



FEBRUARY 2013

## Twenty Years of FMLA: New Regulations and Guidance Issued

It was 20 years ago that the federal Family and Medical Leave Act (FMLA) was signed into law, and the United States Department of Labor (USDOL) marked the anniversary by issuing newly revised and restated FMLA final regulations as well as by updating and expanding the model FMLA forms. Employers should be aware of these recent developments and may need to update their FMLA policies and forms accordingly.

### NEW AND REVISED REGULATIONS CONCERNING MILITARY-RELATED FAMILY LEAVE

The majority of the revisions to the FMLA regulations concern military-related family leave and incorporate recent amendments made to the FMLA itself that expand such leave protections. The more significant changes made by the new regulations on this topic include the following:

- **Expansion of the definition of a covered servicemember to include certain veterans.** The new regulations expand the 26-workweek military caregiver leave provision to include leave to care for covered veterans undergoing medical treatment, recuperation, or therapy for a serious injury or illness that was incurred or aggravated in the line of duty on active duty and that manifested before or after the veteran left active duty.
- **Definition of a covered veteran.** A "covered veteran" is defined as a veteran discharged or released under conditions other than dishonorable within the five-year period before the eligible employee first takes FMLA leave to care for the veteran. For a veteran discharged before March 8, 2013 (the effective date of the new regulations), the period of time between October 28, 2009 (the enactment of the amendment) and March 8, 2013, is *excluded* in calculating the veteran's five-year period.
- **Definition of serious injury or illness of a covered veteran.** The new regulations create a flexible definition for the serious injury or illness of a covered veteran that includes four alternatives (only one of which must be met).
- **Expansion of health care providers authorized to provide medical certifications concerning military members.** Medical certification of a current service member's or veteran's serious injury or illness can be obtained from any health care provider, as

defined in the FMLA regulations, not only those affiliated with the military. If a medical certification is obtained from a provider not affiliated with the military, the employer may request a second (or third) opinion from the employee; however, medical certifications obtained from health care providers associated with the military may not be subject to second and third opinions. In either situation, employers are not permitted to request recertifications.

- **Expansion of qualifying exigency leave.** Qualifying exigency leave is extended to eligible employees who are family members of members of the Regular Armed Forces. The new regulations also add the requirement for all military members to be deployed to a foreign country (which includes international waters) to be on "covered active duty" under the FMLA.
- **Increased time for R&R leave.** The maximum amount of time an employee may take for qualifying exigency leave related to a military family member's Rest and Recuperation (R&R) leave has been increased from 5 days to 15 days. This leave may only be used while the military member is on R&R leave.
- **Parental care leave added as a category of qualifying exigency leave.** A new qualifying exigency leave category has been added for parental care leave to provide care necessitated by the covered active duty of the military member for that member's parent who is incapable of self-care.

## **NEW RULES FOR AIRLINE FLIGHT CREW EMPLOYEES**

In addition to the changes concerning military family leave, the new regulations also implement amendments clarifying the application of the FMLA to airline flight crews. New regulatory provisions for FMLA leave describe the statutory hours of service eligibility requirements for airline flight crew employees, create a unique method of calculating leave for such employees, and establish that intermittent or reduced schedule leave usage taken by these employees must be accounted for by using an increment no greater than one day.

## **OTHER PROVISIONS OF THE FINAL REGULATIONS**

The regulations make clarifying edits to the provisions concerning the "varying increments" rule, which allows employers to utilize different increments of leave at different times of the day or shift, provided the employer tracks FMLA leave using the smallest increment used for other forms of leave, subject to a one-hour maximum. The regulations also amend the record keeping provisions to include an employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). Finally, the new regulations make clear that protections afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA) extend to all military members (Armed Forces, National Guard, and Reserves) returning from USERRA-covered service and that these provisions apply to an absence from work due to any service covered by the USERRA.

## **EFFECTIVE DATES**

Several of the changes to the FMLA regulations made in the new final rules, including military caregiver leave for veterans, qualifying exigency leave for parental care, and the special leave calculation method for flight crew employees, will not be effective until March 8, 2013. Some of the provisions, however—such as the expansion of qualifying exigency leave to families of members of the Regular Armed Forces and the special eligibility hours of service requirement for flight crew employees—are already in effect, as they became effective as of the enactment

date of the relevant statutes amending the FMLA.

## **UPDATED AND NEW MODEL FMLA FORMS**

The FMLA optional-use forms have been updated to reflect the statutory and regulatory changes to the FMLA. In addition, a new optional-use form, Form WH-385-V, has been created for certification of a serious injury or illness of a covered veteran.

Further, the model FMLA forms and general notice poster have been removed from the FMLA regulations. This change allows the USDOL to make non-substantive changes to the forms in a more effective manner and permits the USDOL to maintain one version of the FMLA forms, thereby lessening the confusion among employees and employers currently resulting from the existence of multiple versions of the forms. The forms will continue to be available on the website of USDOL's Wage and Hour Division, [www.dol.gov/whd](http://www.dol.gov/whd).

## **RECENT GUIDANCE ON DISABLED ADULT CHILDREN**

In addition to the new FMLA regulations, the USDOL also recently issued guidance clarifying when FMLA leave is available to an employee to care for a disabled adult son or daughter with a serious health condition. According to the guidance, a parent is entitled to take FMLA leave to care for a son or daughter 18 years of age or older if the adult son or daughter (1) has a disability as defined by the ADA, (2) is incapable of self-care due to that disability, (3) has a serious health condition, and (4) is in need of care due to the serious health condition. It is only when all four of these requirements are met that an eligible employee is entitled to FMLA-protected leave to care for an adult son or daughter.

Prior to this interpretation, there was some question as to whether the adult child's disability must have developed before the child reached age 18 for the parent to be eligible for FMLA leave. The USDOL has now clarified that the age of onset of the disability is irrelevant. Further, under the FMLA, "son or daughter" is a broad concept covering far more than a biological relationship. It also covers adoptive relationships, foster parent-child relationships, stepchildren, legal wards, or children of persons standing in *loco parentis*. The expanded interpretation will likely result in more leave requests and entitlement for employees seeking time off work to care for adult children with medical needs.

## **WHAT SHOULD EMPLOYERS DO NOW?**

In light of the new regulations and guidance, employers are well advised to review their FMLA policies and forms to determine whether updates need to be made. In particular, if an FMLA policy has not been revised since the last round of regulations were issued in 2009, the policy likely needs revisions to incorporate the recent changes, particularly with respect to military family leave. Employers may also want to consider utilizing the new medical certification form for military family leave requests involving veterans.

Finally, employers who are subject to Connecticut FMLA or other state FMLA laws should be aware that the new USDOL model forms and general notice poster incorporate only the requirements of the federal FMLA; they do not take into account any state FMLA laws, which may differ in significant respects. Therefore, the updated federal FMLA forms (which are optional use in any event) cannot be adopted "as is" for situations covered by state FMLA law but need to be modified to account for applicable state law provisions.

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## MORE INFORMATION

To receive additional information regarding state or federal Family and Medical Leave Acts, to get assistance updating policies and forms, or to ask questions concerning employee leaves of absence, please contact one of the following attorneys:

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