



For your information

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DOL Proposes New FMLA Regulations for Military Families and Airline Crew Members

Statutory amendments to the Family and Medical Leave Act expanded its military family leave provisions and added special eligibility requirements for airline flight crews. On February 15, 2012, the DOL issued proposed regulations to implement the amendments.

Background

Since 1993, the federal Family and Medical Leave Act (FMLA) has provided eligible employees with job-protected leave for their own serious illnesses, for the birth or adoption of a child, or to care for seriously ill family members. The National Defense Authorization Act for Fiscal Year 2008 amended FMLA to create two special types of job-protected leave for military families: military caregiver leave and qualifying exigency leave. (See our January 31, 2008 [For Your Information](#).) Department of Labor (DOL) regulations implemented the new military family leave provisions in January 2009. (See our January 15, 2009 [For Your Information](#).)

Since then, two sets of statutory amendments to FMLA have been enacted. The National Defense Authorization Act for Fiscal Year 2010 (NDAA) extended FMLA leave entitlements for military caregivers to eligible family members of certain veterans and for qualifying exigencies to eligible family members of the Regular Armed Forces. The Airline Flight Crew Technical Corrections Act (AFCTCA) modified FMLA eligibility rules for airline flight crew members, such as airline pilots and flight attendants.

Proposed Regulations

On February 15, 2012, the DOL issued [proposed regulations](#) to implement the NDAA's and AFCTCA's expansion of FMLA coverage for military families and airline flight crews.

Military Caregiver Leave

FMLA regulations now in effect entitle an eligible employee who is the spouse, child, parent, or next of kin of a current servicemember with a serious injury or illness incurred in the line of duty to take up to 26 weeks of job-protected caregiver leave during a single 12-month period. The NDAA expands the

definition of a serious injury or illness to include pre-existing conditions that the servicemember (or veteran) aggravates in the line of active duty.

The NDAA also extends the availability of military caregiver leave to eligible employees whose family members are “recent” veterans with serious injuries or illnesses, including injuries and illnesses arising after the veteran left the military. To qualify as a recent veteran, the individual must have been an active member of the military (including the Regular Armed Forces, National Guard, and Reserves) within the past five years.

The proposed regulations include a flexible, three-part definition of serious injury or illness of a veteran. Under the proposed regulations, most veterans who are enrolled in the Department of Veterans Affairs’ (VA’s) Program of Comprehensive Assistance for Family Caregivers would qualify as having a serious injury or illness for purposes of military caregiver leave. Employees can use documentation from the VA’s program in the FMLA certification process, but employers may request additional medical information needed to complete the certification. The proposed regulations allow health care providers who are not affiliated with the military to provide medical certification for the caregiver leave.

Under the proposed regulations, eligible employees may begin taking military caregiver leave up to five years after their family member’s discharge from the service. As long as the employee timely begins a caregiver leave, he or she can continue the leave for up to 26 weeks in a single 12-month period regardless of whether leave extends beyond five years post-discharge.

INSIGHT

Most NDAA provisions took effect on October 28, 2009 when the NDAA was signed into law, but the extension of caregiver leave to veterans’ family members is not effective until the DOL issues final regulations that define “serious injury or illness.” Until then, an eligible employee can still take up to 12 weeks of FMLA leave under existing regulations if the veteran with a serious health condition is a spouse, parent, or child (under 18 or disabled).

Qualifying Exigency Leave

FMLA regulations entitle eligible employees to take up to 12 weeks of leave in a 12-month period for any “qualifying exigency” connected with the call-up to active duty or deployment of a spouse, child, or parent in support of a “contingency operation.” Currently, the law only covers family members of Reserve and National Guard members. The proposed regulations extend qualifying exigency leave to employees whose family members serve in the Regular Armed Forces, and add a foreign deployment requirement for qualifying exigency leave relating to the deployment of all servicemembers (National Guard, Reserves, and Regular Armed Forces).

The proposed regulations also expand from five to 15 days the amount of FMLA leave an eligible employee may take to spend with the deployed servicemember during rest and recuperation periods.

Airline Flight Crew Leave

Due to their unconventional work schedules, pilots and flight attendants often cannot satisfy FMLA's eligibility threshold of at least 1,250 hours worked in the 12-month period preceding leave. AFCTCA amended FMLA to establish a different eligibility requirement for airline flight crew members that better takes into account their hours worked.

The proposed regulations add a special hours-of-service eligibility requirement for flight crew employees along with specific provisions for calculating the amount of FMLA leave used. In determining hours worked for FMLA eligibility purposes, the new requirement takes into account time spent in flight, between flights, and on mandatory standby.

To satisfy the threshold eligibility requirement, an airline flight crew member must:

- Work or be paid for at least 60% of the applicable total monthly guarantee (or equivalent) and
- Work or be paid for at least 504 hours during the preceding 12 months (excluding personal commute time, vacation, and medical or sick leave).

Airline flight crew members remain subject to FMLA's other eligibility requirements. Other airline employees continue to be covered under general FMLA eligibility rules, which require 1,250 hours of service in the 12 months preceding leave.

Other Changes

The proposed regulations also delete a provision in the current regulations that allows employers, under certain circumstances, to use different increments of FMLA leave at different times of the day. Reverting to pre-2009 regulations, the DOL will require employers to use the employer's shortest increment of leave to calculate FMLA leave usage.

The DOL proposes to clarify the employer's responsibility to reinstate an employee following FMLA leave. The proposed regulations would limit the circumstances in which the employer can delay reinstatement to when it is physically impossible for the employee to leave his or her shift early or to restore the employee when he or she no longer needs FMLA leave.

The DOL also proposes to add a recordkeeping provision to remind employers that they must maintain records and documents relating to medical certification, recertification, or medical history of an employee or employee's family member created for FMLA purposes as confidential medical files. Records and documents that contain family medical history or genetic information must be maintained in accordance with any applicable confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 and the Americans with Disabilities Act. (See our February 1, 2011 [For Your Information](#).) Finally, the DOL proposes to remove the optional-use forms and notices from the FMLA regulations' Appendices but continue to make them available on its Wage and Hour Division [website](#).

Conclusion

If adopted, the proposed regulations would significantly expand FMLA protections for military families, veterans, and airline crew members. As a result of added leave entitlements, employers will face increased compliance burdens and greater complexities with respect to administering their absence management programs.

Buck Can Help

- Develop and/or update leave policies, procedures, and forms
- Update employee handbooks and employee communications
- Train managers and supervisors on best practices
- Develop or retool tracking systems for FMLA and other employee leaves
- Develop and maintain appropriate personnel recordkeeping, payroll, and reporting systems

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.
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