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CLIENT BULLETIN

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HERE'S THE SKINNY ON THE PROPOSED "MILITARY" FMLA REGS

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As we recently reported, the Wage and Hour Division of the U.S. Department of Labor issued a Notice of Proposed Rulemaking to address the most recent "military leave" amendments to the Family and Medical Leave Act and some other amendments applicable to airline flight crews. **The proposed rule** also makes some changes to the "regular" provisions in the last set of regulations, which took effect January 16, 2009, under the administration of President George W. Bush.

Although that last part may scare some employers, **with a few exceptions** it appears that the DOL is not making radical changes to the 2009 rule, apart from those that are required by these new statutes that were enacted in the meantime.

For ease of reading, this bulletin will address the changes in "FAQ" format. The examples are my own. Items that I consider "comment-worthy" are designated as such.

It seems like we just got new FMLA regs. Why are the rules changing yet again?

Write your congressman. If you recall, the FMLA was enacted in 1993, and the original regulations were issued in 1995. We lived with those regs a very long time, but in 2008 Congress enacted the National Defense Authorization Act, which created for the first time a right to FMLA leave for certain "military-related" reasons. In December 2008, the outgoing Bush Administration promulgated the current FMLA rule, which took effect in January 2009, just before President Obama took office. The 2009 rule made some changes to the "regular" FMLA rules and also had extensive provisions addressing for the first time the "qualifying exigency" and "serious injury or illness" leaves under the NDAA amendments.

So far, so good, and many of the changes were welcomed by employers. But then it got complicated. In October 2009, Congress enacted yet another NDAA – the National Defense Authorization Act for Fiscal Year 2010 – which liberalized the 2008 criteria for eligibility for "military" FMLA leave.

Since those FY 2010 NDAA amendments took effect, **some of the DOL's forms have not complied with the law**, and large portions of the Bush Administration regulations have become obsolete. So the latest NPRM is the government's attempt to bring everything back into compliance.

In addition to the military leave, Congress also enacted the Airline Flight Crew Technical Corrections Act in December 2009, which addresses the calculation of eligibility for FMLA leave and the amount of available leave for employees who work on flight crews.

How did the FY 2010 NDAA change "qualifying exigency" leave?

In a nutshell, the new law made it more widely available. Originally, this type of leave was available only to family members of those serving in the National Guard and Reserves. Now it's available to families of those serving in the regular Armed Forces, as well. However, the deployment must be to a foreign country in all cases but no longer has to be in support of a "contingency operation."

How did the FY 2010 NDAA change "serious injury or illness" leave?

Under the prior NDAA, this type of leave was not available for preexisting medical conditions that were aggravated while the servicemember was "in the line of duty on active duty." Now, aggravations are also qualifying reasons for leave.

Previously, the leave was not available when the servicemember was a veteran, but now it is available to families of a veteran who "was a member of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy." The FY 2010 NDAA also authorized the DOL to define "serious injury or illness" with respect to veterans.

Which parts of the 2009 Bush Administration rule have been changed?

Under the NPRM, the "Definitions" section at 825.800 is being moved to 825.102, at the beginning. The sections with significant changes to comply with the FY 2010 NDAA are Section 825.126 (Leave because of a qualifying exigency); Section 825.127 (Leave to care for a covered servicemember with a serious injury or illness); Section 825.309 (Certification for leave taken because of a qualifying exigency); and Section 825.310 (Certification for leave taken to care for a covered servicemember (military caregiver leave)).

The sections with significant changes related to airline flight crews are Section 725.110 (Eligible employee); Section 825.205 (Increments of FMLA leave for intermittent or reduced schedule leave); Section 825.500 (Recordkeeping requirements); and Section 825.800 (now 825.102) (Definitions).

Corresponding changes are proposed to the FMLA poster (WHD publication 1420), the Notice of Eligibility and Rights and Responsibilities (Form WHD-381), the Certification for Qualifying Exigency Leave for Military Family Leave (Form WHD-384) and the Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave (Form WHD-385).

The DOL says that it plans to create a new medical certification form for veterans with serious injuries or illnesses.

Perhaps most significantly, the DOL proposes no longer including FMLA forms in the appendices to its regulations but says it will post them on its website so that they can be revised as needed without notice-and-comment rulemaking.

The DOL is also making a number of non-substantive changes to the 2009 rule and reorganizing some of the subject matter.

What are the proposed rules with respect to veterans with serious injuries or illnesses?

A covered veteran is defined as "an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran."

> **EXAMPLE:** If an employee requested "serious injury or illness" leave for a veteran family member to begin on January 1, 2012, the employer would look back to January 1, 2007. If the family member was discharged (for reasons other than dishonorable) from the military on or after January 1, 2007, then the family member would be a "covered veteran."

A "covered veteran" is a "covered servicemember" "if he or she is undergoing medical treatment, recuperation, or therapy for a serious injury or illness" and he or she "was a member of the Armed Forces (including a member of the National Guard or Reserves) at any time during the period of 5 years preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy."

Assuming the covered veteran had a qualifying medical condition, the employee would be entitled to a maximum of 26 weeks of leave in the 12-month period beginning on January 1, 2012, even if that extends beyond the five-year annivesary of the covered veteran's military discharge.

The DOL proposes a different definition of "serious injury or illness" for veterans, saying that the definition for current servicemembers cannot apply "because a veteran no longer has a military office, grade, rank, or rating against which to measure a condition that does not manifest until after the servicemember becomes a veteran." The proposed rule has three alternative definitions of "serious injury or illness" for veterans:

(1) Any condition that would qualify as a "serious injury or illness" for a current servicemember that continues after the servicemember becomes a veteran;

(2) Any "physical or mental condition for which the covered veteran has received" 50 percent or higher from the Department of Veterans Affairs Service Related Disability Rating ("VASRD") (the DOL believes that a 50 percent rating captures veterans who are "substantially impaired" in their ability to work, attend school, or engage in other daily activities, without being overinclusive); or

(3) Any "physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability, or would do so absent treatment." The DOL expects this determination to be made using standards similar to those that apply to Social Security Disability and workers' compensation claims.

The DOL also says that it is considering adding a fourth alternative: "enrollment in VA's Program of Comprehensive Assistance for Family Caregivers."

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Is the DOL proposing any changes to calculation of the 26-week-per-12-month-period that applies to serious injury or illness leave?

***Comment-worthy*:** Yes. The current rule specifies that the leave is available per-covered-servicemember/per-injury. *The DOL appears to be taking the position that the same individual can be a covered servicemember while in current military service and then a "new" covered servicemember after he or she becomes a veteran.*

Now, didn't you say they were making some changes that weren't required by the NDAA? Which ones?

"Qualifying exigency"

***Comment-worthy*:** The DOL, based on feedback from military personnel, proposes *expanding the "R&R" qualifying exigency leave to 15 days. Currently, it is only five days*. According to the DOL, "the amount of time granted to a military member for Rest and Recuperation leave is generally longer than the five days permitted by the regulations . . . ." They're asking for comments as to whether the 15-day period is *long enough*. The proposed rule says that the employee will be required to provide a copy of his or her R&R orders, or other appropriate documentation, to the employer.

The DOL also proposes specifically adding "attending funeral services" to the list of post-deployment activities covered by qualifying exigency leave.

With respect to qualifying exigency leave relating to childcare and school activities, the DOL proposes adding language to clarify that the employee seeking the leave must be a spouse, parent, son or daughter of the person whose military service creates the need for the leave. However, the employee seeking the leave does not have to have this familial relationship with the child.

> **EXAMPLE:** Mary's son, Bill, is being deployed to Germany. Before his deployment, Bill was the primary afternoon and evening caregiver for his daughter because his ex-wife worked a 3-11 p.m. shift. Now that Bill is being deployed, arrangements need to be made for his daughter to get after-school care. Although Mary is the grandmother of the child, Mary can take FMLA qualifying exigency leave to make arrangements for the child's care because she is the "parent" of Bill.

***Comment-worthy*:** The DOL is inviting comments on whether the employer's ability to verify appointments with third parties has created "any privacy issues" for the employees, whether employees have been denied leave because of verification issues, and what employers' experience has been with verifications.

Finally, the DOL seeks comments on whether other types of qualifying exigencies should be added.

"Serious injury or illness"

With respect to "serious injury or illness" leave, the DOL proposes allowing health care providers other than those affiliated with the Department of Defense, the VA, or TRICARE to certify the need for leave. If an alternative health care provider makes the certification, however, the DOL proposes allowing the employer to seek second or third opinions on the same basis that these apply to non-military FMLA leaves. (If the serious injury or illness is certified by a provider affiliated with the DOD, the VA, or TRICARE, the employer may not seek a second opinion.)

February 22, 2012

The DOL proposes adding a provision stating that the employee may not be penalized for failing to provide necessary certification when the failure or delay is due to "administrative delays" and the employee has made a good-faith attempt to get the certification.

"Old-fashioned FMLA leave"

(Remember that?)

***Comment-worthy*:** The DOL appears to be cracking down on employers who require employees to take more intermittent or reduced schedule FMLA leave than is absolutely necessary. Current Section 825.205(a) says that, where an employee takes intermittent or reduced schedule leave, the employer may charge for FMLA based on its smallest increment of time used for other forms of leave (in no event more than one hour). The DOL now wants to add language stating that the employer "may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave." *This appears to effectively gut the "administrative convenience" rationale for the "minimum increment of leave" provisions.*

> **EXAMPLE:** Sue comes to work 15 minutes late for an FMLA-qualifying reason. Her employer charges time for leaves of absence in increments of one hour, which is allowed under the FMLA. But the DOL's proposed rule appears to require the employer to designate only the first 15 minutes as FMLA leave and the other 45 minutes as non-FMLA.

The only proposed exceptions to the proposed "minimum increment" rule are (1) "physical impossibility" (for example, if a flight attendant misses 15 minutes of work for an FMLA-qualifying reason, but the plane has already taken off and he cannot be assigned to another flight); (2) "when the employee elects to substitute paid leave and must use a larger amount of leave in order to satisfy the employer's paid leave policy" (no mention of how this works when the employer, as is its right, requires substitution of paid leave); (3) and special rules that apply to school employees. And the DOL says that it is considering abandoning the "physical impossibility" defense altogether.

***Comment-worthy*:** *The DOL also proposes adding that the FMLA requires restoration as soon as possible, and appears to be taking the position that this applies within a single work shift in the event of intermittent or reduced schedule leave.*

What about the airline provisions?

That's beyond the scope of this bulletin, but the changes reflect the statutory changes to calculation of eligibility and leave for airline flight crews.

How do I comment?

The DOL seeks comments no later than 60 days after publication in the Federal Register (April 16, 2012). To comment on line, go **here**. In the field that says "In the "Search" field,," enter 1235-AA03, hit "Search," and you'll go to a page that says "Search Results." Scroll down, and you'll find a link to the proposed rule. At the far right on the same row is a link entitled "Submit a comment." Click on that, and you'll be good to go.

"Snail mail" is also accepted and should go 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 Ave., N.W., Washington, D.C. 20210.

The DOL requests that commenters not send multiple copies of the same comment, or one online and one regular-mail version of the same comment.

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