. On June 22, 2010, the Administrator of the Wage and Hour Division of the U.S. Department of Labor (DOL) released additional clarifications of the definition of "son or daughter" as it pertains to an employee standing *in loco parentis* to a child. This clarified definition applies to an employee taking FMLA-protected leave for the birth or placement of a child, to care for a newborn or newly placed child, or to care for a child 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." 29 U.S.C. § 2611(12).

The FMLA regulations define *in loco parentis* as including those with day-to-day responsibilities to care for and financially support a child. See 29 C.F.R. § 825.122(c)(3). **“Employees who have no biological or legal relationship with a child may nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave.** It is the Administrator’s interpretation that the 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 found to stand *in loco parentis* to a child.” *Id.*

Even if a child has one or more biological parents in the home, the child could be considered the “son or daughter” of an employee who lacks a biological or legal relationship with the child for purposes of taking FMLA leave. There is no restriction on the number of parents a child may have under the FMLA. For example, if a child’s biological parents divorce, and each parent remarries, the child will be the “son or daughter” of both the biological parents and the stepparents and all four adults would have rights to take FMLA leave to care for the child.

Examples of situations in which an *in loco parentis* relationship may be found

Employees in a domestic partnership

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, the employee could be considered to stand *in loco parentis* to the child. For example, an employee who intends to 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. Similarly, an employee who 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, would be entitled to leave to bond with the child following placement, or to care for the child if the child had a serious health condition, because the employee stands *in loco parentis* to the child.

Extended family

If an employee is a grandparent who takes in a grandchild and assumes ongoing responsibility for raising the child because the parents are incapable or unwilling to take responsibility for the child, the employee may be eligible for a W/FMLA leave if he or she stands *in loco parentis* to the grandchild. Such situations may, or may not, ultimately lead to a legal relationship with the child (adoption or legal ward), but no such relationship is required to find *in loco parentis* status.

Example of situation in which an *in loco parentis* relationship is NOT found

If an employee cares for a child only while the child’s parents are on vacation, the employee is not considered to be *in loco parentis* to the child.

Coordination with Wisconsin FMLA (WFMLA)

UW System Administration’s decision to include the *in loco parentis* relationship in the administration of WFMLA for UW System employees means that employees are able to take up to two weeks of WFMLA-covered leave to care for a domestic partner’s child with a serious health condition and take up to six weeks of WFMLA-covered leave to bond with the child within 16 weeks of birth or adoption. If an employee is eligible to take a leave under both FMLA and WFMLA, the leaves run concurrently.

Substitution of paid leave during FMLA or WFMLA-covered leave

All types of paid leave, including sick leave, can be used during a WFMLA-covered leave. All accrued leave, except sick leave, may be used during a FMLA-covered leave unless the reason for the FMLA leave qualifies as a reason to use sick leave. When FMLA and WFMLA run concurrently, the program that provides the more generous leave substitution benefit must be followed.

Example: An employee requests 12 weeks of leave after her domestic partner gives birth. The employee stands *in loco parentis* to the child because the employee intends to share in the day-to-day parental responsibilities of the child. The employee is eligible for coverage under both FMLA and WFMLA.

First six weeks of leave: The first six weeks of leave count against the employee's WFMLA and FMLA entitlements. Since WFMLA provides more generous leave substitutions rights, during the first six weeks of leave, the employee is eligible to substitute any type of paid leave, including sick leave.

Second six weeks of leave: Employee receives six weeks of FMLA family leave (WFMLA leave was exhausted at the end of the first six weeks of leave). The employee is eligible to substitute paid leave per employer policy (can substitute any accrued leave EXCEPT sick leave).

Employer Responsibilities

Employers should allow any eligible employee who stands *in loco parentis* of a child to take a WFMLA/FMLA leave if requested (provided the employee is otherwise eligible for the W/FMLA leave). As a reminder, under WFMLA, employees may take a WFMLA leave to care for a domestic partner, but under FMLA, an employee is **NOT** eligible to take a leave to care for a domestic partner. According to the UWSA General Counsel's office, we do not have the authority to expand our administration of federal FMLA to allow employees to take FMLA leave to care for a domestic partner. See the summary of WFMLA domestic partner provisions at: <http://www.uwsa.edu/hr/benefits/leave/wfmladpsum.pdf>.

If the employer has questions about whether an employee's relationship to a child is covered under FMLA, the employer may require the employee to provide reasonable documentation or statement of the family relationship. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as *in loco parentis* where there is no legal or biological relationship. See 29 C.F.R. § 825.122(j); 73 Fed. Reg. 67,952 (Nov. 17, 2008).

29 C.F.R. § 825.122(j): *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.*, but the employee is entitled to the return of the official document submitted for this purpose.

According to the UWSA General Counsel's office, if an employee has questions about whether or not he or she stands *in loco parentis* to a child, the employee should consider the following factors:

Determining whether the relationship of *in loco parentis* is established will require a review of the "intention of the person allegedly *in loco parentis* to assume the status of a parent toward the child." 28 Am.Jur. 2D Proof of Facts 545, § 2. The intent to assume such parental status can be inferred from the acts of the parties. *Id.* "Other factors which are considered in determining whether *in loco parentis* status has been assumed are (1) the age of the child; (2) the degree to which the child is dependent on

the person claiming to be standing in loco parentis; (3) the amount of support, if any, provided; and (4) the extent to which duties commonly associated with parenthood are exercised."

It is the Wage and Hour Division Administrator's interpretation that "either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands *in loco parentis* to a child will depend on the particular facts."

Definition of a son or daughter relative to military FMLA leave

This clarified definition of a son or daughter does not address an employee's entitlement to take military FMLA leave for a son or daughter, which is determined by separate definitions. See 29 C.F.R. § 825.122(g), (h).

Full text of Wage and Hour Division administrator's interpretation

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

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