FINAL RULES ISSUED ON FAMILY AND MEDICAL LEAVE ACT EXPANSION

On February 6, 2013, the United States Department of Labor (DOL) published the final regulations that implement and finalize two expansions of the protections afforded under the Family and Medical Leave Act (FMLA). The effective date of the final rule is “30 days after date of publication in the Federal Register” resulting in an effective date of March 8, 2013.

**First expansion:** Pursuant to the National Defense Authorization Act for Fiscal Year 2010, families of eligible veterans are provided with the same job-protected FMLA leave currently available to families of military servicemembers. The final regulations implement this expansion and also provide more military families with an opportunity to take leave for activities that occur when a servicemember is deployed.

**Second expansion:** The 2008 Regulations modified the existing FMLA rules to enable airline personnel and flight crews with enhanced opportunities to use FMLA job-protected leave. The final regulations adopt this expansion.

In addition to these two significant changes, the final rule also provides clarifications related to minimum increments of leave, physical impossibility and record-retention requirements.

A summary of the specific regulations modified under the final rule, as compared to the regulations effective January 16, 2009, was provided by the DOL Wage and Hour Division and may be found at:

http://www.dol.gov/whd/fmla/2013rule/comparison.htm

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**A sampling of the DOL comparison is as follows:**

**Qualifying Exigency Leave:**

**2008 Regulations:** Eligible employees may take qualifying exigency leave for any of the following reasons with respect to a spouse, son, daughter or parent who is on active duty or have been notified of an impending call or order to active duty (a “covered military member”):

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.

**2013 Regulations:** A new qualifying exigency leave category for parental care leave has been added. Eligible employees may take leave to care for a military member’s parent who is incapable of self-care when the care is necessitated by the member’s covered active duty. Such care may include arranging for alternative care, providing care on an immediate-need basis, admitting or transferring the parent to a care facility, or attending meetings with staff at a care facility.

The 2013 regulations also expand the definition of a “covered military member” to include members of the National Guard and Reserves and the Regular Armed Forces.

**2008 Regulations:** Employees who request qualifying exigency leave to spend time with a military member on rest and recuperation leave may take up to five days of leave.
2013 Regulations: The amount of time an eligible employee may take for rest and recuperation qualifying exigency leave is expanded to a maximum of 15 calendar days.

Military Caregiver Leave:

2008 Regulations: An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember (a current servicemember) of the Armed Forces, including National Guard and Reserve members, with a serious injury or illness incurred in the line of duty on active duty for which the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, may take up to 26 workweeks of FMLA leave to care for the servicemember in a single 12-month period.

2013 Regulations: The definition of covered servicemember is expanded to include covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness.

2008 Regulations: A serious injury or illness means an injury or illness incurred by a covered servicemember in the line of duty on active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

2013 Regulations: The definition of a serious injury or illness for a covered servicemember is expanded to include injuries or illnesses that existed before the beginning of the member’s active duty and were aggravated by service in the line of active duty in the Armed Forces.

Required Information for Certification of a Qualifying Exigency:

2008 Regulations: Upon an employer’s request, an employee must provide a copy of the covered military member’s active duty orders to support a request for qualifying exigency leave.

In addition, upon an employer’s request, certification for qualifying exigency leave must be supported by a certification containing the following information: statement or description of appropriate facts regarding the qualifying exigency for which leave is needed; approximate date on which the qualifying exigency commenced or will commence; beginning and end dates for leave to be taken for a single continuous period of time; an estimate of the frequency and duration of the qualifying exigency if leave is needed on a reduced-schedule basis or intermittently; and if the qualifying exigency requires meeting with a third party, the contact information for the third party and description of the purpose of the meeting.

2013 Regulations: The list of required information for certification for qualifying exigency leave for rest and recuperation leave is expanded to include a copy of the military member’s rest and recuperation leave orders, or other documentation issued by the military setting forth the dates of the military member’s leave.

Certification of Military Caregiver Leave:

2008 Regulations: The following healthcare providers may complete a certification for a covered servicemember: (1) U.S. Department of Defense (DOD) healthcare provider; (2) U.S. Department of Veterans Affairs (VA) healthcare provider; (3) DOD TRICARE network-authorized private healthcare provider; (4) DOD non-network TRICARE-authorized healthcare provider.

2013 Regulations: The list of healthcare providers who are authorized to complete a certification for military caregiver leave for a covered servicemember is expanded to include healthcare providers, who are not affiliated with DOD, VA, or TRICARE.
**2008 Regulations:** Second and third opinions are not permitted, but an employer may seek authentication and/or clarification. Recertifications are not permitted.

**2013 Regulations:** Second and third opinions may be required by an employer for military caregiver leave certifications that are completed by healthcare providers who are not affiliated with DOD, VA, or TRICARE.

**Employee Eligibility Hours of Service and USERRA:**

**2008 Regulations:** To be eligible to take FMLA leave, an employee:

1. has been employed by the same employer for at least 12 months;
2. has been employed for at least 1,250 hours of service during the 12-month period immediately preceding commencement of the leave; and
3. is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.

**2013 Regulations:** The USERRA-protections for employees who miss work due to USERRA-covered military service are clarified: the protections afforded by USERRA extend to all military members (active duty and reserve), and all periods of absence from work due to or necessitated by USERRA-covered service is counted in determining an employee’s eligibility for FMLA leave.

**Minimum Increments of Leave:**

**2008 Regulations:** Permits an employer who accounts for leave in varying increments at different times of the day or shift to also account for FMLA leave in varying increments, provided the increment used for FMLA leave is no greater than the smallest increment used for other types of leave during the period in which the FMLA leave is taken.

**2013 Regulations:** Clarifying language is added that employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a one-hour maximum.

**2008 Regulations:** Where it is physically impossible for an employee to start or end work midway through a shift, the entire period the employee is forced to be absent is counted against the employee’s FMLA leave entitlement.

**2013 Regulations:** Clarifying language is added noting that the physical impossibility provision is to be applied in only the most limited circumstances, and the employer bears the responsibility to restore the employee to the same or equivalent position as soon as possible.

**Employee Eligibility Hours of Service Requirement, Calculation of Leave, and Recordkeeping Relating to Airline Flight Crew Employees:**

**2008 Regulations:** Not applicable – added under 2013 Final Rule.

**2013 Regulations:** Special Rules Applicable to Airline Flight Crew Employees.

Hours of service requirement. The hours of service criteria will be met if during the previous 12-month period the airline flight crew employee has worked or been paid for not less than 60% of the applicable monthly guarantee and has worked or been paid for not less than 504 hours (not including commute time, vacation, sick, or medical leave).

Calculation of leave. An eligible airline flight crew employee is entitled to 72 days for one or more of the FMLA-qualifying reasons other than military caregiver leave and 156 days for military caregiver leave. Employers must account for FMLA leave for intermittent or reduced schedule leave for airline flight crew employees in an increment no greater than one day.
Recordkeeping requirements. Employers of airline flight crew employees must maintain certain records, including any records or documents that specify the applicable monthly guarantee for each category of employee to whom the guarantee applies, including any relevant collective bargaining agreements or employer policy documents that establish the applicable monthly guarantee; as well as records of hours scheduled.

Updated Model Notices:

It is important to note that as part of the final rule regulations, DOL updated a number of model notices as noted below. In addition, the DOL provided a number of fact sheets regarding the final rule to implement the statutory amendments to the FMLA.

Notice of Eligibility and Rights & Responsibilities
http://www.dol.gov/whd/forms/WH-381.pdf

Certification for Qualifying Exigency For Military Family Leave

Certification for Serious Injury or Illness of a Current Servicemember - for Military Family Leave

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave
http://www.dol.gov/whd/forms/wh385V.pdf

Employee Rights and Responsibilities under the Family and Medical Leave Act

For a copy of the Final Rule as published in the February 6, 2013 Federal Register, please click on the link provided below:

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