

Proposed Revisions to FMLA Regulations Issued

January 31, 2012

The Department of Labor (DOL) has issued proposed Regulations to implement the 2009 statutory amendments to the Family and Medical Leave Act (FMLA). Since Congress amended the FMLA in January 2008 and the DOL issued a comprehensive set of revised Regulations in November 2008, Congress has amended the statute two more times. Until now, however, the DOL has not revised the Regulations to reflect the most recent statutory changes.

The summary below highlights some of the more noteworthy proposed changes.

Proposed Changes Affecting the Military Provisions

On October 28, 2009, as part of the National Defense Authorization Act for Fiscal Year 2010, Congress amended the FMLA to expand the military family leave provisions. The proposed Regulations implementing the amendment:

- >> reflect that “qualifying exigency” leave has been expanded to include family members of service members on active duty in the Regular Armed Forces when deployed to a foreign country, including deployment to “international waters” and areas outside of the United States, the District of Columbia, or any Territory or possession of the U.S.;
- >> extend the amount of time an employee may take as “qualifying exigency” leave for “rest and recuperation” from five days to a maximum of 15 days;
- >> explain that the employer may require an employee requesting “qualifying exigency” leave for the first time to provide a copy of the military member’s covered active duty orders or other similar documentation issued by the military, and the dates of the covered active duty service;
- >> reflect that “military caregiver” leave is available for family members to care for certain veterans of the armed forces with a serious injury or illness incurred in the line of duty who are receiving medical treatment, recuperation, or therapy if the veteran was a member of the armed forces at any time during the five years before the treatment, recuperation, or therapy;
- >> reflect that a covered “serious injury or illness” for active military members and veterans includes conditions that existed prior to the beginning of the member’s active duty but were aggravated by service in the line of duty while on active duty;
- >> provide three alternative definitions of a covered “serious injury or illness” for a veteran and invite comments on each; and
- >> change existing FMLA forms and posters to reflect the recent statutory amendments and add a brand new certification form for a “serious injury or illness” of a covered veteran.

Proposed Changes Affecting Airline Crew Employees

On December 21, 2009, Congress amended the FMLA as part of the Airline Flight Crew Technical Corrections Act to create a special eligibility provision for airline flight crew employees. The

proposed Regulations implementing this amendment:

>> change the eligibility requirements under 29 C.F.R. § 825.110 to reflect that an airline flight crew employee will meet the hours-of-service rule if she, during the previous 12 months: (1) has worked or been paid for not less than 60% of the applicable total monthly guarantee, which is determined by the employer's policies or an applicable collective bargaining agreement, and (2) has worked or been paid for not less than 504 hours, not including personal commute time or time spent on vacation or sick or medical leave; and

>> add language explaining that the employer bears the burden to show that an airline crew employee has not met the hours-of-service requirement where the employer has not maintained accurate time records.

Other Proposed Changes

Other noteworthy proposed changes to the Regulations include:

>> providing further guidance on how to calculate intermittent and reduced-schedule leave, including clarification that if an employer uses different increments to account for different types of leave, the employer must use the smallest of the increments to account for FMLA leave usage;

>> reminding employers to comply with the recordkeeping requirements of the Genetic Information Non-Discrimination Act if FMLA-related records contain "genetic information;"

>> moving the "definitions" section of the Regulations from § 825.800 to § 825.102; and

>> removing the optional-use forms from the Appendices in an effort to reduce confusion with subsequent versions posted on the DOL's website, which will continue to house sample forms and posters.

The DOL's Notice of Proposed Rulemaking contains many other proposed changes to the FMLA Regulations. See document [here](#). If you have questions about the proposed changes and how they might affect your workplace, please contact your Miller Canfield Employment + Labor attorney or the authors.