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December 2009

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President Signs Bill Easing FMLA Eligibility Requirements for Airline Flight Crew

By Ilyse W. Schuman and Peter J. Petesch

President Obama has signed into law the Airline Flight Crew Technical Corrections Act, a bill designed to close what was seen as a gap in coverage of airline pilots and flight attendants under the Family and Medical Leave Act (FMLA). The Act amends the FMLA to make it easier for flight crews to qualify for leave by changing the way in which hours of service requirements are met to account for the airline industry's unique timekeeping methods.

Background

The Airline Flight Crew Technical Corrections Act of 2009,[1] which became effective upon enactment, was the culmination of an effort to fix what the bill's lead Senate sponsor, Senator Patty Murray (D-Wash), described as "a technical problem that left many full-time flight crew members ineligible for family medical leave for many years due to the unique way their hours are calculated."[2] The Family and Medical Leave Act of 1993 (FMLA)[3] was enacted to provide eligible employees with up to 12 weeks of unpaid leave during any 12-month period for any of the following reasons: (1) the birth and care of a newborn child of the employee; (2) the placement with the employee of a child for adoption or foster care; (3) to care for an immediate family member with a serious health condition; or (4) because of a serious health condition that makes the employee unable to work.[4] An employee must have worked at least 12 months for the employer to be eligible for leave. Additionally, the employee must have worked for the employer at least 1,250 hours during the 12 months preceding the leave, which equates to 60 percent of a standard 40 hour work week.[5] It is the second eligibility requirement with respect to minimum hours of work that created obstacles to the ability of airline pilots and flight attendants to qualify for FMLA leave.

Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established in the Fair Labor Standards Act (FLSA) for determining compensable hours of work.[6] Applying FLSA principles to this determination,

some courts had taken a restrictive view of the calculation of minimum hours worked for the purposes of FMLA eligibility for airline flight crews. Under this standard, time spent between flights on layovers, whether during the day or overnight, or on mandatory standby based on airline scheduling requirements by airline flight crews, who are covered by the Railway Labor Act rather than the FLSA, did not count toward the FMLA hours of work requirement.[7] Flight attendants on reserve status are customarily paid for a guaranteed minimum hours of flight time. Prior to the amendments to the FMLA made by the Airline Flight Crew Technical Corrections Act, only those hours that a pilot or flight attendant spent in-flight, not on the job between flights or on "reserve" qualified for the FMLA hours of service requirement. In other words, pilots and flight attendants had to spend at least 1,250 hours a year in-flight to qualify for FMLA leave.

This threshold effectively precluded FMLA coverage for many flight crew. In fact, Federal Aviation Act regulations prohibit pilots from flying more than 1,000 hours a year. Rep. George Miller (D-CA), Chairman of the House Education and Labor Committee, stated that "more than 200,000 flight attendants and pilots in this country do not meet the minimum threshold of 1,250 hours needed to qualify for unpaid leave under the FMLA."[8] Chairman Miller went on to say that Congress never intended to exclude airline attendants and pilots from the law's protections.[9] Over the span of two Congressional sessions, proponents of the Airline Workers Technical Corrections Act worked to restore what they characterized as the original legislative intent of the FMLA to provide coverage for fight crews.

Changes to FMLA Requirements for Airline Flight Crews

Earlier versions of the legislation were introduced during the 110th Congress by then Senator Hillary Clinton, S. 2959, and by Rep. Timothy Bishop (D-NY), H.R. 2744. While the House passed the bill on May 20, 2008, the Senate failed to act on it before Congress adjourned last year. The bill was reintroduced this year in the House by Rep. Bishop, H.R. 912, and passed on February 9, 2009. Senator Murray introduced a modified version of the bill, S. 1422, which the Senate passed on November 10, 2009 and the House approved on December 2, 2009.

The legislation clarifies that the hours pilots or flight attendants work or for which they are paid, not just those spent in-flight, count towards the FMLA minimum hours calculations. Specifically, the new law amends Section 101(2) of the FMLA[10] to provide that an airline flight crew member is eligible to take FMLA leave if: (1) he or she has worked or been paid for 60 percent of the applicable monthly guarantee; or the equivalent amount annualized over the preceding 12-month period; and (2) he or she has worked or been paid at least 504 hours during the previous 12-month period.

The applicable monthly guarantee for employees other than those on reserve status is defined as the minimum number of hours for which the employer has agreed to schedule the employee for any given month under the applicable collective bargaining agreement or employer's policies. For an employee who is on reserve status, the applicable monthly guarantee means the minimum number of hours for which the employer has agreed to pay the employee for the month under the collective bargaining agreement or employer's policies.

The final version of the legislation differs from the previous House-passed bill by specifying that the minimum 504-hour requirement does not include personal commute time or time spent on vacation leave or medical or sick leave, in parity with other industries under the FMLA. The new law also requires airlines to maintain on file with the Secretary of Labor information specifying the applicable monthly guarantee for each category of employee to which the guarantee applies. The Secretary of Labor is authorized to promulgate regulations implementing the new law, which becomes effective upon enactment.

Prior to passing the bill in the Senate, Senator Murray and Senator Mike Enzi (R-WY) engaged in a colloquy clarifying that the scope of the bill is narrowly tailored to address only the unique situation of pilots and flight attendants in the calculations of hours they need to be eligible for FMLA leave. Senator Enzi asked Senator Murray to confirm that the bill should not be construed to apply to other occupational groups that operate under reserve systems, such as health care, railway, and emergency services, to seek similar treatment. In response, Senator Murray agreed that:

> This bill narrowly deals with flight crews only. The bill is a technical correction for language that was intended to be in the original Family Medical Leave Act, but for some reason or another was left out. Flight crews were specifically mentioned in the FMLA's legislative history. Thus, I believe that the correction is clearly appropriate for flight crews. If other groups were to attempt an adjustment in their FMLA eligibility requirements, I suggest that their situation and the ramifications of such an adjustment would need to be examined on a case by case basis.[11]

This exchange, prior to the approval of the bill by voice vote, was intended to limit a broader application of the amendments to the FMLA beyond airline flight crews or as precedent for applying an alternative eligibility standard for other groups of workers.

Practical Implications for Employers

Airline employers should take the following steps to comply with the Airline Flight Crew Technical Corrections Act. Carriers should amend their FMLA policies and procedures for pilots and flight attendants to comply with the new requirements for calculating hours of service requirements. Even though many carriers, by contract or policy, have already adopted their practices to allow for family and medical leave for flight crews, they should still review and modify their policies as necessary to comply with the new law and regulations that will be forthcoming. They should also comply with the requirement to maintain on file with the Department of Labor information about the applicable monthly guarantee for each category of airline flight crew to which the guarantee applies. Further direction will be provided when the Department of Labor issues regulations implementing the new law.

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[1] The Airline Flight Crew Technical Corrections Act, Pub. Law 111-XXX, December 21, 2009.

[2] Cong. Rec. 115 S11353 (daily ed. Nov. 10, 2009).

[3] The Family and Medical Leave Act of 1993, Pub. L. 103-3, 29 U.S.C. § 2601 ("FMLA").

[4] 29 U.S.C. § 2612(a)(1).

[5] 29 U.S.C. § 2611(2).

[6] 29 C.F.R. § 825.110(c)(1).

[7] *See Knapp v. America West Airlines*, 207 Fed. Appx. 896 (10th Cir. 2006) (excluding an airline pilot's reserve duty time from the calculation of hours worked under the FMLA); *see also Rich v. Delta Airlines*, 921 F. Supp. 767 (N.D. Ga. 1996), (holding that a flight attendant's layover time is not included in the determination of hours worked for purposes of the FMLA).

[8] Opening Statement of Chairman George Miller at the House Education and Labor Committee Markup of H.R. 2744, the Airline Flight Crew Technical Corrections Act, May 14, 2008.

[9] *Id*. During the consideration of the FMLA in the House of Representatives, former Representative William Clay stated that: "We certainly do not intend that dedicated workers in unique circumstances should be excluded from the bill's protection simply because of their industry's unusual timekeeping methods." Rep. Clay continued with a specific reference to airline crews, asserting that "Flight attendants and pilots who work the number of hours constituting half time employment [later increased to 60 percent] during previous 12 months, as defined by their collective bargaining agreement or by industry standard, are fully entitled to family and medical leave under this bill." Cong. Rec. H2205 (May 10, 1990).

[10] 29 U.S.C. 2611(2).

[11] Cong. Rec. 115 S11353 (daily ed. Nov. 10, 2009).