

Legal Update

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NEW FMLA COMPLIANCE REQUIREMENTS

By Jon Vegosen & Orley Moskovits Desser

The Department of Labor (DOL) recently issued a final rule and regulations expanding and clarifying protection of the Family Medical Leave Act (FMLA) to military families and airline personnel and flight crews. The new regulations took effect March 8, 2013, and all employers with more than 50 employees are required to post an updated FMLA poster (which can be found [here](#)).

In addition to updating the FMLA poster, the DOL revised its FMLA forms (available on the DOL's website by clicking [here](#)) to reflect the clarifications and changes it has made during the past several years. Even though employers are not required to use these DOL forms, employers should ask employees requesting leave to provide only the information that is allowed under the FMLA regulations. The new regulations also instruct employers not to require employees to take more leave than necessary to address the issue necessitating leave. Moreover, time an employee spends responding to work related e-mails or phone calls or otherwise "working" while on leave should not be counted against the employee's FMLA leave entitlement. Additional highlights of the recent updates, along with the DOL's interesting interpretation concerning "parental leave," are summarized below.

Additional FMLA Regulations

Nearly five years ago, the FMLA was amended to include (a) a 12-week leave for eligible family members to deal with qualified exigencies of active service members (known as "qualified exigency leave") and (b) a 26-week leave for eligible family members to care for seriously ill or injured service member (known as "military caregiver leave"). For additional information about the prior regulations, please see our previous newsletter by clicking [here](#). The latest regulations provide additional guidance and clarification. More specifically, under the latest regulations for the qualifying exigency leave, the definition of "military member" includes members of the National Guard and Reserves and the Regular Armed Forces. An employee may now also take qualified exigency leave when his or her family member is called to active duty *or* deployment to a foreign country. Furthermore, employees may now take leave to care for a military member's parent who is unable to take care of himself or herself when the military member is on covered active duty. Finally, employees may now take 15 calendar days of leave to be with a military member on rest and recuperation leave. Previously, only five calendar days were allowed.

The new regulations also expand the definition of a covered service member for the military caregiver leave. Previously, under the military caregiver leave provision, an eligible employee could take up to 26 weeks of FMLA leave to care for a covered service member – including service members in either the regular Armed Forces or the National Guard or Reserves – who had suffered a serious injury or illness in the line of duty. Now, a covered service member also includes veterans honorably discharged within the five years preceding the day the employee's FMLA leave for the veteran's serious injury or illness would

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begin. Notably, the five-year period for covered veterans does not include the period between October 28, 2009 (the date that the 2010 National Defense Authorization Act for Fiscal Year 2010 was enacted) and March 8, 2013. Thus, when determining whether an employee's family member is a "covered veteran", employers should keep this extra time period (amounting to approximately 1,226 days) in mind until March 8, 2018. Further, the definition of "serious injury or illness" now also includes pre-existing problems exacerbated by service in active duty.

In addition to expanding on these two leaves, the new regulations establish special hours of service eligibility to accommodate flight crews working odd hours. In general, to be eligible for FMLA leave, an employee must work at least 1250 hours in the 12 months prior to the leave. A flight crew employee will now be eligible for FMLA leave if he or she has worked at least 60% of the applicable total monthly guarantee and has worked or been paid for at least 504 hours in the 12 months prior to the leave.

DOL Also Interprets FMLA to Allow Leave to Care for Adult Children

In addition to harmonizing the FMLA regulations with an updated poster and forms, the DOL also recently issued an administrator's interpretation clarifying the definition of an adult "son or daughter" under the FMLA. The interpretation explains that the child's age at onset of disability is irrelevant to determining whether the parent may qualify for FMLA leave. Accordingly, an employee may qualify for FMLA leave even if the employee's child becomes disabled as an adult (i.e., upon reaching age 18). While an administrator's interpretation clarifies regulatory issues, it is not a court's ruling and should not be relied upon as precedential. Nonetheless, the administrator's interpretation provides valuable insight into the DOL's view of the regulations. The interpretation also clarifies that since the timing for the disability is not determinative, the parent of an adult child who may become injured or ill while in military service may be eligible to take up to 26 weeks of leave under the military caregiver provision and another 12-week FMLA leave in subsequent years due to the adult child's serious condition. Thus, for example, a parent who has already taken 26 weeks of military caregiver leave to care for an injured daughter, may, in the following year, take up to 12 weeks of FMLA-protected leave to provide continued care due to the disability sustained by the daughter while in military service.

FMLA Housekeeping

With expanded definitions for coverage and reasons for leave, employers may experience a rise in requests for leave. Thus, in addition to posting the new poster (linked above), it is critical that employers educate managers and supervisors about the latest changes to the FMLA. Employers should also revisit their FMLA policies and certification forms to ensure compliance with the newest regulations.

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