



August 29, 2011

Ingrid Burford
Work Life Program Specialist
U.S. Office of Personnel Management
1900 E St., NW Rm 7456
Washington, DC 20415-9700

RE: RIN 3206-AL36 Agency Use of Appropriated Funds for Child Care Costs for Lower Income Employees

Dear Ms. Burford:

On behalf of the undersigned organizations, Family Equality Council, the national organization working to ensure full social and legal equality for the approximately 1 million lesbian, gay, bisexual, and transgender (LGBT) parents raising more than 2 million children across the U.S. by providing direct support, educating the American public, and securing inclusion in legislation, policies, and practices impacting families, would like to thank the Director and the Office of Personnel Management (OPM) for proposing revisions to its regulations on funding for child care subsidies for lower-income civilian employees.

Below are specific comments and recommendations regarding the proposed definitions of "child," "domestic partner," and "domestic partnership."

Child

The proposed definition of "child" is broad and we recognize and appreciate OPM's desire to cover as many families as possible. We feel, however, that the following changes to the proposed definition will further expand the number of lower-income employees who will be able to access these child care subsidies.

The proposed definition of "child" includes children who bear "any of the following relationships to either an employee, the employee's spouse, or the employee's domestic partner: . . . (6) A child to whose support the employee, the employee's spouse, or the employee's domestic partner makes regular and substantial contributions."

While part (6) as proposed covers children for whom an employee, employee's spouse, or employee's domestic partner is standing in the place of a parent, we are concerned that the requirement that a parent make "regular and substantial contributions" to the child's support will have the unintended effect of restricting access to the subsidy. In a family with a single earner, the non-earning parent may not be seen as making "regular and substantial contributions" to a child's support. In place of this requirement, we urge OPM to expand the definition to include the children of parents "standing *in loco parentis*," or in the place of a parent. The Department of Labor uses this definition in regulations implementing the Family and Medical Leave Act and has interpreted *in loco parentis* to include parents who either assume the day-to-day care of the child or provide financial support, but who do not



necessarily provide both financial and day-to-day support.¹ We encourage OPM to adopt the Department of Labor interpretation and define “child” and “*in loco parentis*” as recommended below.

Recommended Definition

Child means a child who bears any of the following relationships to either an employee, the employee’s spouse, or the employee’s domestic partner:

- (1) A biological child;
- (2) An adopted child;
- (3) A stepchild;
- (4) A foster child;
- (5) A child for whom a judicial determination of support has been obtained; or
- (6) A child to ~~whose support~~ **for whom** the employee, the employee’s spouse, or the employee’s domestic partner ~~makes regular and substantial contributions~~ **stands in loco parentis**.

Standing in loco parentis includes those with day-to-day responsibilities to care for or financially support a child. A biological or legal relationship is not necessary.

Domestic Partner and Domestic Partnership

The proposed definitions of “domestic partner” and “domestic partnership” place greater restrictions and a greater evidentiary burden on potential child care subsidy recipients than other definitions of the same terms within OPM regulations. Precisely, the proposed definition of “domestic partnership” to qualify for the child care subsidy has nine requirements² while other definitions of “committed

¹ Administrator's Interpretation No. 2010-3, *Clarification of the definition of “son or daughter” under Section 101(12) of the Family and Medical Leave Act (FMLA) as it applies to an employee standing “in loco parentis” to a child*, Wage and Hour Division, Department of Labor (June 22, 2010).

² *Domestic partnership* means a committed relationship between two adults of the same sex in which the partners—

- (1) Are each other’s sole domestic partner and intend to remain so indefinitely;
- (2) Maintain a common residence, and intend to continue to do so (or would maintain a common residence but for an assignment abroad or other employment-related, financial, or similar obstacle);
- (3) Are at least 18 years of age and mentally competent to consent to a contract;
- (4) Share responsibility for a significant measure of each other’s financial obligations;
- (5) Are not married or joined in a civil union to anyone else;
- (6) Are not the domestic partner of anyone else;
- (7) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the U.S. jurisdiction in which the domestic partnership was formed;
- (8) Are willing to certify, if required by the agency, that they understand that willful falsification of any documentation required to establish that an individual is in a domestic partnership may lead to disciplinary action and the recovery of the cost of benefits received related to such falsification, as well as constitute a criminal violation under 18 U.S.C. 1001, and that the method for securing such certification, if required, will be determined by the agency; and
- (9) Are willing promptly to disclose, if required by the agency, any dissolution or material change in the status of the domestic partnership.



relationship” within OPM regulations do not contain the same requirements.³ Under the proposed definition of “domestic partnership,” two persons of the same sex must, among other requirements, “maintain a common residence” and be willing to certify “that they understand that willing falsification of any documentation . . . may lead to disciplinary action.” These requirements go far beyond the requirements for maintaining a domestic partnership under other OPM definitions.

The proposed definitions require “domestic partners” to “[s]hare responsibility for a significant measure of each other’s financial obligations.”⁴ We encourage OPM to understand and interpret interdependence broadly. The explanation of the recommendations clarifies that this requirement “is intended to require only that there be financial interdependence between partners; it should not be interpreted to exclude partnership in which one partner stays at home while the other is the primary breadwinner.” We worry that, as recommended, this requirement would serve to deny some otherwise qualified low-income families from accessing the child care subsidy. We recommend that OPM not place a higher burden of proof on lower-income families than on other families accessing benefits.

We recommend that OPM use the definitions for “domestic partner” and “committed relationship” found in the regulations implementing annual, sick, and funereal leave. These definitions, in addition to maintaining consistency throughout OPM, would create greater efficiency by allowing, but not requiring employees to provide proof of a domestic partnership granted legal recognition by any state.

Recommended Definition

Committed relationship means one in which the employee, and the domestic partner of the employee, are each other’s sole domestic partner (and are not married to or domestic partners with anyone else); and share responsibility for a significant measure of each other’s common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including but not limited to, a civil union).

Domestic partner means an adult in a committed relationship with another adult.⁵

³ See 5 C.F.R. § 630.201 (Annual and Sick Leave) and 5 C.F.R. § 630.803 (Funereal Leave).

Committed relationship means one in which the employee, and the domestic partner of the employee, are each other’s sole domestic partner (and are not married to or domestic partners with anyone else); and share responsibility for a significant measure of each other’s common welfare and financial obligations. This includes, but is not limited to, any relationship between two individuals of the same or opposite sex that is granted legal recognition by a State or by the District of Columbia as a marriage or analogous relationship (including, but not limited to, a civil union).

Domestic partner means an adult in a committed relationship with another adult, including both same-sex and opposite-sex relationships.

⁴ *Id.*

⁵ The definitions found at 5 C.F.R. §§ 630.201 and 630.803 permit opposite-sex couples to enter a domestic partnership for purposes of annual and sick leave or funereal leave. The explanation accompanying the proposed definitions makes it clear that OPM does not want to provide child-care subsidies for opposite-sex domestic partners. Although we encourage OPM to cover all qualified families, including unmarried opposite sex couples



In conclusion, we thank OPM for its continued commitment to ensure equal access to benefits for all families and for this opportunity to offer our comments and recommendations to the proposed regulations.

Please feel free to contact Emily Hecht-McGowan, Director of Public Policy for Family Equality Council, with any questions either by telephone (202.496.1285) or email at ehocht@familyequality.org.

Thank you,

Family Equality Council
American Association of University Women (AAUW)
American Civil Liberties Union
Center for American Progress Action Fund
Gay, Lesbian & Straight Education Network
Lambda Legal
National Black Justice Coalition
National Center for Lesbian Rights
National Center for Transgender Equality
National Coalition for LGBT Health
National Council of Jewish Women
National Gay and Lesbian Chamber of Commerce
National Gay and Lesbian Task Force
National Latina Institute for Reproductive Health
People For the American Way
The Trevor Project

with children, we have amended the definition found at 5 C.F.R. §§ 630.201 and 630.803 to exclude any mention of opposite-sex couples. The full definition can be found *supra* note 3.