

CLIENT ALERT: Department of Labor Issues New FMLA Regulations

On February 6, 2013, the United States Department of Labor (“DOL”) issued its final rules implementing expansions made to the Family and Medical Leave Act (“FMLA”) by the National Defense Authorization Act for Fiscal Year 2010 (“FY 2010 NDAA”) and the Airline Flight Crew Technical Corrections Act (“AFCTCA”). The FY 2010 NDAA increased the FMLA rights of families of military personnel, and the AFCTCA established a special hours of service eligibility requirement for airline flight crew members. The DOL’s final rules address and incorporate these amendments. In addition, the final rules clarify changes made to prior regulations which will impact all employers covered by the FMLA, and the DOL has published an updated FMLA poster for employers to post, and new forms. These changes go into effect on March 8, 2013.

Military Caregiver Leave

The FY 2010 NDAA expanded the 26 work-week military caregiver leave, and the recently issued final rules incorporate these changes. The definition of “covered service member” now includes covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness incurred or aggravated in the line of duty on active duty that manifested before or after the veteran left active duty. The serious injury or illness must fall into one of four categories defined in the rules. A “covered veteran” is an individual who was discharged or released under conditions other than dishonorably within the five years preceding the date that the covered employee first takes FMLA leave to care for the veteran. If, however, the veteran was discharged or released prior to March 8, 2013, the time period between October 28, 2009 and March 8, 2013 is excluded from the five year calculation.

The new regulations also expand military caregiver leave by providing that current service members’ pre-existing injuries that are aggravated in the line of duty on active duty are included in the definition of serious injury or illness. Additionally, the medical certification for military caregiver leave can now be completed by health care providers that are not associated with the military. If an employee chooses to go this route, the employer can require a second or third opinion.

Qualifying Exigency Leave

The FMLA previously provided for 12 weeks of exigency leave for certain family members of individuals serving in the National Guard or Reserves, only. The DOL’s final regulations expand this leave to family members of individuals serving in the Regular Armed Forces. However, there is a new requirement that the military member (whether serving in the National Guard, Reserves, or the Regular Armed Forces) must be deployed to a foreign country.

The new regulations also create a new category for exigency leave, which allows a qualified employee to take leave to care for a military member’s parent who is incapable of self-care necessitated by the member’s deployment or impending deployment. However, this leave may only be taken for certain

activities such as arranging for alternate care for the parent or attending certain meetings at the care facility.

Another additional change concerns the duration of a leave by a qualified employee to be with a military member on Rest and Recuperation leave. The available leave time for this reason has been increased from 5 to 15 days. In order to meet the certification requirements for such leave an employee must provide a copy of the military member's Rest and Recuperation leave orders or other documents issued by the military that set forth the dates of the leave.

Airline Flight Crew Eligibility Requirements

The final regulations have implemented a special provision for calculating the hours of service requirement for eligible airline flight crew employees (crewmembers and flight attendants). In order for an airline flight crew employee to meet the hours of service requirement, during the 12 months prior to leave he or she must have worked or been paid for not less than 60% of the applicable total monthly guarantee and have worked or been paid for not less than 504 hours. The FMLA leave entitlement is 72 days for airline flight crew employees, except when it is for military caregiver leave in which case the airline flight crew employee is entitled to 156 days. If the airline flight crew employee takes FMLA intermittent or reduced work week leave, the employer must account for that leave in an increment no greater than one day.

The final regulations also provide additional recordkeeping requirements for covered employers of airline flight crew employees. These employers must maintain documents or records that contain the applicable monthly guarantee for each category of employee for which it applies, and copies of any relevant collective bargaining agreements or employer policies that establish the applicable monthly guarantee. These employers must also maintain records of hours scheduled.

Forms and Employer Policies

Employers that are covered by the FMLA are required to post a notice explaining the law and its procedures. With the issuance of the final FMLA rules, the DOL has issued a new poster that covered employers should utilize to meet this requirement. The DOL also has issued new and updated forms that employers can use for notices and certifications. The poster and forms can be found at www.dol.gov or by contacting your MBJ attorney. Pursuant to FMLA regulations, if an employer has written policies, leave related materials, and/or handbooks, these written materials should be updated to include the new information contained in the DOL's recently issued FMLA poster.

Recordkeeping

The final rules update the recordkeeping requirements of the FMLA to specify that an employer must comply with the confidentiality requirements of the Genetic Information Non-Discrimination Act.

Clarifications Made by the Final Rules

The final rules clarify aspects of the FMLA concerning intermittent leave for all employees covered by

the FMLA. An employer cannot make an employee take more time than is necessary to address the need for leave. FMLA leave may only be counted against an employee's FMLA entitlement for leave taken, and not for time that is worked for the employer. In addition, an employer must track FMLA leave in the smallest increment used for other leaves, with a maximum increment of one hour.

There are also clarifications concerning the physical impossibility regulation, which provides that if it is physically impossible for an employee to start or end work in the middle of a shift, the entire period the employee must be absent is counted against the employee's entitlement to FMLA leave. The rules clarify that this provision is only to be applied in the most limited circumstances and that as soon as possible the employer must return the employee to the same or equivalent position.

The final rules also clarify the DOL's regulations that went into effect in January 2009 that the protections afforded by the Uniformed Services Employment and Reemployment Act of 1994 ("USERRA") extends to all military members (Regular Armed Forces, National Guard, and Reserves) and that all periods of time away from work that is spent on or due to USERRA covered service must be counted in determining an employee's eligibility for FMLA leave.

Employers are encouraged to contact their MBJ attorney with any questions or for assistance in updating their policies.

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