

To: Mike Ramirez
From: David Roger
Date: December 12, 2013
Re: FMLA for Placement of Adopted Child

BACKGROUND

You have asked for an opinion whether an employee, who has had physical custody of a child for approximately seven (7) years, is entitled to exercise FMLA leave when the employee adopts the child.

ANALYSIS

29 U.S.C section 2612 (a)(1)(A) allows an eligible employee to take 12 weeks of unpaid leave during any 12 month period, “ Because of the placement of a son or daughter with the employee for adoption or foster care.”

The Fifth Circuit Court of Appeals addressed the definition of “placement for adoption” in *Bocalbos, v. National Western Life Ins. Co.*, 162 F.3d 379 (5th Cir. 1998). In that case, the employee adopted his brother’s children who resided in the Philippines. Three years (3) after the adoption became final, the employee applied for FMLA to make arrangements to bring the children to the United States. The Court declined to interpret “placement for adoption” to include the employee’s situation:

“While we recognize the importance of child-parent bonding and of a parent’s presence in early child rearing, we cannot read the Act to extend “placement for adoption” to encompass Bocalbos’ situation. The children, ages 17 and 12, were not being placed for adoption in April 1995, but were being brought to the United States to live in Austin, Texas. The Act contemplates placement for adoption to include the circumstances in which a child is placed in a home *before*

the adoption is finalized. There is no indication, however, that Congress intended placement to include a situation in which the children were actually adopted, left in another country for an extended period of time, and then retrieved at the convenience of the adoptive parent. Congress placed a 12-month limitation on the eligibility so that the period of time for employees to request leave would not be indefinite or too far removed from the actual adoption.”

Id. at 384.

It appears the purpose of this section is to provide families time to bond with children when they are first brought into the home. It is during this fragile time that children need the presence of family to ease the emotionally difficult time of adapting to a new family and unfamiliar surroundings.

The U.S. Department of Labor issued Opinion FMLA2005-1-A on August 26, 2005 addressing a similar issue. The department was asked whether an employee who has a child placed in the home for foster care, and then years later adopts the child, is entitled to FMLA leave.

“The regulations also discuss the timing of when an employee may use FMLA leave for purposes of adoption or foster care placements. Regulation 825.200(a) provides that an eligible employee’s FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for, among other purposes, the “placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child” (emphasis added). The regulation is based on the Act’s legislative history, which similarly emphasizes that the leave is available to care for a “child newly placed with the employee for adoption or foster care.” Senate Report No. 103-3, p.24. The statutory focus on the date of placement and the legislative history indicate that only the initial date of placement with a family triggers the right to leave.”

Id.

While the Ninth Circuit Court of Appeals has not addressed this issue, it is likely they would come to the same conclusion as the Fifth Circuit and the Department of Labor. It appears the date the child first enters the home triggers the FMLA entitlements.