

DOL Issues Final Regulations Implementing the 2009 FMLA Amendments

May 16, 2013

The Family and Medical Leave Act (FMLA) regulations issued by the Department of Labor (DOL) in 2009 addressed the new military leave requirements established in the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA). Earlier this year, the DOL issued its final regulations (Final Rule) and an updated poster for covered employees.

The Final Rule revised the 2009 regulations regarding military leave, incorporates amendments to the military leave provisions made by the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA). It also provided regulations for the 2009 Airline Flight Crew Technical Corrections Act. Both the Final Rule and the requirement to display the updated FMLA poster went into effect on March 8, 2013.

Some noteworthy changes are discussed below.

Military Qualifying Exigency Leave

The FY 2008 NDAA created two new categories of leave, one of which was “qualifying exigency leave.” Under the FY 2008 NDAA’s qualifying exigency leave provision, eligible family members of members of the National Guard and Reserves were entitled to take FMLA leave for “qualifying exigencies” arising out of the military member’s deployment in support of a contingency operation.

The 2008 regulations defined qualifying exigency using eight categories:

1. Short notice deployment;
2. Military events and related activities;
3. Childcare and school activities;
4. Financial and legal arrangements;
5. Counseling;
6. Rest and recuperation;
7. Post-deployment activities; and
8. Additional activities to which both the employer and employee agree. The Final Rule implemented changes by the FY 2010 NDAA, including expanding qualifying exigency leave to include leave for eligible family members of members of the Regular Armed Forces and by adding an active duty foreign deployment requirement. The Final Rule also increased the length of time an eligible family member may take for the qualifying exigency leave reason of rest and recuperation from five days to up to a maximum of 15 days to match the military member’s rest and recuperation leave orders. It also created a new qualifying exigency leave category for parental care. Like the qualifying exigency leave for child care, this leave is not for regular parental care, but rather to deal with urgent care needs, time spent placing a parent in a care facility, or time meeting with caregivers.

Military Caregiver Leave

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The other new category of leave created by the FY 2008 NDAA was “military caregiver leave.” Under the FY 2008 NDAA’s military caregiver leave provision, eligible family members of current service members are entitled to take up to 26 work weeks of military caregiver leave in a single 12-month period. The purpose of this leave is to care for a current service member who incurred a serious injury or illness in the line of duty on active duty that renders the service member unable to perform the duties of his or her office, grade, rank, or rating.

The Final Rule implemented the FY 2010 NDAA amendments that expanded the definition of “serious injury or illness” to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty. It also implemented amendments that expanded military caregiver leave to cover care for retired veterans undergoing medical treatment, recuperation, or therapy for a serious injury or illness. In order to qualify for this leave, the veteran receiving care must have been discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for him. The Final Rule interpreted the five-year period of eligibility for covered veteran to exclude the period between the enactment of FY 2010 NDAA on October 28, 2009, and enactment of Final Rule on March 8, 2013. This protects the military leave entitlement for family members of veterans whose five-year period has either expired or has been diminished during that time.

Airline Flight Crew FMLA Eligibility Requirements

The AFCTCA established special hours of service eligibility requirements for airline flight crew members and flight attendants for FMLA leave. The Final Rule implemented the amendments made to the FMLA by AFCTCA, provided special rules applicable only to flight crew employees regarding the calculation of hours worked for purposes of determining eligibility and adopted a uniform entitlement for airline flight crew employees of 72 days of leave for one or more of the FMLA qualifying reasons and 156 days of military caregiver leave.

Other Changes

The Final Rule clarified rules for calculation of intermittent or reduced schedule FMLA leave, including clarifying regulatory language regarding increments of leave and providing additional explanation of the physical impossibility rule. It also expanded the list of authorized health care providers. Previously, only health care providers who were affiliated with the Department of Defense (DOD) were authorized to provide medical certifications for caregiver leave. Also, an employer may now request a second and third opinion for medical certifications obtained from a non-DOD health care provider.

Finally, the Final Rule also updates the FMLA optional use forms to reflect the statutory changes and creates a new optional use form for the certification of a serious injury or illness for a veteran.

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