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DOL Releases New Regulations Expanding Leave Entitlement for Military Caregivers and Flight Crew Members

By Casey Kurtz and Mark Phillis

On February 6, 2013, the U.S. Department of Labor (DOL) published new regulations that implement the federal Family and Medical Leave Act (FMLA) amendments made by the National Defense Authorization Act for FY 2010 (FY 2010 NDAA) and the Airline Flight Crew Technical Corrections Act. Both laws were enacted in 2009 and entitle more employees to family and medical leave under the FMLA. The regulations become effective on March 8, 2013.

Military Service Member Exigency Leave

The FY 2010 NDAA expanded the military leave provisions that had been added to the FMLA by the National Defense Authorization Act for FY 2008.[1] The FY 2010 NDAA permits the family of regular Armed Forces members, as well as the family of Reserve and National Guard members, to take up to 12 weeks of job-protected leave in a 12-month period for a "qualifying exigency" arising out of the active duty or call to active duty status of a spouse, son, daughter, or parent. A broad range of events and activities are considered qualifying exigencies, including short-notice deployment, childcare and school activities, financial and legal arrangements, rest and recuperation, post-deployment activities, counseling, and military events and related activities.

The new regulations add language to ensure that for purposes of exigency leave related to childcare and school activities the military member must be the spouse, parent, or child of the employee seeking leave, but the child for whom the leave is sought need not be the child of the employee requesting leave. For example, an employee that is the mother of a military member is eligible for leave to deal with the childcare of the military member's child (his or her grandchild). The new regulations also expressly provide for exigency leave for parental care for a military member's parent or a person that stood *in loco parentis* when the parent is incapable of self-care and the need for leave arises out of the military member's active duty or call to active duty. For example, exigency leave may be available to arrange for alternative care for the parent that is required due to the call to active duty.

Prior to the FY 2010 NDAA, exigency leave was limited to the families of Reserve and National Guard members only. The FY 2010 NDAA extended such leave to eligible employees with family

1 *See* Mark Phillis, *Congress Adds Additional Family Military Leave Entitlements to the FMLA*, Littler ASAP (Oct. 30, 2009).

members serving in the regular Armed Forces, but it added the requirement that the military member must be deployed to a foreign country. The new regulations incorporate these changes, and further clarify that deployment in international waters is considered deployment to a foreign country.

The new regulations also expand from five to 15 calendar days the amount of FMLA leave an eligible employee is able to take to spend with a covered family member during rest and recuperation periods, with the length of the leave tied to the length of the military member's rest and recuperation leave.

Military Caregiver Leave

The FY 2010 NDAA extended FMLA military caregiver leave to include leave to care for certain veterans, in addition to active members of the Armed Forces. It also expanded such leave to cover serious injuries or illnesses that are aggravated — rather than just initially incurred — during the service member's active duty. Military caregivers may take up to 26 workweeks of leave in a 12-month period to care for a covered service member or veteran with a serious service-related injury or illness. This leave may be taken up to five years after the service member leaves the military with other than a dishonorable discharge.

The FY 2010 NDAA required the DOL to define what constitutes a "serious injury or illness of a veteran." Consequently, the extension of military caregiver leave to the family members of veterans will not be in effect until March 8, 2013 – 30 days after the final regulations were published. Because of the delay in implementing these regulations, however, the regulations specifically state that the period between October 28, 2009, the date the FY 2010 NDAA was enacted, and March 8, 2013, the effective date of the regulations, may not be counted when considering the five-year eligibility period for such leave.

The DOL has adopted four alternative definitions of "serious injury or illness" for veterans. The first definition covers veterans whose serious injury or illness was incurred or aggravated in active duty, rendered the servicemember unable to perform the duties of his or her office, grade, rank or rating, and is a continuation or manifestation of such injury or illness after the servicemember was discharged. The second definition covers servicemembers with a physical or mental condition that have received a Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or higher when the rating is at least in part based on the condition that has created the need for leave. The DOL believes that this rating closely approximates a condition that substantially impairs a veteran's ability to work without requiring that the veteran be totally disabled under the U.S. Department of Veterans Affairs' (VA) regulations.

Since the DOL recognizes that not all veterans will satisfy these two criteria and many obtain medical care outside of the VA system, its third definition includes a physical or mental condition that either: (1) substantially impairs the veteran's ability to secure or follow a gainful occupation due to the service-related disability; or (2) would do so absent treatment. Finally, an injury, including a psychological injury, that led to a veteran being enrolled in the VA's Program of Comprehensive Assistance for Family Caregivers will be considered to be a "serious injury or illness."

The regulations permit employers to seek second and third opinions at the employer's expense if a certification in support of military caregiver leave is provided by a healthcare provider that is not affiliated with the Department of Defense, the VA, or TRICARE.

Military caregiver leave may be taken in a single 12-month period that begins on the first day the employee takes leave and ends 12 months later. In the regulations, the DOL explains that as long as the leave begins at any point within the five-year period, it can extend beyond the five-year period. The regulations also make it clear that a military caregiver may take leave for a servicemember when she or he is on active duty, as well as for the same servicemember when she or he subsequently becomes a veteran.

Airline Flight Crew FMLA Entitlement

The Airline Flight Crew Technical Corrections Act (AFCTCA) allows more airline employees to avail themselves of leave under the FMLA.[2] The Act's intent was to close a perceived loophole in the FMLA's hours of service requirements for pilots and flight attendants whose unconventional work schedules often failed to qualify them for FMLA leave. To be entitled to FMLA leave, employees must have worked for their employer

2 *See* Ilyse Schuman and Peter Petesch, *President Signs Bill Easing FMLA Eligibility Requirements for Airline Flight Crew*, Littler ASAP (Dec. 22, 2009).

for at least 12 months and for at least 1,250 hours during the previous 12-month period, which equates to at least 60 percent of a standard 40-hour work week. Under the Fair Labor Standards Act, which is used to determine the number of hours worked for FMLA purposes, some courts concluded that the time pilots and flight attendants spent on the job between flights and on mandatory standby duty did not count as "hours worked."

The AFCTCA provided that the hours pilots or flight attendants work or for which they are paid — not just those spent in actual flight — count toward the minimum hours calculation. Under the revised eligibility rules, flight crew employees meet the hours of service requirement if they have worked or been paid for not less than 60 percent of the applicable total monthly guarantee and have worked or been paid for not less than 504 hours during the 12 months prior to the start of their leave.

The regulations establish a special rule for flight crews' use of intermittent or reduced-schedule leave, stating that employers may account for such leave in increments as large as, but no greater than, one day. Because of their unique and widely varying scheduling patterns, flight crews are entitled to 72 days of leave in any 12-month period for FMLA-qualifying leave other than military caregiver leave, and 156 days of leave during any single 12-month period for military caregiver leave. The regulations also impose special recordkeeping obligations on employers of flight crew employees.

Additional Changes to the FMLA Regulations

Although the DOL had proposed making several other changes to the FMLA regulations, with a particular focus on provisions regarding the use of intermittent leave, it made only some language changes that it contends will clarify certain provisions. It had proposed eliminating a provision that was added to the regulations in 2009 that allows employers to require employees to take FMLA leave in different increments at different times of the day under certain circumstances. While retaining that provision, the DOL added language reinforcing its position that such a rule must apply to all other leaves taken during the same time of day. Other language additions serve to remind employers that they may only calculate FMLA leave using the shortest increment of time they use to measure other leaves (provided that it is not more than one hour), and reinforce the point that employers may not require employees to use more FMLA leave than is necessary to address their condition.

The DOL had sought to narrow or eliminate another provision added by the 2009 regulations that permits an employer to delay reinstatement where it is physically impossible for the employee to return to his or her job in mid-shift (for example, if the employee works in a locked clean room). Instead, it added language emphasizing that this exception is limited to the period of time when an employer is physically unable to permit the employee to return to work.

The Department, however, did remove the optional-use forms and notices from the regulations' Appendices. The forms will continue to be available on the Wage and Hour Division's website, where the DOL believes they can be updated more readily. The DOL released a new, optional certification form for military caregiver leave for veterans, and updated the other military caregiver certification form, the qualifying exigency certification form, the FMLA Notice to Employees of Rights and Responsibilities (commonly known as the DOL's "FMLA Poster"), and the Notice of Eligibility and Rights & Responsibilities form to address relevant statutory and regulatory changes to the Act since the documents were last updated or created. It did not alter the other forms at this time. Notably, the DOL did not add to the serious health condition or family care certification forms the "safe harbor" language that employers should use in connection with medical inquiries to avoid liability under the Genetic Information Nondiscrimination Act (GINA). The DOL notes that any future substantive changes to the forms will effectively remain subject to normal notice and comment rulemaking since the authority for the content of the forms is set forth in the FMLA statute and its regulations. The agency further states that *non-substantive* changes to the forms also would be subject to public comment, but it would be through the process established by the Paperwork Reduction Act of 1995.

The DOL has provided fact sheets, a set of frequently asked questions, and additional guidance on these changes on its webpage.

What Employers Should Do Now

Employers should take this opportunity to:

- Review their FMLA policies to ensure that the military exigency leave and military caregiver leave provisions are incorporated and accurately reflect the current state of the law.

- Educate their HR team and managers on the military caregiver provisions of the FMLA, particularly the extension of military caregiver leave for certain veterans that will be available as of March 8, 2013.
- If they use the DOL's FMLA Poster to satisfy their workplace posting obligation, replace it with the new version available on the DOL's website (or update any customized workplace posting to account for relevant changes to the Act). Employers who attach the FMLA Poster to their handbook FMLA policies also should update to the new version.
- Continue to ensure that their FMLA-related medical inquiries — including requests for certifications using the DOL's optional forms — are accompanied by appropriate GINA "safe harbor" language, customized as needed to the particular inquiry.
- Ensure that if they have employees covered by AFCTCA, their FMLA policies and practices have been updated to incorporate the new provisions.

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