

Department of Labor Issues Final Rule Amending FMLA Regulations in Accordance with 2010 Military Leave Amendments

Jessica A. Corbett • 215.665.2108 • jcorbett@cozen.com

Carrie B. Rosen • 215.665.6919 • crosen@cozen.com

On February 6, 2013, the Department of Labor (DOL), Wage and Hour Division, published a Final Rule amending the regulations for the Family and Medical Leave Act of 1993 (FMLA). The 2013 Final Rule sets forth new regulations implementing amendments made to the FMLA by the National Defense Authorization Act for Fiscal Year 2010 (NDAA FY 2010). The NDAA FY 2010 amended the FMLA in four major ways by:

1. expanding qualifying exigency leave to the Regular Armed Forces;
2. requiring that military members be called to active duty in a foreign country in order for an eligible employee to take qualifying exigency leave;
3. expanding military caregiver leave to veterans; and
4. expanding the definition of serious injury or illness for purposes of military caregiver leave to include pre-existing injuries.

The 2013 Final Rule amends the FMLA regulations in compliance with these NDAA FY 2010 amendments, and makes a few new changes, including the addition of qualifying exigency leave for parental care. Because the NDAA FY 2010 has been in effect since late 2009, many employers will find they have already been implementing many of the changes found in the 2013 Final Rule. A summary of the major changes follows.

Parental Care as a New Qualifying Exigency Leave

The most notable change detailed in the 2013 Final Rule, and not included in the NDAA FY 2010, is the creation of qualifying exigency leave for parental care. Eligible employees may now take qualifying exigency leave for parental care of a parent of a military member to:

1. arrange for alternative care;
2. provide care on an urgent, immediate need basis (but not on a routine, regular or everyday basis);
3. admit or transfer the parent to a care facility; or
4. attend meetings with staff at a care facility (but not for routine or regular meetings).

In all cases, the military member's parent must be incapable of self-care, a requirement set forth more specifically in the 2013 Final Rule. Moreover, the need to provide parental care must arise directly out of the military member's active duty status.

New Changes to Qualifying Exigency Leave Regarding Rest and Recuperation and Funeral Leave

The 2013 Final Rule includes two additional changes to qualifying exigency leave that were not included in the NDAA FY 2010. First, the Department of Labor has added an additional example to illustrate when an eligible employee would be permitted to take qualifying exigency leave to address issues arising from the death of a military member – attending funeral services. Second, the 2013 Final Rule extends the amount of qualifying exigency leave that may be taken for rest and recuperation from five to 15 days.

Implementation of NDAA FY 2010 Changes Regarding Service in the Regular Armed Forces and Active Duty in a Foreign Country

The 2013 Final Rule amends the regulations to account for two changes to qualifying exigency leave already made by the NDAA FY 2010. Pursuant to the NDAA FY 2010, qualifying exigency leave now extends to family members of the Regular Armed Forces (as opposed to just the Reserves). However, qualifying exigency leave may only be taken if the military member is called to active duty in a foreign country.

Regulations Regarding Expansion of Military Caregiver Leave to Cover Pre-Existing Injuries and Veterans

As previously mentioned, the NDAA FY 2010 expanded military caregiver leave to cover pre-existing injuries, *i.e.*, an injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces. This expansion to pre-existing injuries is now reflected in the FMLA regulations. In addition, the 2013 Final Rule officially implements the provision of the NDAA FY 2010 expanding military caregiver leave to veterans and defines a serious injury or illness as it applies to veterans.

Changes to the Certification Process

The 2013 Final Rule includes one particularly notable change to the leave certification process. Health care providers unaffiliated with the Department of Defense, Department of Veterans Affairs, or TRICARE may now provide the required certification for an eligible employee to take military caregiver leave.

Other Changes

Aside from the major changes regarding military leave noted herein, the 2013 Final Rule includes a number of other changes or clarifications to the FMLA, many of which are technical in nature, including adding language to clarify the calculation of varying increments of leave and the physical impossibility provision. The 2013 Final Rule also includes changes to the FMLA regulations regarding leave for airline flight crew employees.

New Poster and Forms

The FMLA poster and the certification forms for FMLA leave have all been updated and revised to account for the changes to the FMLA regulations. The new forms (including a new form for military caregiver leave to care for veterans) are available on the [Department of Labor's website](#). The new FMLA poster is available [here](#).

Effective Dates

The 2013 Final Rule becomes effective on March 8, 2013. However, a majority of the provisions of the NDAA FY 2010 have already been in effect since it was signed into law on October 28, 2009. These provisions include the expansion of qualifying exigency leave to family members of the Regular Armed Forces; the foreign deployment requirement; and expansion of military caregiver leave to cover pre-existing injuries. The provision of the NDAA FY 2010 extending military caregiver leave to veterans takes effect on March 8, 2013 (the effective date of the 2013 Final Rule). The provisions expanding qualifying exigency leave to parental care, increasing the timeframe for rest and recuperation leave, and adding qualifying exigency leave to attend funeral services will also take effect on March 8.

Next Steps

In preparation for the effective date of the 2013 Final Rule, all employers should be sure that they are in compliance with the new FMLA regulations by March 8. Employers should review their leave policies to determine if any changes must be made in light of the new regulations. They should also be sure to replace any current FMLA posters and forms with the updated ones the DOL has provided.

If employers have any questions or concerns, they should contact a member of Cozen O'Connor's Labor & Employment Department for more information about these changes.

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