

# Employment, Labor and Benefits Advisory: DOL to Issue New Proposed FMLA Regulations by November

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The U.S. Department of Labor (DOL) recently reported that it will issue new proposed regulations under the Family and Medical Leave Act (FMLA) by this November. The proposed regulations will provide guidance on two new provisions of the FMLA relating to military leave rights and leave for airlines' flight crews, which were signed into law last year: the National Defense Authorization Act for Fiscal Year 2010 and the Airline Flight Crew Technical Corrections Act.

The National Defense Authorization Act for Fiscal Year 2010, which became effective in October 2009, expanded military leave rights under the FMLA in several important ways. For example, the law revised the FMLA so that certain family members of all covered active duty military personnel deployed abroad may take qualifying exigency leave, such as leave to prepare for short notice deployment, arrange for child care, attend to financial or legal affairs or attend post-deployment activities. The law also revised the definition of "injury or illness," permitting covered employees to take up to 26 weeks of FMLA leave to care for a servicemember with a pre-existing injury or illness aggravated in the line of military duty. The law also extended the time period to support military caregiver leave of a veteran, and allows a covered family member of a veteran undergoing medical treatment for a serious injury or illness incurred in the line of duty to take military caregiver leave if the veteran was a member of the military within five years of receiving such treatment.<sup>1</sup>

The Airline Flight Crew Technical Corrections Act, signed into law in December 2009, provided greater FMLA protection to pilots, flight attendants and other flight crew workers. Under the FMLA, an employee is eligible for FMLA leave if he or she: (1) has worked for the employer for a total of 12 months; (2) has worked at least 1,250 hours over the 12-month period immediately preceding the leave; and (3) works at a location in the United States where at least 50 employees are employed by the employer within a 75-mile radius. Before the Airline Flight Crew Technical Corrections Act, many flight crew workers did not meet the hours of service requirement for FMLA leave because the method by which "hours worked" are generally calculated in the airline industry greatly reduced a worker's potential for meeting the hours threshold for FMLA coverage (*i.e.*, working at least 1,250 hours over the 12 months immediately preceding the leave). Moreover, the Federal Aviation Act regulations prohibit pilots from flying more than 1,000 hours a year.

The Airline Flight Crew Technical Corrections Act changed the hours of service eligibility requirement for these occupations, and now flight crew workers may be eligible for FMLA leave if they have: (1) worked or been paid for 60% of the monthly minimum number of hours for which their employer scheduled them or the equivalent amount annualized over the preceding

12-month period; and (2) worked or been paid at least 504 hours during the previous 12-month period.

## Action Items for Employers

Employers must do their best to ensure compliance with the FMLA, regardless of the fact that the DOL will not issue proposed regulations until November. More specifically, covered employers must ensure compliance with the amended FMLA statutory provisions when responding to a request for leave related to military service, and covered employers in the air transportation sector must ensure compliance with the amended FMLA statutory provisions when responding to a request for leave by a flight crew member.

In particular, employers should proceed cautiously when using DOL-issued forms for FMLA leave requests, as several are now outdated in light of these recent FMLA amendments. For example:

- DOL Forms [WH-384](#) “Certification for Qualifying Exigency for Military Family Leave” and [WH-385](#) “Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave”. These forms are provided to employees to document and certify the basis for FMLA leave related to military service, but do not reflect the requirements of the National Defense Authorization Act.
- DOL Form [WH 1420](#) “Employee Rights and Responsibilities under the Family and Medical Leave Act”. This poster is required to be displayed in the workplace, but the DOL has not updated this poster since the passage of the National Defense Authorization Act and the Airline Flight Crew Technical Corrections Act.

While the DOL has indicated that employers’ use of these forms is still appropriate, employers should take care to ensure that *any* leave requests relating to military purposes or by airline flight crew employees complies with the current statutory requirements.

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### Endnotes

<sup>1</sup> For more information on the National Defense Authorization Act for Fiscal Year 2010 and its impact on the FMLA, see our client advisory from [November 11, 2009](#).

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