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CLIENT ALERT

U.S. DEPARTMENT OF LABOR ISSUES FINAL RULE EXPANDING PROTECTIONS FOR MILITARY FAMILIES AND AIRLINE FLIGHT CREWS.

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On February 5, 2013, the U.S. Department of Labor, Wage and Hour Division ("WHD") issued a Final Rule implementing two expansions of the Family Medical Leave Act ("FMLA") protections granted to covered employees. The first expansion to the FMLA provides families of eligible veterans with the same job-protected FMLA leave currently available to families of military servicemembers and it also enables more military families to take leave for activities that arise when a servicemember is deployed. The second expansion modifies existing rules so that airline personnel and flight crews are better able to make use of the FMLA's protections.

The major provisions of the Final Rule applicable to eligible veterans and military servicemembers include:

- Defining a covered veteran, consistent with statutory limitations, as limited to veterans discharged or released under conditions other than dishonorable Five (5) years prior to the date the employee's military caregiver leave begins.
- Creating a flexible definition for serious injury or illness of a covered veteran, that includes Four (4) alternatives only one of which must be met.
- Permitting eligible employees to obtain certification of a servicemember's serious injury or illness (both current servicemembers and veterans) from any health care provider as defined in the FMLA regulations, not only those affiliated with the DOD, VA, or TRICARE networks (as was permitted under the 2009 regulations).
- Extending qualifying exigency leave to eligible employees who are family members of members of the Regular Armed Forces and adding the requirement for all military members to be deployed to a foreign country in order to be on "covered active duty" under the FMLA.
- Increasing the amount of time an employee may take for qualifying exigency leave related to the military member's Rest and Recuperation (R&R) leave from Five (5) days to up to Fifteen (15) days.
- Creating an additional qualifying exigency leave category for parental care leave to provide care necessitated by the covered active duty of the military member for the military member's parent who is incapable of self-care.

Employers will need to make sure that they comply with all of the changes indicated above. However, the biggest changes will apply to the definition of "Veteran" which has now been revised to include both those who serve and those discharged in the prior Five (5) years, whereas, the FMLA previously applied to those who were actively serving.

The second area of major change for employers concerning Veterans is a change to the definition of "Serious Injury or Illness" for a Veteran. The Final Rule defines a serious injury or illness of a covered veteran as: (i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; (ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of Fifty Percent (50%) or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; (iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or (iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

Finally, the changes implemented by the Final Rule with respect to airline personnel and flight crews were enacted with the intent to clarify the application of the FMLA to these categories of employees by creating a unique method of calculation of leave for airline flight crew employees, and establishing that FMLA leave for intermittent or reduced schedule leave usage, taken by airline flight crew employees, must be accounted for using an increment no greater than one day. Prior to the Final Rule, many flight crews did not meet FMLA eligibility criteria due to the unique way in which such employee's hours are counted.

To account for the changes implemented by the Final Rule, the WHD has issued a new FMLA poster which covered employers are required to display and keep displayed. The new poster (WHP Publication Number WH 1420) has a revision date of February 2013 and is effective March 8, 2013.

For any questions regarding the implementation of the provisions of the Final Rule, John R. LaBar and the attorneys at Henry & McCord are available to consult with employers regarding your obligations.

This publication is a service to our clients and friends. It is designed to give only general information on the topic actually covered and is not intended to be a comprehensive summary of recent developments in the law.

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