

FMLA FINAL REGULATIONS FINALLY ISSUED - NEW POSTER REQUIRED MARCH 8, 2013

Over the past five years, the FMLA has been amended on several occasions. While the FMLA was amended most recently in late 2009 under the National Defense Authorization Act ("NDAA") and the Airline Flight Crew Technical Corrections Act ("AFCTCA"), the U.S. Department of Labor Wage and Hour Division delayed in issuing proposed regulations until February 15, 2012. Since that time, employers have been waiting on the issuance of final regulations. The wait is now over.

On February 6, 2013, a **Final Rule** was issued and takes effect on **March 8, 2013**. While most of the new regulations relate to rarely used FMLA provisions, including military caregiver leave for a veteran, qualifying exigency leave for parental care and job-protected leave for airline personnel and flight crews, there is one provision that all covered employers need to know about - and soon!

- *New FMLA Poster Required by March 8, 2013.* The new poster, which reflects many of the changes made by the new FMLA regulations, is available [here](#). The Department of Labor has stated that employers may start using the new poster immediately or they may continue to use the old FMLA poster through March 7, 2013. In any event, covered employers need to make sure the new poster is posted by the deadline.

Below is a summary of some of the most important changes to the regulations for non-airline employers:

- *Qualifying Exigency Leave Definitions Revised.* The new regulations revise the definitions of "military member" and "active duty." An eligible employee may take FMLA leave for qualifying exigencies arising out of the fact that a military member is on active duty or has been notified of an impending call or order to active duty.
 - Under the new regulations, the term military member (previously referred to as a "covered military member") now includes both members of the National Guard and Reserves and the Regular Armed Forces.
 - The term "covered active duty" (previously referred to as "active duty") requires deployment to a foreign country.
- *Parental Care Added as a New Qualifying Exigency.* The new regulations introduce an additional reason that eligible employees can take qualifying exigency leave - "parental care." An eligible employee may now take leave to care for a military member's parent who is incapable of self-care when the care is necessitated by the military member's covered active duty. The "parental care" qualifying exigency covers an employee's request for leave in order to arrange for alternative care for a military member's parent, to provide care on an immediate need basis or to attend meetings with staff at a military member's parent's care facility.
- *Rest and Recuperation Qualifying Exigency Extended to 15 Days.* The amount of time an eligible employee may take for Rest and Recuperation qualifying exigency leave is expanded from 5 calendar days to a maximum of 15 calendar days.
- *Military Caregiver Leave Now Includes Covered Veterans.* The definition of a "covered servicemember" has been expanded to include "covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness." Under the new regulations, a "covered veteran" is defined as an individual who was discharged or released under conditions other than dishonorable at any time during the five years prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. However, the regulations state that the period between October 28, 2009, the date the NDAA was enacted, and March 8, 2013, the effective date of these regulations, cannot be counted when determining a covered veteran's five-year eligibility period.
- *Definition of a Serious Illness or Injury of a Covered Servicemember Expanded.* Under the regulations, the definition of a serious illness or injury now includes both: (1) an illness or injury incurred in the line of duty on active duty in the Armed Forces; or (2) an illness or injury aggravated in the line of duty.
- *Eligibility for FMLA Leave and USERRA.* The new regulations clarify the Department of Labor's stance that any period of absence due to or necessitated by USERRA-covered military service must be counted in determining an employee's eligibility for FMLA leave.

- *Minimum Increments of Leave.* The Department of Labor has clarified its position that an employer must track FMLA using the smallest increment of time used for other leave. An employer, however, may account for FMLA leave in shorter increments than used for other forms of leave. The regulations also state that an employer may not require an employee to take more leave than necessary.
- *Compliance with GINA Recordkeeping Requirements.* The new regulations provide that FMLA documentation covered by the Genetic Information Non-Discrimination Act ("GINA"), e.g., medical certification forms for family members, must comply with the confidentiality requirements of GINA.

In addition, the Department of Labor has published a helpful side-by-side comparison of the 2008 regulations and the new regulations, which is available [here](#).

In light of these new regulations, employers having 50 or more employees should make sure the new FMLA poster is posted by March 8, 2013 and should review existing FMLA policies to make sure references to military FMLA contained in the policies are up to date.

If you have any questions, please contact Jennifer Richter at 317.977.1477 or jrichter@hallrender.com, Mary Kate Liffbrig at 317.977.1455 or mliffbrig@hallrender.com or your regular Hall Render attorney.

Reference: Family Medical Leave Act; Final Rule, 78 Fed. Reg. 8834 (to be codified at 25 C.F.R. Part 825).

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