FMLA Insights
Guidance & Solutions for Employers

DOL Proposes FMLA Regulatory Changes Regarding Military Family Leave, Flight Crew Eligibility and How Employers Calculate FMLA Leave

By Jeff Nowak January 31, 2012

On January 30, 2012, the U.S. Department of Labor announced proposed changes to Family and Medical Leave Act regulations (pdf) in three specific areas: 1) Military Family Leave; 2) Flight Crew FMLA Eligibility; and 3) the manner in which employers calculate increments of FMLA leave. Rules for the first two have been expected for some time, but the proposed rule on calculating increments of FMLA leave is a bit unexpected and essentially seeks to revert back to pre-2009 regulations on this issue.

The proposed regulations also comment on the DOL's model FMLA forms as well as an employer's obligations under the Genetic Information Non-Discrimination Act (GINA). So, read on...

Military Family Leave

Caregiver Leave

Under the National Defense Authorization Act of 2010, eligible employees can take up to 26 weeks of FMLA leave ("caregiver leave") in a single 12-month period to care for a covered service member or veteran with a serious injury or illness. Under the NDAA and the proposed regulations, caregiver leave now can be taken up to five years after the service member leaves the military and for an injury or illness that results from a condition that predates the individual's active duty but that was exacerbated by the military service. Prior to the NDAA, caregiver leave was available only to employees caring for current service members, not veterans.

Interestingly, the DOL is proposing that caregiver medical certification also may be completed by health care providers who are not affiliated with the military or Veterans Administration. The same would apply to second and third opinions, so long as the initial certification was conducted by a HCP not affiliated with the military or Vets Administrations. Under the current regulations, second and third opinions are not allowed for caregiver leave. The DOL has specifically sought feedback on this issue, suggesting that it is open to even further changes to the proposed rule.

Exigency Leave

The NDAA and the proposed regulations also allow employees to take up to 12 weeks of FMLA leave for a "qualifying exigency" due to a family member's call to active duty in a foreign country. Qualifying

exigencies naturally encompass a wide range of activities associated with a service member's deployment, such as attending to legal, financial, family, child care, school and other matters.

Prior to the NDAA's enactment, exigency leave only was available to family members of Reserve and National Guard members, and not regular service members. The latter group specifically was excluded in the original statute. At that time, the DOL rationalized that the lives of regular service members were not disrupted in the same manner as Reserve and National Guard members; hence, no exigency leave for "regular" freedom fighters. However, the NDAA and proposed regulations reverse that position and now make clear: FMLA leave is available to family members of regular armed service members, as well as family members of Reserve and National Guard members.

Finally, the proposed regulations seek to expand from five to 15 days the amount of FMLA leave an employee can take to be reunited with a service member during "rest and recuperation" periods.

Airline Flight Crew Eligibility

The Airline Flight Crew Technical Corrections Act (AFCTCA) ensures that more employees are eligible for FMLA leave. Enacted in 2009, AFCTCA closed a loophole in the “hours worked” eligibility requirements for airline pilots and flight attendants whose unique schedules often left them short of the hours required to qualify them for FMLA leave. Under the FMLA, employees must work at least 1,250 hours in the previous 12-month period, which equates to 60 percent of a typical 40-hour workweek.

AFCTCA applies the same concept to airline flight crews. In short, the Act provides that the hours flight crew employees work or for which they are paid – not just those hours working in flight – count as hours of service for purposes of FMLA eligibility. Under AFCTCA and the proposed regulations, an airline flight crew employee (as defined by FAA regulations) will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months. This calculation would not include personal commute time, or time spent on vacation, medical or sick leave.

The rules proposed by the DOL provide specific instruction on how to implement this technical correction and apply the standards for flight crew benefits.

Calculation of Increments of FMLA Leave

Smallest Increments of Leave

In an interesting add on, the DOL also proposes to change the manner in which employers calculate increments of leave. Before the regulations were changed in January 2009, employers were required to track intermittent or reduced schedule FMLA leave in the smallest increments used by their payroll systems to account for such leave, so long as it was one hour or less. Thus, if an employer tracked

employee time worked in 6-minute increments, the FMLA regulations required employers to also track FMLA leave in the same manner.

In a move that was heralded at the time by the employer community, the DOL amended the regulations in 2009 to allow employers to track FMLA leave time in the same manner they track other forms of leave. For instance, if the employer required employees to exhaust sick or vacation leave in one-hour increments, they also could require employees to exhaust FMLA leave in one-hour increments so long as the employee wished to use paid leave for the absence.

In short, the DOL proposes that we revert back to the pre-2009 regulations, reasoning 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." Thus, the DOL favors reverting back to the principle that employers must track FMLA leave in the shortest increments of leave at any time.

Physical Impossibility Provisions

Finally, the proposed regulations also seek to roll back a 2009 regulatory change that allowed employers to delay reinstatement where it is physically impossible for the employee to return to his or her job in the middle of their shift. For example, if a flight attendant required two hours of intermittent leave because of a migraine headache, but also missed his scheduled flight as a result, the airline could delay returning him to work on that day because it was physically impossible for him to join his flight (since it already took off!). As a result, the employer could designate a larger block of time as FMLA leave in that instance.

Not any more. According to the DOL's FAQs on the proposed rules, the DOL “is concerned that some employers may have misinterpreted the concept of physical impossibility to apply to circumstances where it is merely inconvenient to reinstate the employee mid-shift.” Therefore, the proposed rule would apply the physical impossibility provision "only the most limited circumstances and only where it is, in fact, physically impossible to allow the employee to leave his or her shift early or to restore the employee to his or her same position or to an equivalent position at the time the employee no longer needs FMLA leave."

An Employer's GINA Obligations

The DOL also proposes adding a standard record keeping provision that would confirm employers' obligations to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). The DOL reminds employers that, "to the extent that records and documents created for FMLA purposes contain 'family medical history' or 'genetic information' as defined in GINA, employers must maintain such records in accordance with [GINA's] confidentiality requirements."

Oddly, the DOL does not propose an obligation on employers to include any language on GINA protections within the medical certification form. For a quick review of best practices in doing so, see our post from earlier this month on the issue.

The DOL's FMLA Forms are gone too?

Sniff, sniff. The DOL also intends to whack from the Appendices all of the required FMLA model forms and notices. Why? We haven't a clue, since we know the federal government's fondess for paper. If the rule is approved, these forms and notices would only be available on the DOL's wage and hour website.

Insights for Employers

1. First, take a deep breath and digest. Nothing is final just yet! We now have 60 days (from the time these proposed rules are published in the Federal Register, which is any moment now) to comment on the proposed regulations. When the proposed rules are officially published, we will be able to submit comments here.
2. In addition to the newly proposed regulations (see link above), take a minute to review the DOL's FAQs and Fact Sheet #1 and Fact Sheet #2 on the proposed regulations.
3. After a deep breath (see No. 1 above), bombard your employment attorney with all kinds of exceedingly appropriate questions: Will we need to change our FMLA policy and forms? (Yes!) Will we need to train our managers on these changes? (Yes!) Will the FMLA continue to be an administrative nightmare? (Yes!) But will we still live to see tomorrow? (An unreserved Yes!)