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CLIENT ALERT

U.S. DEPARTMENT OF LABOR ISSUES GUIDANCE AS TO FMLA LEAVE TO CARE FOR AN ADULT CHILD.

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On January 14, 2013, the United States Department of Labor, Wage and Hour Division ("WHD") issued Administrator's Interpretation No. 2013-1 (the "Interpretation") in order to provide clarification of the definition of "son" or "daughter" under the Family and Medical Leave Act ("FMLA") as it applies to an individual 18 years of age or older.

The FMLA entitles an otherwise eligible employee to take up to Twelve (12) workweeks of unpaid, job-protected leave during a 12-month period to care for a son or daughter with a serious health condition. The FMLA also 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 under 18 years of age, or 18 years of age or older and incapable of self-care because of a mental or physical disability. The FMLA does not require that a biological or legal relationship exist between the employee and the child (i.e. the WHD has also interpreted the FMLA definition of "son" or "daughter" to include a child of a person standing in loco parentis [those with day-to-day responsibilities to care for or financially support a child, which may include same-sex couples]).

A child under 18 years of age is a "son" or "daughter" for the purposes of FMLA leave without regard to whether or not the child has a disability and an otherwise eligible employee requesting FMLA leave to care for such child must only show a need to care for the child due to a serious health condition. The Interpretation does not apply to an employee's entitlement to take FMLA military family leave for a son or daughter. FMLA regulations set forth separate definitions of "son" or "daughter" of an active duty servicemember, a servicemember called to active duty status, and "son" or "daughter" of a covered servicemember. Pursuant to these regulations, the general definition of "son" or "daughter," applicable to the FMLA's military family leave provisions are not restricted by age.

An adult child, in order to meet the FMLA's definition of a "son" or "daughter" (i.e., one who is 18 years of age or older), must have a mental or physical disability and be incapable of self-care because of that disability. Because the FMLA regulations adopt the Americans with Disabilities Act's ("ADA's") definition of "disability" as interpreted by the EEOC, the broad changes to the definition of "disability" set forth in the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") and its implementing regulations are applicable to the definition of an adult son or daughter under the FMLA. As such, a parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older, if the adult son or daughter: (1) has a disability as defined by the ADA; (2) is incapable of self-care due to that disability; (3) has a serious health condition; and (4) is in need of care due to the serious health condition. It is only when all four requirements are met that an eligible employee will be entitled to FMLA protected leave to care for his or her adult son or daughter.

With respect to the requirement that the employee's son or daughter be "incapable of self-care due to" a disability, the FMLA regulations define "incapable of self-care" to mean that the adult son or daughter "requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' (ADLs) or 'instrumental activities of daily living' ("IADL's")." However, the determination of whether an adult son or daughter is incapable of self-care due to a disability under the FMLA is a fact-specific determination that must be made by the employer based on the employee's adult son or daughter's condition at the time of the requested leave. Such determination will need to focus on whether the individual currently needs active assistance or supervision in performing three or more ADLs or IADLs. The determination must also be based on all relevant factors that might impact the ability of the adult child to perform ADLs or IADLs without active assistance or supervision, including, for example, the current effect of any episodic impairment. If an adult child is determined to have a disability and to be incapable of self-care because of that disability, he or she will qualify as a "son or daughter" under the FMLA.

The FMLA regulations define a "son" or "daughter" 18 years of age or older as one who is "'incapable of self-care because of a mental or physical disability' at the time that FMLA leave is to commence." These regulations do not address whether it is relevant if the disability occurs before or after the son or daughter turns 18 years old. The Administrator's interpretation resolves this issue by determining that the age of the onset of the disability is irrelevant to the determination of whether an individual is considered a "son" or "daughter" under the FMLA (i.e. the disability of the son or daughter does not have to have occurred or been diagnosed prior to the age of 18.) The onset of a disability may occur at any age for purposes of the definition of a "son" or "daughter" under the FMLA.

The Interpretation also includes several examples. In one example, an employee has a 37-year old daughter who has suffered a shattered pelvis in a car accident which substantially limits her in a number of major life activities (i.e., walking standing, sitting, etc.). As a result of this injury, the employee's daughter is hospitalized for two weeks and under the ongoing care of a health care provider. Although the daughter is expected to recover, she will be substantially limited in walking for six months. The Interpretation concludes that if the daughter needs assistance in three or more activities of daily living such as bathing, dressing, and maintaining a residence, she will qualify as an adult "daughter" under the FMLA as she is incapable of self-care because of a disability. The daughter's shattered pelvis would also be a serious health condition under the FMLA and her employee parent would be entitled to take FMLA-protected leave to provide care for her immediately and throughout the time that she continues to be incapable of self-care because of the disability.

In another example included in a supplemental Fact Sheet, an eligible employee's daughter has been diagnosed with cancer at age 19. The daughter's cancer is stated to meet the ADA's definition of disability. The WHD concludes that even if the daughter's cancer goes into remission, it will continue to meet the ADA's definition of disability because the active condition substantially limits a major life activity (i.e. normal cell growth). However, in order for the employee parent to qualify for FMLA leave, (1) the cancer must cause the daughter to be incapable of self-care (based on her condition at the time the FMLA leave commences), (2) the daughter must have a serious health condition under the FMLA, (related to the cancer or not), and (3) the parent must be needed to care for the daughter because of the serious health condition. Thus, if the daughter suffers from the effects of cancer or chemotherapy that render her unable to perform activities of daily living (such as bathing, eating, and dressing), she will qualify as a "daughter" under the FMLA because she is incapable of self-care due to a disability. The daughter's cancer would meet the FMLA's definition of a serious health condition if

it required her to receive inpatient care or continuing treatment by a doctor. The daughter's cancer would also qualify is the parent could demonstrate that the daughter would be in need of care for events such as being driven to her radiation treatments. In these circumstances, the employee parent would be entitled to take FMLA protected leave to provide care for their daughter.

Continuing with this example, if the daughter's cancer subsequently goes into remission and the daughter is not incapable of self-care, the daughter will still meet the ADA's definition of disability, but will now not meet the FMLA's definition of a "son" or "daughter." And, the employee parent would not qualify for FMLA protected leave to care for their daughter even.

In all instances, determinations under the FMLA depend upon all the facts of a particular situation. The determination of whether an adult child qualifies as a "son" or "daughter" under the FMLA does not change the law's other requirements. An employee requesting FMLA leave to care for an adult child must meet the FMLA's coverage and eligibility requirements, must provide his or her employer with notice of the need for leave, and must submit medical certification of a serious health condition if required by the employer.

An employer, in responding to a request for FMLA for an otherwise qualified employee to care for an adult son or daughter, must base its analysis upon a thorough examination of all of the relevant factors. Based upon this new Interpretation, employers may wish to review their policies concerning granting FMLA leave to employees with children 18 years of age or older to determine if they are in line with this Interpretation.

John R. LaBar and the attorneys at Henry & McCord are available to consult with employers regarding the best course of action.

John R. LaBar is a named member of Henry, McCord, Bean, Miller, Gabriel & LaBar, P.L.L.C. His practice focuses on business/corporate, real property, tax, intellectual property, creditor bankruptcy, estate planning, probate, corporate litigation and employment law. Mr. LaBar has extensive experience negotiating and structuring business and real estate transactions, including choice and formation of businesses, purchase and sale of businesses and real estate, commercial lending and leasing transactions as well as advising clients on estate planning and probate matters. He has successfully litigated a multitude of cases involving contractual and business disputes. Mr. LaBar is the Town Attorney for the Town of Morrison, Tennessee. He has served as an Adjunct Professor of Law at the University of Tennessee, College of Law teaching Contract Drafting and is often a speaker and acts as faculty for legal education seminars.