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Department of Labor Implements Final Rule Regarding FMLA Amendments

By Maria Tavano

This week, amendments to the federal Family and Medical Leave Act ("FMLA") affecting family military leave and airline flight crew employees take effect. The changes stem from two statutes enacted after the 2008 amendments to the FMLA: the National Defense Authorization Act for Fiscal Year 2010 (the "2010 NDAA"), which expanded family military leaves created by the 2008 FMLA amendments; and the 2009 Airline Flight Crew Technical Corrections Act ("AFCTCA"), which established new methods for calculating leave and determining FMLA-eligibility for airline flight crew employees. On February 6, 2013, the Department of Labor ("DOL") published a Final Rule implementing the FMLA amendments created by both those acts, and on March 8, 2013, that Final Rule takes effect.

Exigency Leave

Under the 2010 NDAA, an FMLA-eligible employee who is the parent, spouse, son, or daughter of a servicemember of the regular Armed Forces and Reserves is entitled to up to twelve weeks of leave in a 12-month period for a "qualifying exigency" related to the servicemember's covered active duty status. "Covered active duty" is defined as duty during deployment to a foreign country or under an impending call to active duty in support of a contingency operation in a foreign country. The Final Rule clarifies that a servicemember's deployment to international waters qualifies as deployment to a foreign country.

Qualifying exigencies for which employees may seek leave include: 1) dealing with issues arising out of short-notice deployment; 2) attending military events and related activities; 3) child care and school activities; 4) parental care; 5) making financial and legal arrangements; 6) bonding time with a deployed servicemember assigned to a rest and recuperation period; 7) attending certain

post-deployment activities; and 8) counseling. The Final Rule also provides for a catch-all category that includes any other activity arising out of a servicemember's covered active duty status and which the employer agrees qualifies for exigency leave.

For purposes of exigency leave related to childcare/school activities, the employee seeking leave must be the spouse, parent, son, or daughter of the servicemember. However, the child for whom leave is sought does *not* need to be the child of the employee. The Final Rule also expressly provides for parental care leave when the need for such care arises out of a servicemember's covered active duty status and the servicemember's parent (or one who stands *in loco parentis*) is incapable of self-care.

The Final Rule also expands leave available to an employee for a related servicemember's rest and recuperation period from five to fifteen days.

Military Caregiver Leave

Under the 2010 NDAA, an FMLA-eligible employee is entitled to up to 26 weeks of leave in a 12-month period to care for a covered servicemember. The employee must be the spouse, parent, son, daughter, or next of kin of the covered servicemember for whom leave is sought.

Covered servicemembers include current servicemembers who are undergoing medical treatment, recuperation, or therapy; are on outpatient status; or are on the temporary disability retired list due to a serious injury or illness. A serious injury or illness of a current servicemember is defined as an illness or injury incurred or aggravated by a servicemember while on active duty and which causes the servicemember to be medically unfit to perform the duties of his or her office, grade, rank, or rating.

The Final Rule also covers veterans who were members of the Armed Forces at any time during the five years preceding the start of leave, were discharged for any reason other than a dishonorable discharge, and are undergoing medical treatment, recuperation, or therapy for a qualifying serious illness or injury. Four alternative definitions for a veteran's qualifying serious injury or illness are provided in the Final Rule. Because the 2010 NDAA left it up to the DOL to define a veteran's "serious injury or illness," the changes to caregiver leave for veterans do not take effect until the effective date of the Final Rule. Consequently, any caregiver leave provided to employees for a veteran's serious injury or illness prior to March 8, 2013 does not count toward the 26-week annual cap. Moreover, while leave pursuant to this section may be taken up to five years after the servicemember leaves the military, the Final Rule specifically excludes from the five year look-back period, the period between October 28, 2009, the date the Act was enacted, and March 8, 2013, the effective date of the Final Rule.

Under the Final Rule, the certifying provider of the serious illness or injury is no longer required to be affiliated with the Department of Defense ("DOD"). However, if the employee provides a certification by a non-DOD affiliated

provider, employers are permitted to require a second or even a third medical opinion.

Special FMLA Rules for Airline Flight Crew Employees

The AFCTCA provides special rules for determining FMLA eligibility and leave calculation for airline flight crew employees, whose non-standard work schedules may otherwise deem them ineligible for FMLA leave. The AFCTCA provides that an airline flight crew employee meets the hours-of-service requirement under the FMLA if he or she has worked or been paid for not less than 60% of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the twelve months prior to the start of the covered leave. For an airline flight crew employee who is not on reserve status, the applicable monthly guarantee is the minimum number of hours an employer has agreed to schedule the employee. Alternatively, the applicable monthly guarantee for an airline flight crew employee who is on reserve status is the minimum number of hours an employer has agreed to pay the employee.

FMLA-eligible airline flight crew employees are permitted to take up to 72 days of leave for the employee's own sickness; for the sickness of a spouse, parent, or child; for the birth, adoption, or foster placement of a child; or for exigent circumstances related to the call to covered active duty of an employee's spouse, parent, son, or daughter. Airline flight crew employees are also entitled to military caregiver leave for up to 156 days in a 12-month period.

The Final Rule permits employers to account for intermittent leave by airline flight crew employees in increments not greater than one day (as opposed to one hour for other employees) and imposes special record keeping requirements upon employers.

Conclusion

The Final Rule adds several more twists and turns to what is already complicated territory. To assist employers in complying with the Final Rule, the DOL has posted [a FAQ page](#) on its website as well as several forms employers may use to determine leave eligibility. Employers should review their FMLA policies and procedures to ensure they are in compliance with the family military leave changes and, if applicable, leave calculation and eligibility changes for airline flight crew employees.

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