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DOL Releases Proposed Rule Expanding Leave Entitlement for Military Caregivers and Flight Crew Members

By Ilyse Schuman and Mark Phillis

On January 30, 2012, the Department of Labor (DOL) released a proposed rule that implements the 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 enacted in 2009 entitle more employees to family and medical leave under the federal FMLA.

Military Service Member Exigency Leave

The FY 2010 NDAA expanded the military leave provisions that had been added to the FMLA by the FY 2008 NDAA. 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. Notably, the proposed regulations seek to add language to ensure that, for purposes of exigent 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. The DOL gives the following example: An employee who is the mother of a military member is eligible for leave to deal with the childcare of the military member's child (her grandchild).

Prior to the FY 2010 NDAA, exigency leave was limited to the families of Reserve and National Guard members only. The 2010 NDAA extended qualifying exigency leave to eligible employees with family members serving in the Regular Armed Forces as well, but it added the requirement that the military member must be deployed to a foreign country in order for eligible family members to take leave for a qualifying exigency. The proposed rule would update the regulations to incorporate these changes. For example, the proposed rule would consider deployment in international waters to be deployment to a foreign country. The proposed rule also seeks to expand from five to 15 days the amount of FMLA leave an eligible employee would be able to take to spend with the 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.

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Military Service Member Caregiver Leave

The FY 2010 NDAA also extended the military caregiver leave to include leave to care for certain veterans as well as active members of the armed forces. Military caregivers may take up to six months (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, including when a caregiver is needed because of serious injuries or illnesses that result from a condition that predates the service member's active duty, but was exacerbated by the military service.

Unlike the other changes made by the FY 2010 NDAA, which took effect immediately, this change is not yet effective. Because the FY 2010 NDAA required the DOL to define what constitutes a "serious injury or illness of a veteran," the DOL's position is that the extension of the military caregiver leave to the family members of veterans will not take effect until final regulations are in place. In the preamble to the proposed rule, the DOL notes that while employers may provide leave to employees to care for an injured or ill veteran, such leave would not be FMLA-protected military caregiver leave and would not count against the employees' FMLA entitlement.

The DOL is proposing three, possibly four, alternative definitions of "serious injury or illness" for veterans. The first definition would cover veterans whose serious injury or illness rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating. This is similar to the definition used for active duty servicemembers. The second definition would cover servicemembers who 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 considers this rating to closely approximate a condition that substantially impairs a veteran's ability to work without requiring that the veteran be totally disabled under the VA's 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 would include a physical or mental impairment 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, although it is not in the text of the proposed regulations, in the preamble, the DOL solicits comments on whether a veteran enrolled in the VA's Program of Comprehensive Assistance for Family Caregivers should be considered to have a "serious injury or illness."

Military caregiver leave is not calculated using the calendar-year method. Rather, the caregiver may take this leave in a single 12-month period, which begins on the first day the employee takes leave and ends 12 months later. Under the proposed regulations, as long as the leave begins within the five-year period, it extends for a full 12 months. The proposed regulations also make it clear that a military caregiver could take military caregiver leave for the same servicemember both when the servicemember is on active duty and when the servicemember is 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 as well. 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. In order to be entitled to FMLA leave, employees must have worked for their employer 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 (FLSA), 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 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 will 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 their leave.

The proposed rule implementing these changes details the special hours of service eligibility requirement for airline flight crew employees, and it includes specific provisions for calculating the amount of FMLA leave used by airline flight crew employees. Because the DOL is not statutorily required to issue regulations to effectuate the AFCTCA, and employers can provide leave to airline flight crew employees under the

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current FMLA regulations, the Department takes the position that employees became entitled to take leave under the AFCTCA as of December 21, 2009. Until the DOL issues a final rule specifically addressing calculating FMLA leave usage for flight crew employees, the Department stated that it will exercise its discretion in assessing employer compliance, in light of the individual facts and circumstances, in accord with current rules.

Additional Proposed Changes to the FMLA Regulations

In addition, the DOL is proposing to make several other changes to the FMLA regulations, with a particular focus on provisions regarding the use of intermittent leave. Among the more notable changes it proposes is the elimination of 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. The DOL would revert to requiring employers to calculate FMLA leave using the employer's shortest increment of leave at any time. The DOL also would add provisions that would further explain that employers may not require employees to use more FMLA leave than is necessary to address their condition.

Along similar lines, the proposed rule also seeks 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). According to the DOL, some employers may have misinterpreted the concept of physical impossibility and applied it to circumstances where it is merely inconvenient to reinstate the employee mid-shift.

The Department also proposes to remove the optional-use forms and notices from the regulations' Appendices. The forms, including a form that incorporates language required by the Genetic Information Nondiscrimination Act (GINA), will continue to be available on the Wage and Hour Division website where the DOL believes they can be updated more readily.

DOL Rejects Three Other Proposed Changes

The DOL noted that as part of its compliance with Executive Order 13563, "Improving Regulation and Regulatory Review," it solicited public comments on a framework to review the agency's significant rules. It reports that the DOL received only three comments on the FMLA, and it is rejecting all three. Notably, a commenter requested that the DOL modify the regulation that permits an employer to transfer an employee who is receiving intermittent leave for foreseeable, planned medical treatment to another position. The commenter asked that this ability to transfer employees also apply to situations in which the need for intermittent leave is foreseeable but unscheduled. The DOL rejected this change as being inconsistent with the statute. Another commenter requested a clarification of the definition of "substantial and grievous economic injury" that is used in denying leave to key employees. The other commenter asked the DOL to exclude from FMLA coverage medical conditions that are subjectively determined.

What Employers Should Do Now

The issuance of the proposed regulations highlights for employers the changes made to the FMLA over the past several years. 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.
- Decide whether their FMLA policies should cover caregivers of injured or ill veterans even before the DOL considers them to be entitled to leave under the FMLA.
- Ensure that any leave that caregivers receive for veterans under the military caregiver provisions of an FMLA policy is not counted against employees' FMLA entitlement.
- Educate their HR team and managers on the military caregiver provisions of the FMLA.
- Ensure that if they have employees covered by the AFCTCA, their FMLA policies have been updated to incorporate the new provisions.
- Review the proposed regulations and consider commenting on them.

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More information on the proposed regulations, including a set of FAQs, can be found on the Wage and Hour Division's rulemaking page.[1]

Comments to the proposed rule are due 60 days after it is published in the Federal Register, and must include the Regulatory Information Number (RIN) 1235-AA03. Input may be submitted electronically through the federal eRulemaking Portal: www.regulations.gov or sent by mail to Mary Ziegler, Director of the Division of Regulations, Legislation, and Interpretation, Wage and Hour Division, U.S. Department of Labor, Room S-3510, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

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[1] Available at www.dol.gov/whd/fmla/NPRM/index.htm.

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