

Strategy & Insights

Department of Labor Issues New FMLA Regulations

On February 6, 2013, the Department of Labor (“DOL”), which regulates and oversees enforcement of the Family and Medical Leave Act (“FMLA”), issued its final regulations, which go into effect March 8, 2013. These new regulations implement changes previously made by the National Defense Authorization Act for Fiscal Year 2010 and the 2009 Airline Flight Crew Technical Corrections Act amendments to the FMLA. The new regulations do the following:

- Increase and clarify scope of military exigency leave;
- Extend military caregiver leave;
- Clarify calculation of increments of intermittent FMLA leave; and
- Clarify airline flight crew employees FMLA eligibility requirements.

In addition to implementing the new regulations, the DOL made minor modifications to its forms and issued a new form for military caregiver leave for veterans. DOL also issued an Administrator’s Interpretation regarding the definition of a “son or daughter” with respect to the age of a son or daughter at the onset of a disability.

While the substance of these regulations is not unexpected, employers should make certain they are in compliance with the changes. The most significant revisions to the regulations -- along with their practical impact -- are addressed below.

Military Family Leave

Exigency Leave:

Qualifying Exigency leave, which has been available under the FMLA since 2008, has been expanded to cover employees with family members in the regular Armed Forces, whereas before it had only been available to relatives of National Guard or Reservist members. Under this leave, an employee may take up to 12 weeks of unpaid time for qualifying exigencies that arise out of active duty or call to active duty.

The definition of active duty has been revised to include a foreign deployment requirement such that the Armed Forces or Reservist member must be on active duty or on call to active duty in a foreign country.

There is also a new category of qualifying exigency leave--parental care. This is comparable to the child care exigency provision and allows family members to take time off to arrange for care for parents of military members who are incapable of self-care when the need for leave arises as a result of active duty or a call to active duty. Note, this cannot be used to provide routine day-to-day care. Rather, it is leave for activities such as making arrangements for on-going care, providing urgent care, attending meetings with staff at a care facility for a parent, or admitting or transferring a parent to a care facility.

Further, the revised regulations increased the maximum number of days a family member can bond with a military member on rest or recuperation leave from 5 to 15 calendar days. This leave may be taken intermittently and should correspond to the length of leave given the military member. Employers may verify that the leave taken corresponds with the leave indicated on the military member's recuperation orders.

Caregiver Leave

The new regulations expand the availability of military caregiver leave to eligible employees whose family members are recent veterans with serious injuries or illnesses ("covered veteran"). This includes conditions that do not arise until up to five years after the veteran has left active military service (other than for dishonorable reasons).

The regulations define a serious injury or illness for a *current service member* as one that occurred while in the line of duty or a preexisting condition that was aggravated in the line of duty and that may render the member medically unfit to perform the duties of the member's office, grade, rank or rating.

A serious injury or illness for a *covered veteran* includes the above and additionally, the injury or illness must be one of the following:

- (i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the service member unable to perform the duties of his or her office, grade, rank, or rating;
- (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service-Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
- (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
- (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Expanded Health Care Provider Provision

The new regulations have also expanded the health care provider provision. Previously, only health care providers who were affiliated with the Department of Defense (DOD) were authorized to provide medical certifications for caregiver leave. Under the new regulations, an employee may obtain a certification from any health care provider who meets the definition under Section 825.125. In addition, an employer may now obtain second and third opinions where the initial certification was provided by a non-DOD health care provider.

Airline Flight Crew FMLA Eligibility Requirements

To implement requirements made by the Airline Flight Crew Technical Corrections Act and add new leave calculation regulations for flight crew employees.

The new regulations provide that airline flight crew employees (as defined by FAA regulations) will meet the FMLA hours of service eligibility requirement if s/he has worked or been paid for not less than 60% of the applicable total monthly guarantee or the equivalent, and if s/he has worked or been paid for not less than 504 hours during the previous 12 months.

Calculating Increments of Intermittent FMLA Leave

The DOL clarified the regulations with respect to intermittent leave. The minimum increment of FMLA leave is defined as

no greater than the shortest increment of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. Some employers interpreted this to mean that intermittent FMLA could be taken in one-hour increments even where shorter periods of time were used for leave such as vacation and sick leave. The new regulations make it clear that employers must use the shortest increment of time rule and the one-hour reference was simply a maximum. Thus, if an employer allows an employee to take vacation in 15-minute increments, it must allow employees to take FMLA in 15-minute increments.

Under the new regulations, an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave.

Additionally, under the new regulations, FMLA leave may only be counted against an employee's entitlement for leave taken and not for time that is worked for the employer. For example, where an employee arrives a half hour late to work due to an FMLA-qualifying condition and the employer waives its normal one-hour increment of leave and puts the employee to work immediately, only the amount of leave actually taken by the employee may be counted against the FMLA entitlement, not the minimum normal one-hour increment.

Forms and Recordkeeping

The DOL will continue to provide forms on its website, but the forms will no longer be included as part of the appendices to the regulations. This enables the DOL to make changes to the forms without going through the formal rulemaking process. The DOL has made very minor revisions to a number of the model forms, including to the mandatory poster, Notice of Rights to Employees Under the FMLA, which has been revised to mirror the changes reflected in the new regulations. Many of the model forms, however, were unchanged, and simply had their expiration dates extended to 2015. New certification forms related to the serious injury or illness of a covered veteran were created.

Note, the new regulations also remind employers of their confidentiality obligations under the Genetic Information Nondiscrimination Act of 2008 (GINA). The DOL noted that GINA allows employers to disclose genetic information or family history obtained by the employer consistent with the FMLA.

Department Of Labor Administrator's Interpretation Regarding Age of Onset Of Disability For Adult Children

Just prior to issuing the new regulations, on January 14, 2013, the DOL issued an Administrator's Interpretation clarifying that the onset of a son or daughter's disability may occur after the age of 18 for purposes of an employee seeking leave to care for a son or daughter age 18 or older who has a serious health condition. An eligible employee may take up to 12 unpaid weeks of leave during a 12 month period to care for a son or daughter who has a serious health condition. If a son or daughter is under the age of 18 years, an eligible employee may take leave regardless of whether the child has a physical or mental disability. However, if a son or daughter is 18 years of age or older, an eligible employee is only entitled to leave if the son or daughter is incapable of self-care because of a physical or mental disability. In that case, if the son or daughter suffers from a serious health condition - regardless of whether the serious health condition is related to the disability - an eligible employee may take leave, provided all other requirements for leave are met.

The opinion also clarifies that: (1) whether a son or daughter has a disability is defined by the definition of a disability under the ADA, which "shall be construed in favor of broad coverage;" (2) the determination of whether an adult son or daughter is incapable of self-care focuses on whether the individual currently needs active assistance or supervision in performing three or more activities of daily living (or ADLs) including "grooming, hygiene, bathing, dressing and eating;" or instrumental activities of daily living (or IADLs) including "cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones, and using a post-office, etc;" (3) a serious health condition is an illness, injury impairment, or physical or mental condition that involves inpatient care or continuing treatment by a healthcare provider; and (4) for a parent to take FMLA leave to care for an adult son or daughter, the parent must be "needed to care" for that son or daughter due to the serious health condition.

Practice Pointers

From a practical perspective, there are no sweeping changes as the new regulations simply reiterate legislative changes that have been in effect since the statutory amendments to the FMLA. Many employers have already revised their policies and practices based on the amendments. However, prior to March 8, employers should:

- Review policies and update, as necessary, to conform with the new regulations;
- Replace current FMLA posters with the revised Notice of Rights to Employees Under the FMLA;
- Revise any current forms to conform with the new regulations;
- Charge intermittent leave using the shortest increment of time utilized for other forms of leave;
- Count only the actual time the employee was on leave against FMLA entitlement when waiving the shortest increment of time rule;
- Ensure that the expanded military leave is being provided where appropriate;
- Analyze requests to care for an adult child using the broad definition of disability under the ADA with an understanding that the onset of the disability can occur after the child is 18 years of age.

For more information, please contact the Seyfarth Shaw attorney with whom you work, or any Labor & Employment attorney on our website.

By: *Ellen McLaughlin, Tracy Billows, Abigail Flynn-Kozara and Katherine Mendez*

Ellen McLaughlin and *Tracy Billows* are both partners in Seyfarth Shaw's Chicago office. *Abigail Flynn-Kozara* and *Katherine Mendez* are associates in the firm's Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Ellen McLaughlin at emcloughlin@seyfarth.com, Tracy Billows at tbillows@seyfarth.com, Abigail Flynn-Kozara at aflynn-kozara@seyfarth.com or Katherine Mendez at kmendez@seyfarth.com.