

FMLA UPDATE: Expanded Leave for Military Families and Airline Flight Crews

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On March 8, 2013, the U.S. Department of Labor's ("DOL") [Final Rule](#) will go into effect, implementing regulations expanding Family and Medical Leave Act ("FMLA") protections to military families and airline flight crews, pursuant to the National Defense Authorization Act for Fiscal Year 2010 ("2010 NDAA") and the Airline Flight Crew Technical Corrections Act ("AFCTCA").¹

The DOL's FMLA regulations were previously amended, effective January 2009, to implement changes to the FMLA made by the National Defense Authorization Act for Fiscal Year 2008 ("2008 NDAA"), which provided up to twenty-six weeks of leave for eligible employees who are the spouse, son, daughter, parent, or next of kin of a servicemember (National Guard, Reserves, or Regular Armed Forces) with a serious injury or illness incurred in the line of duty to care for their family member (Military Caregiver Leave). The 2008 NDAA also added a special military family leave entitlement to allow eligible employees whose spouse, child, or parent is called to active duty in the National Guard or Reserves to take up to twelve weeks of FMLA leave for "qualifying exigencies" related to the call-up of their family member (Qualifying Exigency Leave).

This recent expansion of the DOL's regulations provides families of eligible veterans with job-protected FMLA leave, enables more military families to take leave for activities that arise when a service member is deployed, and clarifies the method that should be used to calculate leave time for airline flight crews.

Major Changes in the Final Rule Include:

- **Military Caregiver Leave**
 - The definition of "covered servicemember" was expanded to include covered veterans who were members of the Armed Forces, National Guard or Reserves, and were discharged or released under conditions other than dishonorable, within five years preceding the first date the

¹ It should be noted that, as the DOL stated in its Final Rule, some of the provisions of the 2010 NDAA and the AFCTCA, such as the expansion of qualifying exigency leave to families of members of the Regular Armed Forces and the special eligibility hours of service requirement for flight crew employees, were effective as of the enactment date of those statutes (October 28, 2009 and December 21, 2009, respectively).

employee takes FMLA leave to care for the veteran. Previously, only eligible employees who were the spouse, parent, child, or next-of-kin of a current servicemember with a serious injury or illness were entitled to twenty-six weeks of Military Caregiver Leave.

- The definition of “serious injury or illness” has also been expanded (for both current servicemembers and veterans) to include preexisting conditions that are aggravated in the line of duty.
- The regulations provide a flexible definition of “serious injury or illness” for a veteran, and include four alternatives, only one of which must be met. The veteran must be undergoing medical treatment, recuperation or therapy for an injury or illness that the veteran incurred in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member’s active duty and was aggravated by service in the line of active duty in the Armed Forces) and manifested itself before or after the member became a veteran, and is:
 - (1) A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember’s office, grade, rank, or rating; or
 - (2) A physical or mental condition for which the covered veteran has received a Veterans Affairs Schedule for Rating Disabilities (“VASRD”) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; or
 - (3) A physical or mental condition that substantially impairs the veteran’s ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment; or
 - (4) An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.
- Finally, eligible employees are permitted to obtain certification of a servicemember’s serious injury or illness (both current servicemembers and veterans) from any health care provider as defined in the FMLA regulations, not only those affiliated with the Department of Defense (“DOD”), Department of Veterans Affairs (“VA”), or TRICARE networks (as was permitted under the 2009 regulations).

- **Qualifying Exigency Leave**

- This category of leave is now available to eligible employees with a spouse, child or parent in the National Guard, Reserves and the Regular

Armed Forces, so long as the military member is deployed to a foreign country. Previously, this leave was only available to eligible employees with family members in the National Guard and Reserves.

- In addition, a new qualifying leave category has been added for “parental care leave,” so that an employee can care for a deployed military member’s parent (including the military member’s biological, adoptive, step, or foster father or mother, or any other individual who stood in loco parentis to the military member when the member was under 18 years of age) who is incapable of self-care. 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. As with all instances of qualifying exigency leave, the military member must be the spouse, son, daughter, or parent of the employee requesting qualifying exigency leave. As such, and importantly, in this instance, the employee may use the FMLA to provide care for an in-law, if the in-law is the parent of the military member.
 - Finally, the amount of time an eligible employee may take for rest and recuperation leave has been increased from five days to a maximum of 15 calendar days.
- **Airline Flight Crews – Hours of Service, Calculation of Leave, Recordkeeping**
 - The “hours of service criteria” for airline flight crews was implemented to address the unique scheduling requirements of the airline industry. Previously, the FMLA contained no guidelines for calculating leave for these employees.
 - An employee will meet the FMLA hours of service requirement if during the previous 12-month period the employee has worked or been paid for at least 60% of the applicable monthly guarantee (the minimum number of hours for which an employer has agreed to schedule or pay such employee for any given month) and has worked or been paid for not less than 504 hours (not including commute time, vacation, sick, or medical leave).
 - An eligible airline flight crew employee is entitled to 72 days of leave for one or more of the FMLA-qualifying reasons other than military caregiver leave and 156 days for military caregiver leave. Employers must account for FMLA leave for intermittent or reduced schedule leave for airline flight crew employees in an increment no greater than one day.
 - Employers of airline flight crew employees must maintain certain records, including any records or documents that specify the applicable monthly guarantee for each category of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee; as well as records of hours scheduled.

- **Employee Eligibility and USERRA**

The regulations clarify, consistent with the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), that an employee returning from fulfilling his or her USERRA-covered military service obligation will be credited with the hours of service that would have been performed, but for the period of absence from work due to or necessitated by military service. Accordingly, to determine whether the employee meets the hours of service requirement (i.e., 1,250 hours of service during the 12-month period immediately preceding commencement of a proposed leave), an eligible employee reemployed following a USERRA-covered absence from work will be deemed to have worked the hours that would have been worked, but for the employee’s covered military service.

- **Minimum Increments of Leave**

The regulations also clarify that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave, provided that the leave is counted using the shortest increment of leave used to account for any other type of leave. Furthermore, employees may not be charged FMLA leave for periods during which they are working.

- **Recordkeeping**

The recordkeeping requirements are updated to specify the employer’s obligation to comply with the confidentiality provisions of the Genetic Information Non-Discrimination Act (“GINA”). Specifically, records and documents created for purposes of the FMLA containing family medical history or genetic information as defined in GINA shall be maintained in accordance with the confidentiality requirements of Title II of GINA (e.g., genetic information must be kept confidential and in a separate medical file), which permit such information to be disclosed consistent with the requirements of FMLA.

What Employers Should Do Now

- Modify employee handbook FMLA policies to reflect these new changes.
- An updated DOL [notice poster](#) must be displayed by all covered employers by March 8, 2013. Electronic posting is permitted to satisfy the posting requirement.
- Replace existing notice and certification forms with new forms available on the DOL’s [website](#). The new forms do not contain any substantive changes (expiration dates are now February 28, 2015), however, there is a new form for “Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.”

- Beginning March 8, 2013, employers must comply with the new FMLA rules, including permitting eligible employees to take twenty-six weeks of FMLA leave to care for a veteran (not only a current servicemember) who is the employee's spouse, parent, next of kin, son, or daughter with a serious health condition. Remember that eligible employees may still take a regular 12-week FMLA leave to care for a veteran who is a qualifying family member, even if the veteran was separated from the military more than five years before the outset of the leave.
- Keep all medical documentation, whether related to a request for FMLA leave or otherwise, in a confidential and separate medical file.
- Keep in mind those airline employees who are not flight crew members continue to be covered under the general hours of service eligibility requirements which requires 1,250 hours of service in the previous 12 months.

If you have questions about the DOL's new regulations, please contact:

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