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CLIENT ALERT

Department of Labor Proposes FMLA Rule on Leave for Caregivers to Servicemembers and Airline Flight Crew Employees

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The U.S. Department of Labor ("DoL") recently issued a Notice of Proposed Rulemaking ("Notice") that, among other things, would implement legislation that extended military caregiver leave under the Family and Medical Leave Act ("FMLA" or "the Act"). The proposed rule change also provides guidance as to a 2009 amendment to the FMLA that addressed FMLA coverage for airline flight crew employees. Additionally, the proposed rule change addresses calculation of FMLA leave time under certain circumstances, defines key terms and phrases that were previously undefined, and provides substantial guidance to employers in the implementation of their leave policies. Once the Notice is published in the Federal Register, interested parties will have sixty days in which to submit comments.

Congress has enacted several amendments to the FMLA since 2008, expanding the Act to allow a spouse, son, daughter, parent, or next of kin of a "covered servicemember" to take up to 26 workweeks of military caregiver leave in a 12-month period to care for a servicemember receiving treatment for a "serious injury or illness." The military caregiver leave provisions of the proposed regulations provide that the covered servicemembers now include recent Veterans, such as those released under conditions other than dishonorable discharge from the Regular Armed Forces, National Guard, or Reserves within the previous five years. Caregiver leave may also, under the proposed regulations, be taken in connection with covered servicemembers' pre-existing injuries aggravated in the line of duty. Additionally, the rule change would provide that exigency leave, which was previously only available to family members of those serving in the National Guard and Reserves, will now be extended to include family members of those serving in the Regular Armed Forces.

The proposed regulations also address the complex scheduling demands of airline flight crew employees by implementing 2009 legislation modifying their FMLA hours of service eligibility requirements. Under the precise formula enacted by Congress, coverage for FMLA leave was extended to airline flight crew employees who, in the prior 12-month period, have "worked or been paid for not less than 60 percent of the applicable monthly guarantee (or its equivalent) and [have] worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation leave or sick or medical leave)." The airline crew employee legislation failed to provide an effective date for this "hours of service eligibility requirement," and the proposed rule would make this change effective immediately upon enactment of the final rule.

Regulations governing the calculation of leave time for intermittent or reduced schedule leave would, under the proposed rule, be revised as well. First, the new rules would require "that where an employer uses different increments to account for different types of leave (e.g., sick leave in one-half hour increments and annual leave in increments of one hour), the employer must use the smallest of the increments to account for FMLA leave usage." Second, the new rules would clarify that employers who waive their "increment of leave policy" in order to return an employee to work may count "only the amount of leave actually taken by the employee" against the FMLA entitlement. Explaining this clarification, the DoL said it was necessary to ensure that FMLA leave is not being counted against an employee's FMLA entitlement "for time that is worked for the employer."

In short, the proposed rule provides further guidance to employers on several esoteric issues of FMLA coverage. Employers should assess their family and medical leave policies and procedures in order to ensure that they comply with the most recent FMLA amendments and existing U.S. Department of Labor regulations. Employers should also assess the extent to which the proposed regulations would require modification of their leave policies and practices. As always, Crowell & Moring's labor and employment attorneys are available to assist employers in developing, modifying and/or evaluating existing family and medical leave policies to reflect these new developments.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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