

Labor and Employment Law Update **Lawyers for Employers®**

02/14/2013

DOL Expands FMLA Coverage for Military Family Leave

To mark the 20th anniversary of the signing of the Family and Medical Leave Act (“FMLA”), the U.S. Department of Labor (“DOL”) released the results of a study showing “employers generally find it easy to comply with the law, and misuse of the FMLA by workers is rare.” According to the Department of Labor’s [press release](#), 91 percent of employers report that complying with the FMLA “has either no noticeable effect or a positive effect on business operations such as employee absenteeism, turnover and morale.”

The FMLA covers private sector employers who have 50 or more employees, public agencies, and certain federal employers and entities. Over the last twenty years, most covered employers have become fairly accustomed to granting more traditional forms of FMLA leave. These employers have little difficulty recognizing the need to grant up to twelve weeks of FMLA leave when an employee needs leave due to the birth, foster care or adoption of a child, or because of the serious health condition of an employee or his or her covered family member. Most covered employers also recognize that an employee returning from FMLA leave is generally entitled to be restored to his or her same position and that the FMLA is not the only source of protected leave rights for employees.

On the other hand, some covered employers have yet to master the FMLA rules governing military family leave, which was added to the FMLA in 2008. On February 6, 2013, the DOL published additional regulations implementing changes to the FMLA passed by Congress in 2009 and 2010. These new regulations, which become effective on March 8, 2013, make technical changes to the FMLA’s military family leave provisions and address eligibility requirements for airline flight crew employees. Accordingly, Lane Powell’s Labor and Employment Group provides this refresher on military family leave, along with guidance on the new FMLA regulations.

What is Military Family Leave Under the FMLA?

On January 28, 2008, President Bush signed into law amendments to the FMLA that created two additional categories of job-protected leave for eligible employees with military family members: (1) caregiver leave of up to 26 weeks for those employees who provide care for covered servicemembers with a serious injury or illness; and (2) exigency leave of up to 12

weeks for qualifying exigencies arising out of the fact that a covered military member is on active duty or has been notified of an impending call or order to active duty in support of a contingency operation.

What Are the Changes to the Military Family Leave That Are Reflected in the DOL's Final Regulations?

The final FMLA regulations that become effective on March 8, 2013, will:

- Expand exigency leave to include eligible employees with family members serving in the Regular Armed Forces, and further require that the military family member be deployed to a foreign country;
- Expand exigency leave for rest and recuperation from five days under previous regulations to a maximum of 15 days;
- Recognize that exigency leave may be taken for parental care;
- Expand the definition of serious injury or illness for caregiver leave to include pre-existing injuries or illnesses of current servicemembers that were aggravated in the line of duty;
- Expand caregiver leave to include care for a covered veteran, which is defined as an individual who is undergoing medical treatment, recuperation or therapy for a serious injury or illness, and 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;
- Further define a serious injury or illness of a covered veteran to include, among other things, a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces;
- Expand the list of authorized health care providers from whom an employee may obtain a certification to include those outside the military, and permit employees to request a second and third opinion from health care providers who are not affiliated with the military;
- Recognize the employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 ("GINA"); and
- Update the FMLA optional use forms to reflect the statutory changes and remove the forms from the regulations; forms will now be available on the DOL's website.

What Should Employers Do Now to Prepare for Changes to the FMLA?

- Visit the DOL's website and review the [Frequently Asked Questions](#).
- Modify FMLA policies to reflect the expanded categories of caregiver and exigency leave reflected in the final regulations.
- Download the new FMLA certification forms found on the [DOL's website](#).
- Post the [new FMLA poster](#) that has been updated to reflect the statutory changes.
- Train supervisors and managers to recognize when employees are eligible for FMLA leave, and refer employees to Human Resources so that the company's FMLA policy is consistently applied and the certification process is correctly followed.

- Consult with appropriate legal counsel to resolve any thorny FMLA eligibility and coverage questions to avoid interfering with employees' FMLA rights, and reduce exposure to claims and monetary penalties.

For more information, please contact the Labor and Employment Practice Group at Lane Powell: employlaw@lanepowell.com

1.800.426.5801 ■ Your Pacific Northwest Law Firm® ■ www.lanepowell.com

This is intended to be a source of general information, not an opinion or legal advice on any specific situation, and does not create an attorney-client relationship with our readers. If you would like more information regarding whether we may assist you in any particular matter, please contact one of our lawyers, using care not to provide us any confidential information until we have notified you in writing that there are no conflicts of interest and that we have agreed to represent you on the specific matter that is the subject of your inquiry.

Copyright © 2013 [Lane Powell PC](#)
Seattle | Portland | Anchorage | Olympia | Tacoma | London