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DOL Proposes New FMLA Regulations on Military Family Leave

Proposed rules impact exigency leave and military caregiver leave and include clarifications on increments of intermittent leave.

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On January 31, the U.S. Department of Labor (DOL) made public proposed Family and Medical Leave Act (FMLA) regulations that attempt to align existing regulations with two statutory amendments passed in 2009. The DOL's Notice of Proposed Rulemaking (NPRM) addresses the coverage of military caregiver and exigency leaves and revamps eligibility requirements for certain airline industry employees. It also proposes changes to other FMLA regulations, although it does not contain the kind of groundbreaking regulatory changes issued in 2008. Nevertheless, the proposed changes do contain important clarifications to existing law that, if finalized, will impact employers.

Background on FMLA Amendments

As most employers are now well aware, the FMLA was amended in January 2008 to provide two types of military family leave for FMLA-eligible employees:

- "Exigency leave": A 12-week entitlement for eligible family members of National Guard and Reserves servicemembers to deal with exigencies related to a call to active duty.
- "Military caregiver leave": A 26-week entitlement for eligible family members to care for seriously ill or injured servicemembers of the regular Armed Forces, National Guard, and Reserves.

Less than a year later, Congress once again amended the FMLA. Through the National Defense Authorization Act for Fiscal Year 2010 (FY 2010 NDAA), P.L. No. 111-84, Congress expanded both types of military family leave by doing the following:

- Expanding the FMLA's military caregiver leave entitlement to include veterans with serious injuries or illnesses who are receiving medical treatment, recuperation, or therapy if the veterans were members of the Armed Forces at any time during the period of five years preceding the date of the medical treatment, recuperation, or therapy. Veterans had not been covered under existing law.

- Expanding the exigency leave entitlement to include family members of the regular Armed Forces deployed to a foreign country who were not entitled to exigency leave under existing law.[1]
- Extending the availability of military caregiver leave for current members of the Armed Forces to include a preexisting serious injury or illness that was aggravated by active duty service.

FY 2010 NDAA did not include an effective date, so these changes were presumed to be effective on October 28, 2009. The DOL, however, has now taken the position that employers are not required to provide employees with military caregiver leave to care for a veteran until the DOL defines, through regulation, a qualifying serious injury or illness of a veteran. Thus, according to the DOL, until the regulations are finalized, any time provided voluntarily by employers under this provision cannot count to reduce an employee's FMLA entitlement. Because the statute did not have a delayed effective date for this provision, however, it is not clear whether a court would agree with this approach.

Later in 2009, Congress also passed the Airline Flight Crew Technical Corrections Act (AFCTCA), Public Law 111-119, to provide an alternate eligibility requirement for airline flight crew employees.

Now, more than two years after the passage of the 2009 amendments, the DOL has issued its NPRM to promulgate rules related to the FY 2010 NDAA and AFCTCA. The public comment period on these proposed rules will close 60 days after the NPRM is officially published in the *Federal Register*.

A summary of the key proposals follow.

Proposals Relating to Qualifying Exigency Leave

Definition of Active Duty
§ 825.126(a)

The DOL proposes important amendments that help clarify what kind of service qualifies for exigency leave under the FMLA. Specifically, the proposal would replace the existing definition of "active duty" with two new definitions: "covered active duty" as it applies to the Regular Armed Forces and "covered active duty" as it applies to the Reserves. The DOL believes that this change will "more accurately reflect the fact that there are limitations on the types of active duty that can give rise to qualifying exigency leave."

The proposed definition of "covered active duty" as it relates to the Regular Armed Forces comes as no surprise, given the mandate of the FY 2010 NDAA. Simply put, a member of the Regular Armed Forces meets the definition of "covered active duty" when deployed with the Armed Forces in a foreign country.

The proposed definition of "covered active duty" as it relates to Reserve members, however, is a bit more nuanced. Proposed Section 825.126(a)(2) defines "covered active duty or call to covered active duty" status for a member of the Reserve components as duty under a call or order to active duty during the deployment of the member to a foreign country under a federal call or order to active duty in support

1. The scope of this provision was actually narrowed for members of the National Guard and Reserves, because prior to the FY 2010 NDAA amendments, there was no requirement that Reserve components be deployed to a foreign country.

of a contingency operation. While the FY 2010 NDAA struck the term "contingency operations" from the FMLA, the DOL takes the position that it will continue to require members of the Reserve components to be called to duty in support of a contingency operation in order for their family members to be entitled to qualifying exigency.

That means that, if the proposal is adopted, employers would need to offer exigency leave only to those Reserve members who are (1) called to duty in support of a contingency operation when that call is (2) in a foreign country.

Exigency Leave for Childcare and School Activities
§ 825.126(a)(3)

The current regulations allow eligible employees to take qualifying exigency leave to arrange childcare or attend certain school activities for a military member's son or daughter. The proposed regulations would place new limits on this type of leave. Specifically, if the proposal becomes effective, the military member must be the spouse, son, daughter, or parent of the employee requesting leave in order for the employee to qualify for the leave under the DOL's proposed amendment to the regulation. The child in question could be "the military member's biological, adopted, or foster child, stepchild, legal ward, or child for whom the military member stands in loco parentis, who is either under age 18 or age 18 or older and incapable of self-care because of a mental or physical disability at the time that FMLA leave is to commence."

For example, the employee may be the mother of the military member and may need qualifying exigency childcare and school activities leave for the military member's child. Under this proposal, the child for whom childcare leave is sought need not be a child of the employee requesting leave.

Exigency Leave for Rest and Recuperation
§ 825.126(a)(6)

Current regulations allow an eligible employee to take up to five days of leave to spend time with a military member on rest and recuperation leave during a period of deployment. The DOL proposes to expand the maximum duration of rest and recuperation qualifying exigency leave from five to 15 days, noting that the leave remains limited to the actual amount of time granted to the military member.

The proposal also clarifies that employers may request a copy of the member's rest and recuperation leave orders or other military documentation to certify the need for leave.

Proposals Relating to Military Caregiver Leave

Certification Provisions for Caregiver Leave
§ 825.310

The current regulations limit the type of healthcare providers authorized to certify a serious injury or illness for military caregiver leave to providers affiliated with the Department of Defense (DOD) (e.g., a Department of Veterans Affairs (VA) or DOD-TRICARE provider). The proposed regulations would eliminate this distinction and would allow any healthcare provider that is authorized under Section 825.125 to certify a serious health condition under the FMLA to also certify a serious injury or illness under the military caregiver provisions.

Because of this change, the DOL also proposes to remove the prohibition on second and third opinions on certifications of military caregiver leaves—at least as it relates to non-DOD/VA providers. That is, the DOL proposes in Section 825.310(d) to provide that second and third opinions are not permitted when the certification has been completed by one of the types of DOD/VA authorized healthcare providers identified in Section 825.310(a)(1)-(4), but second and third opinions are permitted when the certification has been completed by a healthcare provider that is not one of the types identified in Section 825.310(a)(1)-(4).

Definition of Covered Veteran for Caregiver Leave
§ 825.127

Since the current regulations do not define "covered servicemember" with regard to veterans, the DOL plans to define "covered veteran" as an individual who was 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 the covered veteran.

That is, a veteran will be considered a covered veteran under FMLA if he or she was a member of the Armed Forces within the five-year period immediately preceding the date the requested leave is to begin. If the leave commences within the five-year period, the employee may continue leave for the applicable "single 12-month period," even if it extends beyond the five-year period. This interpretation may exclude veterans of previous conflicts (Gulf War veterans) and may exclude certain veterans of the War in Afghanistan and Operation Iraqi Freedom, depending on the veteran's discharge date and the date the eligible employee's leave is to begin.

Definition of Serious Injury or Illness
§ 825.127

In the NPRM, for both current members of the Armed Forces and covered veterans, a serious injury or illness that existed before the beginning of the military member's active duty and was aggravated by serving in the line of duty on active duty includes both conditions that were noted at the time of entrance into active service and conditions that the military was unaware of at the time of entrance into active service but that are later determined to have existed at that time. A preexisting injury or illness will generally be considered to have been aggravated by service in the line of duty on active duty where there is an increase in the severity of such injury or illness during service, unless there is a specific finding that the increase in severity is due to the natural progression of the injury or illness.

In addition, and because the FY 2010 NDAA requires the DOL to define a qualifying serious injury or illness for a veteran, the DOL proposes a new Section 825.127(c)(2) that would define serious injury or illness for a covered veteran with three alternative definitions set out in paragraphs (c)(2)(i), (c)(2)(ii), and (c)(2)(iii).

- **Definition 1:** Proposed Section 825.127(c)(2)(i) defines a serious injury or illness of a covered veteran as a serious injury or illness of a current servicemember, as defined in Section 825.127(c)(1), that continues after the servicemember becomes a veteran. Thus, if a veteran suffered a serious injury or illness when he or she was an active member of the Armed Forces and that same injury or illness continues after the member leaves the Armed Forces and becomes a veteran, the injury or illness will continue to qualify as a serious injury or illness warranting military caregiver leave.

- **Definition 2:** Proposed Section 825.127(c)(2)(ii) defines a serious injury or illness for a covered veteran as a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50% or higher and such VASRD rating is based, in whole or part, on the condition precipitating the need for caregiver leave. The DOL's review indicates that a VASRD disability rating of 50% or higher encompasses disabilities or conditions such as amputations, severe burns, post traumatic stress syndrome, and severe traumatic brain injuries. However, the DOL notes that there are injuries that do not qualify as creating a total disability under the VASRD system that will qualify as a serious injury or illness for military caregiver leave. For example, burns resulting in distortion or disfigurement (*see* 38 C.F.R. § 4.118) or psychological disorders resulting from stressful events (*see* 38 C.F.R. § 4.129) occurring in the line of duty on active duty may not result in a VASRD rating of 60% or higher, but nonetheless may be severe enough to substantially impair a veteran's ability to work and therefore should be considered qualifying injuries or illnesses. The DOL is particularly concerned that military caregiver leave be available to family members of veterans suffering from, or receiving treatment for, such injuries or illnesses, which may include continuing or follow-up treatment for burns, including skin grafts or other surgeries, and amputations, including prosthetic fittings, occupational therapy, and similar care.
- **Definition 3:** Proposed Section 825.127(c)(2)(iii) is the third alternative definition of a serious injury or illness for a covered veteran; it covers injuries and illnesses that are not technically within the definitions proposed in paragraph (c)(2)(i) or (ii), but are of similar severity. The DOL proposes to define a serious injury or illness for a covered veteran in the third alternative as a physical or mental condition that either substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a service-connected disability, or would do so absent treatment. This proposed definition is intended to replicate the VASRD 50% disability rating standard under paragraph (c)(2)(ii) for situations in which the veteran does not have a service-related disability rating from the VA. The DOL expects that, when making determinations of serious injury or illness under this proposed definition, private healthcare providers will do so in the same way they make similar determinations for Social Security Disability claims and Workers' Compensation claims. The DOL stresses that this definition is meant to comprehensively encompass traumatic brain injuries, post traumatic stress disorder, and other such conditions that may not manifest until sometime after the member has become a veteran.

Additionally, the DOL seeks comments on whether it should make a rule that veterans who qualify for enrollment in VA's Program of Comprehensive Assistance for Family Caregivers automatically meet the requirement of having a serious injury or illness.

Proposals Affecting Airline Flight Crews

Effective December 21, 2009, the AFCTCA provides that an airline flight crew employee will meet the hours of service eligibility requirement if he or she has worked or been paid for not less than 60% of the applicable total monthly guarantee (or its equivalent) and has worked or been paid for not less than 504 hours (not including personal commute time or time spent on vacation, medical, or sick leave) during the previous 12 months. Airline flight crew employees continue to be subject to the FMLA's other eligibility requirements.

The DOL proposal includes provisions to align existing regulations with the passage of the AFCTCA. The proposal also does the following:

- **Defines monthly guarantees for airline employees and "line holders" (e.g., flight crew employees who are not on reserve status).** For airline employees who are on reserve status, the applicable monthly guarantee means the number of hours for which an employer has agreed to pay the employee for any given month. For line holders, the applicable monthly guarantee is the minimum number of hours for which an employer has agreed to schedule such employee for any given month.
- **Defines how to calculate "hours worked" and "hours paid."** Airline flight crew employees may become eligible under the FMLA (as amended by the AFCTCA) if they have either the required number of "hours worked" or "hours paid." The DOL proposes to base the number of hours that an airline flight crew employee has worked on the employee's duty hours during the previous 12-month period. Hours paid, according to the DOL, are routinely tracked by most airlines' payroll systems.
- **Adds recordkeeping requirements for employers of airline flight crews.** The requirements include all the records required of other employers under the FMLA, plus any records or documents that specify the applicable monthly guarantee for each type 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, in order to be able to apply the leave calculation principles contained in proposed Section 825.205(d).

Other Proposed Changes Universal to the FMLA

Increments of Intermittent FMLA Leave
§ 825.205

The current Section 825.205(a) defines the minimum increment of FMLA leave to be used when taken intermittently or on a reduced schedule as an increment no greater than the shortest period of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. The DOL intends to emphasize that an employee's entitlement should not be reduced beyond the actual leave taken and therefore proposes to add language to paragraph (a)(1) stating that an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. However, the DOL underscores that this principle remains subject to the rest of the rule, including the increment of leave rule. Thus, this change in the rules does not necessitate action for any employer already complying with the shortest increment rule.

The DOL notes that if an employee elects to substitute paid leave for the unpaid leave time offered under the FMLA, and the employer has a policy of offering paid leave in larger increments of time than unpaid leave, the employer can then require the employee to use more FMLA leave than necessary for the purpose of the leave in order to get the benefit of wage replacement. However, the employee can always elect to take the shorter increment of leave without pay to avoid drawing down the FMLA entitlement.

The DOL further proposes to clarify that the additions to Section 825.205(a) underscore the rule that if an employer chooses to waive its increment of leave policy in order to return an employee to work at the

beginning of a shift, the employer is likewise choosing to waive further deductions from the FMLA entitlement period. In other words, if the employee is working, the time cannot count against FMLA time, no matter what the smallest increment of leave may be.

The DOL also proposes to remove the language in Section 825.205(a) allowing for varying increments at different times of the day or shift in favor of the more general principle of using the employer's shortest increment of any type of leave at any time

Currently, Section 825.205(a)(2) includes a provision on physical impossibility, which provides that where it is physically impossible for an employee to commence or end work midway through a shift, the entire period that the employee is forced to be absent is counted against the employee's FMLA leave entitlement. The DOL proposes to do either of the following:

- Delete this provision.
- Add language emphasizing that it is an employer's responsibility to restore an employee to his or her same or equivalent position at the end of any FMLA leave as soon as possible.

If the DOL retains the provision as modified, it offers the following example: If after three hours of FMLA leave use it was physically possible to restore a flight crew employee to another flight, the employer would be required to do so. If, however, no other flight is available to which the employee could be assigned, or no other equivalent work is available, restoration could be delayed and the employee's FMLA entitlement reduced for the entire period the employee is forced to be absent.

The DOL also proposes to clarify that the rule stated in Section 825.205(c), which addresses when overtime hours that are not worked may be counted as FMLA leave, applies to all FMLA qualifying reasons, not just serious health conditions.

The DOL further proposes to add Section 825.205(d), which will provide a methodology for calculating leave for airline flight crew employees.

Recordkeeping Requirements
§ 825.300

The DOL proposes adding a sentence to Section 825.300 reminding employers of their obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). To the extent that records and documents created for FMLA purposes contain "family medical history" or "genetic information" as defined in the GINA, employers must maintain such records in accordance with the confidentiality requirements of Title II of GINA. The DOL notes that GINA permits genetic information, including family medical history, obtained by the employer in FMLA records and documents to be disclosed consistent with the requirements of the FMLA.

Conclusion

With most employers having taken the position that the veteran's provisions went into effect when the FMLA was amended in 2009, little action is called for at this time. However, employers should take this opportunity to review their FMLA policy, and should be aware that the DOL may take issue if a qualifying exigency for a veteran is counted against an employee's FMLA entitlement such that the employee is later restricted in taking another leave. Further, employers should consider whether they

wish to provide comments to the DOL during the comment period. Beyond that, most employers need only "watch and wait" until the DOL finalizes this rulemaking process to make tweaks to existing policies. Nevertheless, the DOL's NPRM serves as a good reminder to employers to ensure that their FMLA policies incorporate the 2009 statutory changes.

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