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Final Rule on the Family and Medical Leave Act to Take Effect March 8, 2013

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The final rule on the Family and Medical Leave Act, which is based upon the proposed rule issued last February (as we reported in a prior Alert), will take effect March 8, 2013. This new rule will replace the prior (2008) version which took effect in 2009.

Primarily, this new rule's purpose is to implement FMLA amendments from two other federal acts: the National Defense Authorization Act for Fiscal Year 2010 ("NDAA") and the Airline Flight Crew Technical Corrections Act ("AFCTCA").

The NDAA was originally enacted on October 28, 2009 and is most commonly known as the act which amended the FMLA to provide employees with family members in the military to take a leave of absence for the purpose of providing care to a recently-returned veteran or, in the case of a "qualifying exigency" (loosely related to the family member's deployment to a foreign country), as well as to attend military events, among other reasons. The new rule also implements the AFCTCA which was enacted on December 21, 2009 to establish special exceptions to the minimum amount of time pilots and/or flight crew members must work to meet FMLA eligibility requirements.

CHANGES TO "MILITARY" LEAVE

Exigency Leave. This new rule expands the eligibility of "exigency" leave to employees with a spouse, child or parent in the Regular Armed Forces to cover leave provided to employees with family members called up to serve from the National Guard and/or Reserves. The new rule also adds a broader type of "qualifying exigency," which includes leave for the purpose of caring for a parent on active duty or involved in a call or impending call to active duty in support of a contingency operation. Moreover, the new rule

would expand the amount of leave available during "Rest and Recuperation" ("R&R") leave from five (5) days to fifteen (15) days.

Military Caregiver Leave. The new rule expands the reasons for which an employee may take military caregiver leave in cases where the employee's family member(s) are recent veterans with a serious injury or illness. Under this new rule, the employee is eligible for leave if the family member is a veteran discharged within a five (5) year period prior to the date the employee first takes the leave. A "serious injury or illness" will now also include: (a) a Veterans-related disability rating of 50% or more; (b) a disability that substantially affects the veteran's ability to obtain gainful employment; and/or (c) injuries which form the basis for enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers. Additionally, the term "serious injury or illness" now includes preexisting injuries aggravated by military service.

Calculating FMLA Leave Eligibility Under USERRA.

The new rule clarifies that the exceptions to the eligibility requirements for members of the military apply to all types of military service, including service in the regular Armed Forces, the National Guard, and the Reserves, and to members of airline flight crews. For example, in calculating whether an employee met the 12-month employment eligibility requirement, the employer was typically not required to consider all periods of employment if they were interrupted by a break of seven years or more. An exception exists, however, for interruptions (pursuant to USERRA) because of military service. These interruptions are not counted against the employee.

CHANGES FOR AIRLINE FLIGHT CREWS

The new rule also implements the AFCTCA which

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was enacted on December 21, 2009 to establish special exceptions to the minimum amount of time pilots and/or flight crew members must work to meet FMLA eligibility requirements. Under this new rule, an airline flight crew member or airline pilot could be eligible for FMLA leave 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.

CHANGES FOR ALL EMPLOYEES

Intermittent Leave. The new rule provides that employers must use the smallest timekeeping increment possible for tracking intermittent leave and specifically may not use any increment larger than one hour.

New Forms. The DOL has revised the FMLA forms that it maintains on its website and has removed the model forms from the regulations so that it would be easier for the Department to modify or amend the model forms. These forms are WH-380-E through WH-385-V. Of course, Employers may continue to use their own forms so long as they do not request more information than that which is contained on the government form.

Certifications. The new rule provides that, in cases of R&R leave, an employee can provide a copy of the R&R leave orders for the military member. As for military caregiver leave, the new rule provides that the employee can provide documentation from any health care provider or the enrollment paperwork to the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

The Bottom Line. Employers should update their FMLA policies in accordance with this new rule, replace their FMLA posters, and make sure that all FMLA Fact Sheets are up to date. Additionally, Employers should obtain the new DOL notification and certification forms. Moreover, the DOL has issued a “side-by-side” comparison of the new and old rules on its website. Employers should always consult with counsel as to any questions regarding leave. ■

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