OFFICE OF POLICY AND LEGAL ANALYSIS

To: Members, Joint Standing Committee on Labor and Housing
From: Steven Langlin, Legislative Analyst
Date: February 22, 2021
Subj: **LD 61, "An Act to Include Grandparents under Maine's Family Medical Leave Laws" (Stearns)**

SUMMARY

This bill allows a grandparent to request employee family medical leave in order to care for a grandchild who has a serious health condition.

TESTIMONY

Proponents	**Opponents**
Sponsor (written testimony) • Caring for grandparent in the absence of a parent is a natural occurrence • Rep. Stearns indicated his intent is to let grandparents take leave to care for grandchildren with serious health conditions – not caregiving. • Sponsored amendment (attached) defines grandchild to mean living with the employee or the employee's domestic partner *Isaac Gingras, Maine DOL (written testimony, attached)* • Definition of "child" is uncertain and could be clarified • Helpful to provide further definition of "grandchild"- biological? • Indicated Rep. Stearns amendment clarifies this *Jeff Young, ME Employment Lawyers Assoc. (written testimony)* • States including CA, WA, NJ and DC include grandparents in their definitions • Bill should expand coverage to include parental and grandparent leave to care for children and grandchildren unable to attend school because of COVID-19.	Steven Bailey, Maine School Management Association (written testimony) • Concerned the bill as written would allow teachers who are grandparents to take time off from teaching to care for their grandchildren while the grandchildren's parents go to work **Neither For Nor Against** *Kate DuFour, ME Municipal Association (written testimony)* • Share concerns with others about definition of grandchild/grandparent - should be strengthened Peter Gore, ME State Chamber of Commerce (written testimony) • Become slippery slope when you add new categories to accepted leave – where does it stop? • Compliance difficult for small businesses because leave is allowed in increments • Only designed to be used for "serious health condition" – see definition.

POTENTIAL ISSUES OR TECHNICAL PROBLEMS:

- Public hearing discussion on whether the bill's intent is to allow caregiving or medical leave. The sponsor indicated medical leave.
- The intent of the statute is to allow medical leave.

COMMITTEE REQUESTS FOR ADDITIONAL INFORMATION:

- Sen. Guerin wanted to know if both a parent and a grandparent could take FMLA for the same child – "double-dipping."
    - *Unaware of provision forbidding this. FMLA provides that spouses who work for the same employer are allowed only a combined amount of time under some circumstances, such as the birth of a child – see attached U.S. DOL bulletin.*
- Rep. Drinkwater wanted to know about part-time employees and if they can benefit.
    - *Maine law specifies "any employee" and doesn't define employee to mean working a minimum number of hours. However, the employee can only take leave after working for the employer for 12 consecutive months.*
- Discussion about whether this leave policy is guided by ME DOL rules – *there are no rules.*
- Can grandparent "taking the place of the parent" use FMLA?
    - *Yes, if a grandparent is acting "in loco parentis," FMLA can be used. See attached U.S. DOL bulletin.*

Excerpts from Maine Family Medical Leave Requirements (26 MRSA, Chapter 7, subchapter 6-A)

4. Family medical leave. "Family medical leave" means leave requested by an employee for:
A. Serious health condition of the employee;
B. The birth of the employee's child or the employee's domestic partner's child;
C. The placement of a child 16 years of age or less with the employee or with the employee's domestic partner in connection with the adoption of the child by the employee or the employee's domestic partner;
D. A child, domestic partner's child, parent, domestic partner, sibling or spouse with a serious health condition;
E. The donation of an organ of that employee for a human organ transplant; or
F. The death or serious health condition of the employee's spouse, domestic partner, parent, sibling or child if the spouse, domestic partner, parent, sibling or child as a member of the state military forces, as defined in Title 37-B, section 102, or the United States Armed Forces, including the National Guard and Reserves, dies or incurs a serious health condition while on active duty.

6. Serious health condition. "Serious health condition" means an illness, injury, impairment or physical or mental condition that involves:
A. Inpatient care in a hospital, hospice or residential medical care facility; or
B. Continuing treatment by a health care provider.

PRELIMINARY FISCAL IMPACT STATEMENT:

- Not yet determined

FMLA vs. ME Family Medical Leave Requirements

FMLA (federal)	**ME Family Medical Leave Requirements**
12 workweeks of leave in 12-month period AFTER working for employer for 12 months (12 months of work need not be consecutive; could be seasonal) Have worked 1,250 hours during the 12 months prior to the start of leave	Up to 10 workweeks in any 2-year period AFTER being employed by employee for 12 consecutive months *Any* employee (regardless of full-time or part-time status – no hours-worked requirement)
Unpaid	**Unpaid**
50 or more employees	**15 or more employees at one location in this state**

STATE OF MAINE
DEPARTMENT OF LABOR
54 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0054

Janet T. Mills
GOVERNOR

Laura A. Fortman
COMMISSIONER

Testimony of Isaac Gingras, MDOL Legislative Liaison

Maine Department of Labor

In Support of LD 61, "An Act to Include Grandparents under Maine's Family Medical Leave Laws"

Before The Joint Standing Committee on Labor and Housing

Date of Hearing: February 3, 2021

Senator Rafferty, Representative Sylvester, and members of the Joint Standing Committee on Labor and Housing, my name is Isaac Gingras, and I am the Legislative Liaison for the Maine Department of Labor (Department). On behalf of the Department I am offering this testimony in support of LD 61, "An Act to Include Grandparents under Maine's Family Medical Leave Laws."

Currently, under the Family Medical leave statute, leave may be provided for a worker caring for a child, domestic partner's child, parent, domestic partner, sibling or spouse with a serious health condition. This bill would simply add grandchildren, including those of a domestic partner, to the list of persons for the care of whom an employee may request family medical leave from an employer and be entitled to unpaid, job-protected leave in accordance with the law.

In the light of the many potential stresses on the health of Maine workers and their families, including both the current pandemic and the devastation caused by the opioid crisis, the Department recognizes the merits of providing Family Medical Leave protections to grandparents similar to those provided to other family members. For this reason, we support this proposed expansion of coverage. We would, however, recommend that the definition of covered employees be clarified.

It is possible to interpret the current statute to include grandchildren (and thus grandparents) in its protections. Specifically, the term "child" in §843, sub-§4, ¶D could refer to any person under the age of majority, as it excludes any reference to the child's relationship to the employee. Even so, the proposed language added to definitions would serve to clarify that it is the intent of the legislature to include grandchildren. Even clearer would be to add the words "the employee's" before both "child" in the current section and "grandchild" in the proposed amendment, assuming that is the intent.

In addition, it would be helpful to provide a further definition of grandchild (and in fact of child) that would clarify whether the intent is to include biological, adopted or other possible legal statuses in the covered parental and grandparental relationships. The Department would also suggest clarifying the scope of the legislation if possible. There is a distinction between grandparents who are not primary caregivers and those who are in a primary caregiving role for their grandchild. It may be beneficial to clarify this in statutory language if the committee wishes to do so.

In summary, the department appreciates the overall goal of this bill and we appreciate Representative Stearns and the cosponsors for bringing this bill forward. Staff from the Department will be available for the work session to assist with the technical aspects of this bill if necessary. Thank you for your consideration of my testimony. I am available to answer any questions that you may have now or at the work session.

Committee Amendment to LD 61, An Act To Include Grandparents under Maine's Family Medical Leave Laws

Emergency preamble. Whereas, acts and resolves of the Legislature do not become effective until 90 days after adjournment unless enacted as emergencies; and

Whereas, this legislation allows an employee to request family medical leave to care for a grandchild who has a serious health condition; and

Whereas, this legislation needs to take effect as soon as possible in order to allow grandparents to take family medical leave in order to care for their grandchildren, especially in light of the increasing number of COVID-19 cases; and

Whereas, in the judgment of the Legislature, these facts create an emergency within the meaning of the Constitution of Maine and require the following legislation as immediately necessary for the preservation of the public peace, health and safety; now, therefore,

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 26 MRSA §843, sub-§4, ¶D, as repealed and replaced by PL 2007, c. 519, §1, is amended to read:

D. A child, domestic partner's child, grandchild, domestic partner's grandchild, parent, domestic partner, sibling or spouse with a serious health condition;

Sec. 2. 26 MRSA §843, sub-§9 is enacted to read:

9. Grandchild. "Grandchild" means a child of the employee's child or a child of the domestic partner's child that resides with the employee or domestic partner.

Emergency clause. In view of the emergency cited in the preamble, this legislation takes effect when approved.

SUMMARY

This bill allows a grandparent to request employee family medical leave in order to care for a grandchild who has a serious health condition. This amendment defines grandchild to mean a child of the employee's child or a child of the domestic partner's child that resides with the employee or domestic partner.

U.S. Wage and Hour Division
(July 2015)

Fact Sheet #28L: Leave under the Family and Medical Leave Act for Spouses Working for the Same Employer

The Family and Medical Leave Act (FMLA) entitles eligible employees who work for covered employers to take unpaid, job-protected leave for specified family and medical reasons. Generally, the FMLA entitles an employee to take up to 12 workweeks of FMLA leave in a 12-month period for certain family and medical reasons. The FMLA also entitles an employee to take up to 26 workweeks of FMLA leave in a single 12-month period for military caregiver leave.

When spouses work for the same employer and each spouse is eligible to take FMLA leave, the FMLA limits the combined amount of leave they may take for some, but not all, FMLA-qualifying leave reasons.[1] This fact sheet explains when and how the limitation applies.

For purposes of FMLA leave, spouse means a husband or wife as defined or recognized in the state where the individual was married and includes individuals in a common law 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.

For which FMLA-qualifying leave reasons are spouses subject to the combined limitation?

Eligible spouses who work for the same employer are limited to a combined total of 12 workweeks of leave in a 12-month period for the following FMLA-qualifying reasons:

- the birth of a son or daughter and bonding with the newborn child,
- the placement of a son or daughter with the employee for adoption or foster care and bonding with the newly-placed child, and
- the care of a parent with a serious health condition.

Eligible spouses who work for the same employer are also limited to a combined total of 26 workweeks of leave in a single 12-month period to care for a covered servicemember with a serious injury or illness (commonly referred to as "military caregiver leave") if each spouse is a parent, spouse, son or daughter, or next of kin of the servicemember. When spouses take military caregiver leave as well as other FMLA leave in the same leave year, each spouse is subject to the combined limitations for the reasons for leave listed above.

Which FMLA-qualifying leave reasons are not subject to the combined limitation?

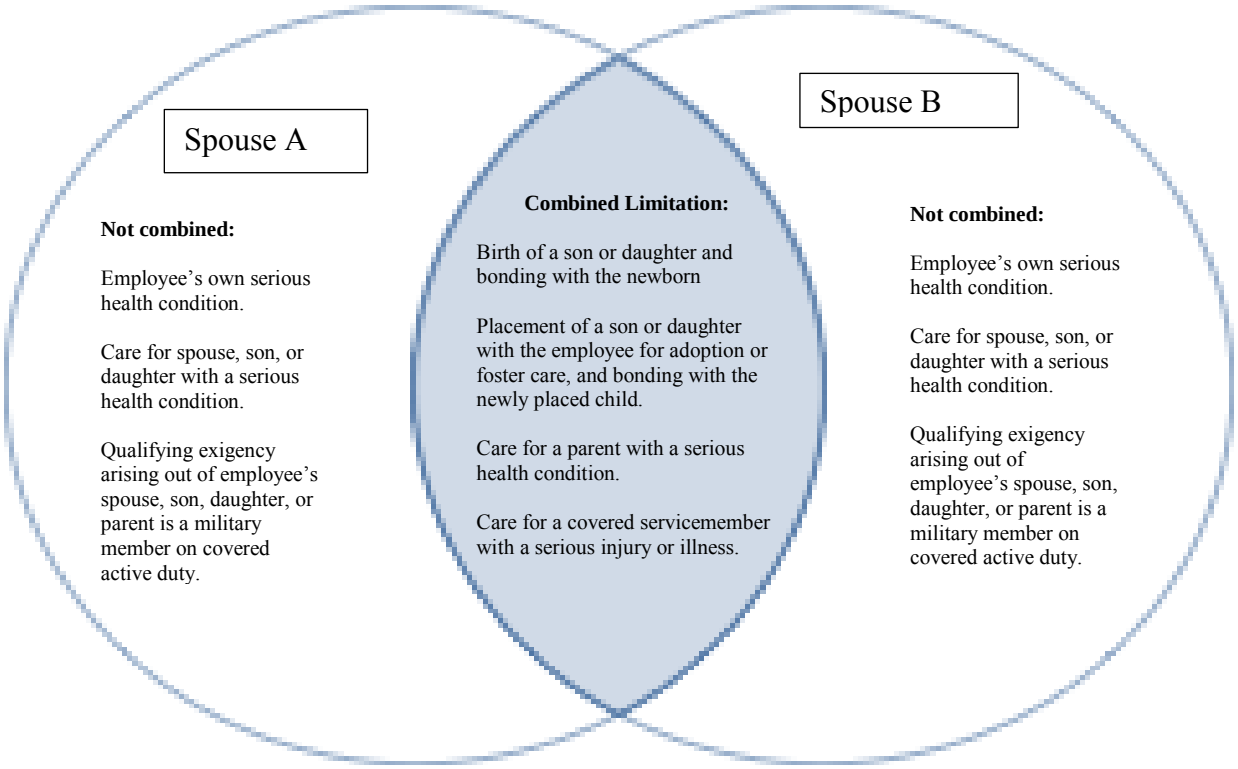
The limitation on the amount of leave for spouses working for the same employer does not apply to FMLA leave taken for some qualifying reasons. Eligible spouses who work for the same employer are each entitled to up to 12 workweeks of FMLA leave in a 12-month period, without regard to the amount of leave their spouses use, for the following FMLA-qualifying leave reasons:

[1] If one of the spouses is not eligible for FMLA leave, these limitations on the combined amount of leave do not apply. The spouse that is eligible for FMLA leave is entitled to the full amount of leave.

- the care of a spouse or son or daughter with a serious health condition;
- a serious health condition that makes the employee unable to perform the essential functions of his or her job; and
- any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on "covered active duty."

NOTE: For more information on how employers establish the 12-month period, *see* Fact Sheet #28H. For more information on the single 12-month period applicable to military caregiver leave, *see* Fact Sheets #28M, 28M(a), and 28M(b).

Combined Limitation Chart



Example 1:

Mary and Juan are married, FMLA-eligible employees, who work for the same employer. After Mary gives birth to their daughter, she uses six workweeks of FMLA for her own serious health condition and two workweeks of FMLA leave for bonding with her newborn baby, Anna. In the same 12-month period, Juan also wishes to use leave to bond with his infant daughter.

How many workweeks of FMLA leave may Juan take?

Birth and bonding with a child is a combined leave category for spouses who work for the same employer. Juan and Mary are limited to a combined total of 12 workweeks in a 12-month period for the birth of their daughter and for bonding with their child, and Mary has used two of the 12 workweeks of leave available to the couple for this leave reason.

Juan may take up to 10 workweeks of FMLA leave for the birth of his daughter and to bond with his child.

If Juan uses ten workweeks of FMLA leave available to bond with Anna, he may use up to two workweeks of leave for non-combined FMLA-qualifying leave reasons, such as caring for Mary if she has a serious health condition.

Example 2:

Morgan and Taylor are married, FMLA-eligible employees, who work for the same employer. Taylor takes 11 workweeks of FMLA leave to care for her father who has a terminal illness. Later in the same 12-month period, Morgan learns that her mother will need several weeks of care while recovering from hip replacement surgery. Morgan has not used any FMLA leave during the 12-month period.

How many workweeks of FMLA leave may Morgan take to care for her mother?

Leave to care for a parent with a serious health condition is one of the combined leave categories for spouses who work for the same employer. Morgan and Taylor are limited to a combined total of 12 workweeks in a 12-month period for the purpose of caring for a parent. Taylor has already used 11 workweeks of FMLA leave to care for her father, leaving a balance of one workweek for Morgan to use to care for her mother.

Morgan may take no more than one week of FMLA leave to care for her mother with a serious health condition.

In this example, if Morgan uses one week to care for her mother, she would have 11 workweeks of FMLA leave available to use for non-combined qualifying FMLA leave reasons.

UNLAWFUL ACTS

It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA. *See* Fact Sheet #77B.

ENFORCEMENT

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring an action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4-USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(July 2015)

Fact Sheet #28B: FMLA leave for birth, placement, bonding, or to care for a child with a serious health condition on the basis of an "*in loco parentis*" relationship

The Family and Medical Leave Act (FMLA) entitles an eligible employee to take up to 12 workweeks 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. See 29 USC 2612(a)(1).

This Fact Sheet provides guidance on an employee's entitlement to FMLA leave to bond with or care for a child to whom the employee stands "in loco parentis." You may also wish to review Fact Sheet #28C on FMLA leave to care for a parent on the basis of an *in loco parentis* relationship.

FMLA 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*. See 29 USC 2611(12). The broad definition of "son or daughter" is intended to reflect the reality that many children in the United States live with a parent other than their biological father and mother. 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.

The definition of "son or daughter" is limited to children under the age of 18 or 18 years of age or older and incapable of self-care because of a mental or physical disability. See 29 USC 2612(12). The FMLA military leave provisions have specific definitions of son or daughter that are unique to those provisions. See 29 C.F.R. § 825.122(g), (h).

What does in *loco parentis* mean under FMLA?
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 of *in loco parentis*
Examples of situations in which FMLA leave may be based on an *in loco parentis* relationship include:

- 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.

What may be required to document an *in loco parentis* relationship?
The employer's right to documentation of family relationship is the same for an individual who asserts an *in loco parentis* relationship as it is for a biological, adoptive, foster or step parent. Such documentation may take the form of a simple statement asserting the relationship. For an individual who stands *in loco parentis* to a child, such statement may include, for example, the name of the child and a statement of the employee's *in loco parentis* relationship to the child. An employee should provide sufficient information to make the employer aware of the *in loco parentis* relationship. See 29 CFR § 825.122.

***In loco parentis* status and other FMLA requirements**
In loco parentis status under the FMLA does not change the law's other requirements, such as those regarding coverage, eligibility, and qualifying reasons for leave. All requirements must be met for FMLA protections to apply. An employee asserting a right to FMLA leave for birth, bonding, or to care for a child for whom he or she stands *in loco parentis* may be required to provide notice of the need for leave and to submit medical certification of a serious health condition consistent with the FMLA regulations.

Where to Obtain Additional Information
For additional information about the FMLA, visit the Wage and Hour Division Website, http://www.wagehour.dol.gov and/or call our toll-free helpline, 1-866-4-USWAGE (1-866-487-9243) available 8 a.m. to 5 p.m. in your time zone.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

1-866-4-USWAGE
TTY: 1-866-487-9243
Contact Us