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Department of Labor Issues New Regulation Expanding FMLA Rights

On February 6, 2013, the U.S. Department of Labor (“DOL”) published a Final Rule implementing certain changes to the Family and Medical Leave Act (“FMLA”). The Final Rule expands FMLA coverage for qualifying veterans, extends exigency leave for military members, and creates a special hours of service requirement to bring certain airline personnel within the FMLA’s eligibility criteria. The Final Rule takes effect on March 8, 2013.

The key provisions are:

- Expanded coverage to include caregivers of qualifying veterans discharged or released within five years of the need for caregiver leave;
- Allows any approved healthcare provider to certify a service member’s injury or illness rather than restricting certification to DOD, VA or TRICARE providers;
- Amends the definition of serious injury or illness of a covered veteran and provides four qualifying alternatives;
- Extends qualifying exigency leave to eligible employees with family members in any branch of the Armed Forces;
- Increases the amount of qualifying military exigency leave from five to 15 calendar days;
- Modifies the work hour threshold for airline flight crews to account for the special way flight crew hours are counted.

The FMLA requires covered employers to provide unpaid leave to qualifying employees for certain family and health related issues. The Final Rule expands coverage to individuals who provide care to a veteran within five years of the date

they were discharged from service provided the veteran was not dishonorably discharged. Previously, only employees related to current service members could qualify for extended leave to care for the service member.

The Final Rule expands the definition of a serious injury or illness to include four alternatives, only one of which must be satisfied for coverage. The four alternatives are:

1. A continuation of a serious injury or illness that was incurred or aggravated when the veteran was a member of the Armed Forces, rendering the service member unable to perform his or her duties;
2. A physical or mental condition for which the veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating ("VASRD") of 50 percent or higher, if based on the specific condition;
3. A physical or mental condition that substantially impairs the veteran's ability to secure a gainful occupation as a result of disability related to military service; or
4. An injury, including psychological injury, on the basis of which the veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

The Final Rule also extends qualifying exigency leave to eligible employees who have family members in any branch of the Armed Forces. Previously, exigency leave was limited to eligible employees with family members in the National Guard and Reserves. Exigency leave allows family members extra time to handle the exigencies involved with foreign deployment, such as financial, legal, and childcare arrangements, and also provides bonding time for military members on rest and recuperation leave. The maximum amount of time an employee may take under this type of leave also will increase from five to 15 calendar days.

Due to these changes, Thompson Coburn recommends that you review your current employee handbooks and/or policies to ensure continued compliance with the FMLA. Should you have questions or need assistance revising your current policies, please contact your Thompson Coburn attorney or a member of our Labor and Employment Group.

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