

New FMLA Rule Takes Effect

by: David N. Michael

On the 20th anniversary of the enactment of the Family and Medical Leave Act (FMLA), the United States Department of Labor (DOL) published a Final Rule which implements several recent legislative expansions of the protection provided for under the FMLA. The Final Rule, effective as of March 8, 2013, provides further guidance on the FMLA's provision of job-protected leave for military families and airline flight crews. As stated by the Acting Secretary of Labor:

Enabling our military families to care for their loved ones without fear of losing their job and to actively participate in deployment, reunification and recovery reflects our deeper understanding of the role family members have in sustaining an all-volunteer force. [T]he rule makes clear this administration's strong, ongoing commitment to respond to the needs and sacrifices of our military families. The rule also helps ensure that pilots and flight crews will no longer need to choose between career and caring for a loved one.

While the FMLA has allowed eligible employees of covered employers to take unpaid, job-protected leave for a variety reasons since 1993, two recent laws expanded that coverage to include additional leave for employees with a relative who is a military servicemember and to establish a special hours of service eligibility requirement for airline flight crews. While the airline flight crew changes are beyond the scope of this article, the major changes to the FMLA for military servicemembers and their families are highlighted below.

Since 2008, the FMLA has allowed for two types of leave related to military service – leave to care for a family member injured in military service and leave for a “qualifying exigency” related to a family member's military service. In 2009, Congress further amended those two provisions, leading to the DOL's issuance of the Final Rule.

Military Caregiver Leave

The FMLA allows an eligible employee who is a relative of a covered servicemember with a serious illness or injury to take up to 26 workweeks of unpaid, job-protected leave during any single 12-month period to care for the servicemember. The Final Rule further expands on the definition of a covered servicemember to include veterans undergoing treatment, recuperation, or therapy for a serious injury or illness if he or she was discharged or released under conditions other than dishonorable within the five-year period before the eligible employee first takes FMLA military caregiver leave. Because this provision is still new, the five-year eligibility period excludes the period between the statutory amendment's effective date (October 28, 2009) and the Final Rule's effective date (March 8, 2013).

The Final Rule also expands the definition of serious injury or illness for current service members to include preexisting conditions that were aggravated by service in the line of duty on active duty. For covered veterans, a serious injury or illness is defined as one that was incurred in the line of duty on active duty in the Armed Forces or that existed before and was aggravated

by service in the line of duty on active duty, and that manifested either before or after becoming a veteran. The new definition for veterans includes four alternative categories for serious injury or illness, only one of which must be met.

The Final Rule also makes changes to the FMLA's medical certification requirements for military servicemembers. Unlike the previous regulations which required health care providers to be affiliated with either the Department of Defense, Department of Veterans Affairs, or the DOD TRICARE, the Final Rule expands the list of health care providers who are authorized to complete certification for military caregiver leave to include any health care provider approved under the FMLA. The Final Rule does not change the provision that certifications provided by military-associated healthcare providers are not subject to second or third opinions (but are allowed for certifications from non-military-associated health care providers). Also, documentation of enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers is sufficient certification of the covered veteran's serious injury or illness, even if the employee relative is not the named caregiver. In that case, however, an employer may still require confirmation of the familial relationship with the covered servicemember and documentation of the veteran's discharge date and status.

Qualifying Exigency Leave

Under the FMLA's qualifying exigency leave provisions, eligible employees can take up to 12 weeks of leave for certain situations arising out of active duty or a call to active duty. The Final Rule makes clear that members of the Regular Armed Forces as well as the National Guard and Reserves are covered. The Final Rule also provides that active duty is now defined as "covered active duty" which requires deployment to a foreign country.

The Final Rule also establishes a new qualifying exigency leave category: eligible employees may now take leave to care for a military member's parent who is incapable of self-care when the care is necessary due to the military member's covered active duty. This leave includes arranging for alternate care, providing care on a non-routine, urgent, immediate-need basis; admitting or transferring the military member's parent to a new facility; and attending meetings with staff at a care facility (as in meetings with hospice or social service providers).

Additionally, the Final Rule addresses the time an eligible employee may take to spend with his or her family member during that member's Rest and Recuperation leave, increased the permitted from five days to up to 15 calendar days. The Final Rule also expands the list of documents permitted to certify for qualifying exigency leave for Rest and Recuperation, allowing for submission of a copy of the military member's Rest and Recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member's leave.

Other Changes to the Regulations

The Final Rule no longer includes optional use Forms as part of its Appendix. Removal of the Forms from the Appendix will give the DOL the ability to maintain one version of the Forms, thus lessening the confusion among employees and employers resulting from the

existence of multiple versions of the forms. Those Forms and the new *required* poster on the FMLA are available on the DOL's website (www.dol.gov/whd).

If you have not yet updated your company's FMLA policy nor hung the new FMLA poster, now is the time to do so.