

CLIENT ALERT

U.S. Department of Labor Publishes New FMLA Regulations that Significantly Expand Military Leave Provisions and Modify Eligibility Rules for Airline Flight Crews

Feb.20.2013

Marking the twentieth anniversary of the enactment of the Family and Medical Leave Act (FMLA), the United States Department of Labor (DOL) recently issued a Final Rule that significantly expands the FMLA's military caregiver leave provisions. The Rule also contains provisions related to "qualifying exigency leave" for eligible employees whose family members are currently serving in the Armed Forces or are recent veterans. For example, the Final Rule creates a new category of qualifying exigency military leave that enables eligible employees to take leave to provide care to a military member's parent, and expands the scope of military caregiver leave to include care for veterans. The Final Rule, which takes effect on March 8, 2013, also establishes eligibility rules for airline personnel and flight crews with regard to hours-of-service requirements for FMLA leave.

Through amendments to the FMLA that were made by the National Defense Authorization Act for Fiscal Year 2010 (NDAA), the Final Rule makes a number of important changes to key provisions related to military family leave:

Qualifying Exigency Leave

- Extends to eligible employees the right to take qualifying exigency leave in connection with the deployment of a family member who is a member of the Regular Armed Forces. Qualifying exigency leave includes leave for any of the following reasons: (1) short notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) additional activities. Under the existing FMLA regulations, qualifying exigency leave is only available to members of the National Guard and Reserves. The Final Rule also adds the requirement that members of the Regular Armed Forces, National Guard and Reserves be deployed to a foreign country in order for their covered family members to take qualifying exigency leave. The DOL has issued a new form for Certification of Qualifying Exigency for Military Family Leave, [WH-384 Certification of Qualifying Exigency For Military Family Leave \(PDF\)](#), as well as a revised FMLA Notice of Eligibility and Rights & Responsibilities. [WH-381 Notice of Eligibility and Rights & Responsibilities \(PDF\)](#)
- Creates a new qualifying exigency leave category for parental care. Eligible employees will now be able to take leave to provide care to a military member's parent, who is incapable of self-care, when such care is made necessary by the military member's covered active duty. Such care may include arranging for alternative care, providing care on an immediate need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.
- Increases the amount of time an eligible employee may take for qualifying exigency leave to spend time with a military member on Rest and Recuperation from five to 15 days.

- Clarifies that in order to qualify for exigency leave to make arrangements for or provide childcare, or to attend school activities for a child of a military member, the military member must be the spouse, son, daughter or parent of the employee requesting such leave.

Military Caregiver Leave

- Expands military caregiver leave to include eligible employees who are family members of "covered veterans." Pursuant to the Final Rule, covered veterans are individuals who are undergoing medical treatment, recuperation, or therapy for a serious illness or injury. Covered veterans are further defined as members of the Armed Services, National Guard or Reserves who were discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee took FMLA leave to care for the covered veteran. Eligible employees are entitled to take up to 26 workweeks of leave to provide military caregiver leave. Under existing regulations, only eligible employees who are family members of current service members are entitled to take military caregiver leave.
- Expands the definition of serious injury or illness in connection with military caregiver leave to include pre-existing injuries or illnesses that were aggravated by a current service member's service in the line of duty on active duty. A serious injury or illness under the current regulations includes only those that were incurred in the line of duty on active duty.
- Expands the definition of serious injury or illness in connection with military caregiver leave to include injuries or illnesses that were incurred or aggravated by a covered veteran's service in the line of duty on active duty. In order to qualify for military caregiver leave for a covered veteran, the serious injury or illness must also satisfy one of the following criteria: (1) the service member is rendered medically unfit to perform the duties of his or her office, grade, rank or rating as a result of the serious injury or illness; (2) the injury or illness is a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater; (3) the injury or illness is a physical or mental condition that substantially impairs the veteran's ability to be gainfully employed by reason of disability or disabilities related to military service; or (4) the injury, including a psychological injury, provides a basis for the covered veteran to be enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Certifications for Military Caregiver Leave

- Expands the list of healthcare providers who are authorized to certify that an illness or injury satisfies the requirements of the military caregiver leave provisions to include health care providers authorized to certify other FMLA-qualifying leaves. Pursuant to the existing regulations, only certain healthcare providers, such as U.S. Department of Defense (DOD) or U.S Department of Veterans Affairs (VA) healthcare providers, are permitted to complete military caregiver leave certifications. Under the Final Rule, health care providers who are not affiliated with the DOD or VA will be permitted to provide such certifications. When certifications are provided by health care providers who are not identified in the regulations, however, employers may require second and third opinions on certifications for military caregiver leave. The DOL has issued revised certification forms that reflect the amendments to the certification provisions. [WH-385 Certification for Serious Injury or Illness of Current Servicemember -- for Military Family Leave \(PDF\)](#); [WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave \(PDF\)](#)

In addition to amending the FMLA's military leave provisions, the Final Rule also amends the regulations to implement the Airline Flight Crew Technical Corrections Act (AFCTCA). The amendments modify the hours of service requirements for airline flight crew members to qualify for FMLA leave. Pursuant to the amendments, airline flight crew employees will now be eligible for FMLA leave if, during the previous 12-month period, they have worked or been paid for not less than 60 percent of the applicable total monthly guarantee or its equivalent, and worked or been paid for not less than 504 hours. For airline flight crew employees, the applicable monthly guarantee is the minimum number of hours for which an employer has agreed to schedule an employee for a given month. The Final Rule also establishes a uniform entitlement of 72 days of FMLA leave, which is based on a maximum 6-day week for all airline flight crew employees.

In light of the substantial changes expanding employees' rights and clarifying employers' obligations under the FMLA, employers should carefully review their FMLA policies and practices to ensure that they are in compliance with the Final Rule.

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