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## Employer Compliance Alert

### DOL Publishes Final Regulations Addressing Military Family Leave Provisions

Date: 02.08.2013

The U.S. Department of Labor (DOL) has published final regulations clarifying several amendments to the Family and Medical Leave Act (FMLA) that expand the law’s military family leave provisions. The agency’s final rule, released on the FMLA’s 20-year anniversary, also implements changes enacted through the Airline Flight Crew Technical Corrections Act and contains other modifications to the prior regulations.

Following a 2008 law that extended FMLA-qualifying leave to certain eligible employees for reasons arising from a family member’s service in the military, the National Defense Act Authorization Act for FY 2010 (NDAA) further expanded the leave entitlements available to relatives of covered servicemembers. The DOL’s final rule, published in the Federal Register on February 6, 2013, provides additional guidance regarding these and other changes.

#### Qualifying Exigency Leave

Prior to the 2010 NDAA’s enactment, eligible employees could take FMLA leave for qualifying exigencies because the employee’s spouse, son, daughter or parent was on active duty or had been notified of an impending call or order to active duty in support of a contingency operation. Among other things, the 2010 NDAA extended qualifying exigency leave to family members of servicemembers in the Regular Armed Forces, as the law previously only provided such leave to family members of servicemembers in the National Guard and Reserves. The 2010 law also added the requirement that the servicemember (National Guard, Reserves and Regular Armed Services) be deployed to a foreign country in order for qualifying exigency leave to be utilized by a covered family member.

The DOL’s final regulations also add a new category of qualifying exigency leave. Eligible employees are now entitled to “parental care leave” to care for a military member’s parent, which in many cases will be an in-law, who is incapable of self-care when the care is necessitated by the

member's covered active duty. Further, under prior law, employees could take up to five days of qualifying exigency leave to spend time with a military member on Rest and Recuperation; the new regulations extend that time to 15 days.

### **Military Caregiver Leave**

Under the 2008 amendments to the FMLA establishing military caregiver leave law, certain family members were entitled to 26 workweeks of FMLA leave in a single 12-month period to care for a covered servicemember with a serious injury or illness incurred in the line of duty on active duty for which the servicemember was undergoing medical treatment, recuperation, or therapy. The NDAA revised the definition of "covered servicemember" to add veterans, provided they were a member of the Armed Forces at any time during the five-year period preceding the date of the medical treatment, recuperation, or therapy. Importantly, the final regulations state that the period between their effective date and enactment of the NDAA on October 28, 2009, does not count for purposes of determining the five-year period for covered veteran status.

The regulations also clarify that, for a veteran, an injury or illness that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty may constitute a "serious injury or illness" in certain situations. The final regulations similarly expand the definition of a "serious injury or illness" for current servicemembers, but without the limitations applicable to veterans.

### **Certifications**

The final regulations clarify that, with respect to military leave, FMLA certifications can be signed by any health care provider who is authorized to certify a FMLA medical certification form for other FMLA-qualifying reasons.

The DOL also has replaced the previous prototype FMLA medical certification and notice forms with a note that such forms should be obtained directly from the DOL website or a local office. Thus, in the future, the DOL will not need to issue new regulations each time it changes the required certification forms.

### **Airline Flight Crew Employees**

The DOL's regulations provide additional guidance for employers in the airline industry on how to calculate FMLA leave for airline flight crew employees. FMLA regulations previously contained no provision regarding the calculation of FMLA leave specifically for airline flight crew employees. This had caused airline employers significant problems in calculating the number of days in a workweek for airline flight crew employees for FMLA purposes, as well as in accounting for FMLA leave taken on an intermittent or reduced work schedule basis.

The DOL's Proposed Rule was nearly universally opposed by both employer and employee representatives. They said it was too complicated to administer due to the unique scheduling practices in the airline industry, thereby causing confusion and leading to inequitable deductions of FMLA leave. The DOL agreed with many commenters. The DOL's solution, however, creates an entirely different system for calculating FMLA leave for airline flight crew employees than for other employees.

The final regulations address two important aspects of calculating FMLA leave for airline flight crew employees. First, the final regulations establish a uniform FMLA leave entitlement of 72 days for

airline flight crew employees. The DOL chose 72 days because it corresponds to the maximum six-day workweek an airline flight crew employee can work under Federal Aviation Administration regulations. Second, the final regulations provide that an employer must account for an airline flight crew employee's FMLA intermittent or reduced workweek leave in an increment no greater than one day, instead of the usual maximum increment of one hour. Other regulatory changes were made to implement the special eligibility rules applicable to airline flight crew employees regarding actual hours worked.

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The Department of Labor's final regulations take effect on March 8, 2013. Joe Lynett, Partner in the Disability, Leave and Health Management Practice Group at Jackson Lewis observed, "All employers covered under the FMLA should review their FMLA policies to confirm that their descriptions of military family leave entitlements are consistent with these new regulations. The new rules are particularly important, however, for airlines that must now adopt an entirely new method for calculating FMLA workweeks for flight crews."

If you have questions about the DOL's new regulations, please contact your local UBA Partner Firm.

**Jackson Lewis LLP**

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