

# Issue Summary

## Final FMLA Rules on Qualifying Exigency Leave, Military Caregiver Leave and Airline Flight Crews

March 2013

### Provisions

#### Qualifying Exigency Leave and Military Caregiver Leave

Eligible employees may take FMLA leave for a qualifying exigency, in which a military member (active duty, Reserve or National Guard) is on covered active duty or called to covered active duty status. The military member must be the employee's spouse, son, daughter or parent. Covered active duty applies when the military member is deployed to duty in a foreign country.

#### *Leave Because of a Qualifying Exigency*

There are nine categories of qualifying exigency leave for which employees may take FMLA leave:

- Short-notice deployment
- Military events and related activities
- Child care and school activities
- Financial and legal arrangements
- Counseling
- Rest and recuperation
- Post-deployment activities
- Parental care
- Additional activities that employer and employee agree should qualify as an exigency.

These final rules add parental care as a category to supplement the eight categories first established in 2008. Additional changes and clarifications were made to some of the other categories of qualifying exigency leave.

The final rule retains the current seven calendar-day period for *short-notice deployment* qualifying exigency leave. Employees will, however, remain eligible to take qualifying leave for any of the other defined exigencies after the seven-day short-notice deployment period.

For *child care and school activities*, the final rule states that the FMLA definition of "son or daughter" is applicable: a biological, adopted or foster child, a stepchild, a legal ward or child of a person standing *in loco parentis* who is either under 18 years old or older than 18 years old and incapable of self-care due to a mental or physical disability.

### Background

The Department of Labor's (DOL's) Wage and Hour Division published the final rule on amendments to the Family and Medical Leave Act (FMLA) on Feb. 6, 2013. This final rule implements military caregiver and qualifying exigency leave provisions made by the National Defense Authorization Act for Fiscal Year 2010, leave calculation guidelines for airline flight crew employees made by the Airline Flight Crew Technical Corrections Act of 2009, and makes clarifications to the rules for calculating intermittent FMLA leave, the physical impossibility provision, leave calculation, overtime, and compliance with the Genetic Information Nondiscrimination Act (GINA).

## Final Rules on FMLA (cont.)

Employees who take qualifying exigency leave for *rest and recuperation* now may do so for a maximum of 15 days, equal to the number of days granted to the service member. Prior to the publication of these final rules, the limit on rest and recuperation qualifying exigency leave was five days. Rest and recuperation made available to service members varies by service and position, but it also is capped at 15 days. Employees also may choose to take rest and recuperation qualifying exigency leave as a continuous block of time or intermittently, but it must be taken during the period of time that the service member is on rest and recuperation orders.

The DOL also added attendance at funeral services to the definition of *post-deployment activities*. Employees may take qualifying exigency leave to address issues arising from the death of a service member.

Employees may now take qualifying exigency leave for *parental care* that may be used for:

- Arranging for alternative care for the parent of a military member when the parent is incapable of self-care
- Providing care for the parent on an urgent and immediate need basis
- Admitting or transferring a parent to a care facility
- Attending meetings with staff at a care facility.

The definition of self-care is adopted from the determination of whether a son or daughter older than 18 years qualifies for FMLA protections: The parent requires active assistance or supervision to provide daily self-care in three or more of the defined “activities of daily living” or “instrumental activities of daily living.”

### *Certification Requirements for Leave Taken Because of a Qualifying Exigency*

When employees request qualifying exigency leave for the first time, employers may require that the employee provide a copy of the service member’s active duty orders or other similar documentation. This information only needs to be presented to employers once, but additional documentation can be required if the same service member is called under different active duty orders, or another service member who is the employee’s spouse, son, daughter or parent and receives separate orders.

Employers also may require that employees taking qualifying exigency leave provide any of the following certifications:

- A statement of facts supporting the need for qualifying exigency leave
- Approximate start date of leave
- Approximate beginning and end dates for a continuous absence

- An estimated frequency and duration of intermittent leave
- Appropriate contact information for a third party the employee may be meeting with
- Certification from the military on a service member’s rest and recuperation orders.

If an employee provides sufficient certification that supports the need for FMLA qualifying exigency leave, the employer may not request any additional information. Employers may contact a third party that the employee is meeting with for verification purposes, and employers also may contact the Department of Defense to request verification of the service member’s active duty status. In both cases, the employee’s permission is not required, but employers may not request additional information.

[Form WH-384](#), an optional-use form for employees to meet FMLA’s certification requirements, was modified to reflect the updates made by these final rules.

### *Leave to Care for a Covered Service Member with a Serious Injury or Illness (Military Caregiver Leave)*

Eligible employees may take up to 26 weeks of FMLA leave in a single 12-month period to care for a covered service member with a serious illness or injury. The employee must be the spouse, son, daughter, parent or next of kin of a covered service member. A covered service member can be:

- A current member of the armed forces, guard or reserves, with a serious injury or illness suffered in the line of duty and is undergoing medical treatment, recuperation, therapy, in outpatient status or on the temporary disability retired list.
- A covered veteran who was a member of the armed forces, guard or reserve and undergoing medical treatment, recuperation or therapy for a serious injury or illness, and was discharged or released from the military under conditions other than dishonorable at any time during the five-year period prior to the first date the employee takes FMLA leave.

The final rules define a serious injury or illness for a current service member as an injury or illness that was incurred in the line of duty while serving on active duty, or that existed before the beginning of active duty and was aggravated by service in active duty. For a covered veteran, a serious injury or illness is defined in the same way, but one of four alternate definitions of injury or illness must be met:

- A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a service member that rendered the service member unable to perform the duties of their office, grade, rank or rating
- A physical or mental condition for which the covered veteran has received a VA Service-Related Disability Rating (VASRD) of 50% or greater
- A physical or mental condition that substantially impairs the veteran’s ability to secure or follow a substantially gainful

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occupation by reason of a service-connected disability or would do so absent treatment.

- A physical or psychological injury on the basis of which the covered veteran has enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

The single 12-month period in which an employee is entitled to take up to 26 workweeks of military caregiver leave begins on the first day of FMLA leave and ends one year after that date. Any unused portion of the 26 workweeks in a 12-month period is forfeited.

The military caregiver leave is to be applied on a per-covered service member and per-injury basis, so an employee may qualify for more than one period of 26 workweeks in FMLA leave over several years or an overlapping period, but the employee may not qualify for more than 26 workweeks in a given 12-month period. An eligible employee can take more than one 26-workweek period if a covered service member develops a subsequent serious injury or illness separate from the first serious injury or illness, or for a different covered service member who meets the status of the employee's spouse, son, daughter, parent or next of kin.

Eligible employees are entitled to a combined total of 26 workweeks in leave during a 12-month period for any FMLA-qualifying reason, as long as they are entitled to no more than 12 workweeks of leave for the FMLA-qualifying reasons except military caregiver leave. As an example, the DOL indicates that an eligible employee may take during a 12-month period 16 workweeks of military caregiver leave and 10 workweeks to care for a newborn child. However, the employee may not claim a reduced amount of military caregiver leave and apply it to additional leave to care for a newborn child beyond 12 workweeks.

For employee leave that qualifies as both military caregiver leave and care for a family member with a serious health condition, the employer must designate the leave as military caregiver leave. Employers may not count them concurrently against the 12-workweek entitlement for care of a family member as well as the 26-workweek entitlement to care for a covered service member.

A husband and wife eligible for FMLA leave for any qualifying reason who are employed by the same covered employer may be limited to a combined total of 26 workweeks of leave during a 12-month period.

### *Certification for Leave Taken to Care for a Covered Service Member (Military Caregiver Leave)*

An employer may request certification regarding the covered service member's status from an authorized health-care provider, including a Department of Defense or Veterans Administration health-care provider, a TRICARE network authorized private health-care provider, or a non-network TRICARE-authorized

private health-care provider. The final rules added a new source that employers may contact – health-care providers unaffiliated with the Department of Defense.

The authorized health-care provider may rely on military-related determinations from an authorized Veterans Administration or Department of Defense representative if the health-care provider is unable to make military-related determinations. Employers may ask that the health-care provider produce the following information:

- Appropriate contact information of the health-care provider, the type of medical practice medical specialty.
- Whether the covered service member's injury or illness was incurred in the line of duty and, if not, whether the injury or illness existed before the service member began active duty and was aggravated by service in the line of duty.
- The approximate date on which the serious injury or illness commenced or was aggravated and its probable duration.
- A statement of appropriate medical facts regarding the covered service member's health condition for which leave is requested.
- Information sufficient to establish that the covered service member is in need of care, whether the service member will need care for a continuous period of time, estimate of time needed for treatment and recovery, and an estimated beginning and end dates for this period of time.
- Medical necessity for a request to take intermittent or reduced schedule leave and an estimate of the treatment schedule for appointments.
- Medical necessity for a covered service member to have periodic care for a condition other than planned medical treatments in which an employee requests intermittent leave, and an estimate of the frequency and duration of periodic care.

Employers are permitted to request documentation confirming that a covered service member is a veteran, his/her date of separation from the military, and whether that separation was other than dishonorable. The final rule specifies that an eligible employee may provide a copy of the covered service member's DD Form 214 (Report of Separation) to satisfy the employer request.

To clarify certification requirements, the DOL modified existing form [WH-385](#) to provide information for employees requesting military caregiver leave for current service members, and created form [WH-385-V](#) for employees requesting caregiver leave for covered veterans. All other related FMLA optional use forms (WH-380, WH-381, WH-382, and WH-384) are updated to reflect the final rules and have been removed from the text of the regulations themselves.

Employers may not pursue second and third opinions regarding a covered service member's medical certifications when the certification has been completed by a Department of Defense

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or Veterans Administration health-care provider, or a network or non-network TRICARE-authorized private health-care provider. Second or third opinions are, however, permitted if the private health-care provider is not affiliated with the Department of Defense, Veterans Administration or TRICARE program. The costs associated with obtaining a second or third opinion are the employer's responsibility, and the employee will remain provisionally entitled to FMLA leave while those additional opinions are being sought.

Employees may provide certification of a covered veteran's enrollment in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers as sufficient certification that the veteran has a serious injury or illness. An employer may seek authentication and clarification of this documentation, but may not seek a second or third opinion.

### *Effective Date*

The DOL considers that the qualifying exigency leave provision was effective Oct. 28, 2009, when the National Defense Authorization Act for Fiscal Year 2010 was enacted.

Military caregiver leave provisions are effective as of March 8, 2013. Any leave taken by an employee to care for a veteran that was provided by an employer before the effective date will not count against the employee's FMLA entitlement in the future. For a veteran who was a member of the armed forces and was discharged or released under conditions other than dishonorable prior to Feb. 6, 2013, the period between Oct. 28, 2009, and Feb. 6, 2013, will not count toward the determination of the five-year period for covered veteran status.

### **Airline Flight Crew Technical Corrections Act**

Airline flight crew employees are subject to special rules for determining eligibility and calculation of FMLA leave, with corresponding special recordkeeping provisions. Crew employees and their employers are still subject to all other FMLA requirements.

### *Hours of Service Requirement*

Airline flight crew employees are eligible to take FMLA leave if they have worked or been paid for no less than 60% of the applicable monthly guarantee, and for a minimum of 504 hours during the previous 12-month period. The definition of "applicable monthly guarantee" varies depending on whether an employee is on reserve or nonreserve status. For nonreserve flight crew employees, the applicable monthly guarantee is the number of hours that the employer has agreed to schedule the employee in any given month. For reserve flight crew employees, the applicable monthly guarantee is measured by the minimum number of hours for which the employer has agreed to pay the employee in any given month.

The regulations use the term "duty hours" to define the number of hours an employee has worked for the purpose of establishing the hours of service requirement. Duty hours are used broadly within the airline industry to include both the hours spent in flight, as determined by the FAA, as well as additional time worked before or after the flight, as determined by employer policy or a collective bargaining agreement.

A flight crew employee returning from service covered by the Uniformed Services Employment and Reemployment Rights Act ([USERRA](#)) must be credited with the hours of service that would have been performed by the employee. Employers may use the employee's pre-service work schedule to calculate the hours that would have been worked.

Final rules place the burden of proving employee ineligibility on the employer if the employer has not maintained accurate records of the employee's hours worked. This is consistent with application of the FMLA to other, non-flight crew employees.

### *Calculation of Leave and Physical Impossibility*

The final rules set a uniform entitlement for eligible airline flight crew employees to take FMLA leave, expressed as a number of days. Eligible employees may take 72 days of FMLA leave and 156 days of military caregiver leave. These figures are based on the airline flight crew's uniform schedule of six work days per week and conform to the statutory 12-workweek entitlement for FMLA leave and 26-workweek entitlement for military caregiver leave. Final rules also indicate that the employers may define the minimum increment of intermittent FMLA leave as one day, even if the employee is absent for a matter of hours.

A provision was inserted into the FMLA's physical impossibility language to reflect the workplace realities of the airline, railroad and related industries in which it is physically impossible for employees to leave work early or begin work late. A member of an airline flight crew who may only need two hours of FMLA leave within the middle of a shift necessarily needs to miss the connecting flights immediately preceding and following. So for those employees, the entire period the employee is forced to be absent is designated as FMLA leave and counts towards the employee's overall FMLA entitlement.

### *Recordkeeping Requirements*

Employers of eligible airline flight crew must maintain records of hours scheduled, applicable monthly guaranteed hours, and any relevant collective bargaining agreements or employer policy documents that establish such guarantees. Employers will not be required to submit such documents to the Secretary of Labor unless requested.

## Final Rules on FMLA (cont.)

### *Effective Date*

The DOL concluded that the effective date of the hours of service eligibility was on the date of enactment of the Airline Flight Crew Technical Corrections Act, Dec. 21, 2009.

### **Revisions Concerning Minimum Increment of Intermittent Leave, Physical Impossibility, Calculation of Leave, Overtime and Genetic Information**

#### *Minimum Increment*

The DOL added three clarifying changes to more clearly explain intermittent leave requirements:

- An employer may not require an employee to take more leave time than necessary.
- An illustrative example: When an employer uses different increments to account for different types of leave, the employer must use the smallest of the increments to account for FMLA leave.
- An employer may only reduce an employee's FMLA entitlement by the amount of leave actually taken, excluding any time after the employee has returned to work.

The DOL, after initially proposing deletion, retained and modified the varying increments rule. Employers may not apply a varying increment of leave only to FMLA leave, but must use the varying increment for all types of employee leave. The DOL intends for this section to serve as a clarification of the existing varying increment rule and not a substantive change to its interpretation.

#### *Physical Impossibility*

After likewise considering deletion of the physical impossibility section, the DOL chose to retain it with added clarifications. The DOL clarified that the intent of the physical impossibility rule is to be applied in limited circumstances and to apply solely to situations in which it is truly physically impossible for the employee to return to work. The rules also state that it is an employer's responsibility to restore an employee to their same or equivalent position at the end of any FMLA leave as soon as possible.

#### *Calculation of Leave*

This section includes a clarifying change to reinforce that the employee's total available entitlement is 12 workweeks under FMLA, or 26 workweeks if the employee is claiming military caregiver leave.

If an employer has made a permanent or long-term change in the employee's schedule for reasons other than FMLA and before the employee provides notice of the need for FMLA leave, the hours the employee has worked under the new schedule will be used for calculating FMLA leave.

For employees whose weekly schedule varies to the point where the employer is uncertain how many hours the employee would have worked during FMLA leave, employers should use a weekly average of the hours scheduled over the 12 months prior to the beginning of the leave period.

### *Overtime*

The final rule modified the FMLA's section on when overtime hours not worked by an employee may be counted as FMLA leave. The term "FMLA-qualifying reason" replaces the term "serious health condition" to reflect that overtime hours missed by an employee may be due to any FMLA-qualifying reason.

### *Recordkeeping Requirements Under the Genetic Information Nondiscrimination Act (GINA)*

Employers must maintain FMLA records in accordance with the confidentiality requirements of Title II of [GINA](#), since records and documents for FMLA leave may contain a family medical history or other genetic information.

### *Effective Date*

The rules go into effect as of March 8, 2013.

## Practitioner Impact

As noted, the final regulations clarify several items from the existing provisions as well as add new items. While practitioners need to be aware of all of them, a few items to highlight are:

- Both the definition of covered service member and covered veteran, along with the definitions of a "serious injury or illness" for these categories, are expanded.
- A new qualifying exigency leave category for parental care leave is added.
- The amount of time an eligible employee may take for rest and recuperation qualifying exigency leave, along with the list of required information for certification, is expanded. Rest and recuperation qualifying exigency leave for employees is now a maximum of 15 calendar days, equal to the amount of leave granted to the service member.
- Added attending funeral services as a qualified reason under the post-deployment activities category of qualified exigency leave.

One particular item to note is the military caregiver leave expansion to include eligible employees with a family member who is a recent veteran. With this expansion comes an expanded definition of serious injury or illness to include pre-existing conditions, and a broad interpretation of the definition of veteran to include those discharged or released within the previous five years. The period between Oct. 28, 2009, and March 8, 2013, does not count toward the determination of the five-year period for covered veteran status. Non-military health-care providers may now certify these forms of leaves, potentially making it easier for employees to qualify for such leaves.

The clarification of use and measurement of intermittent leave still allows employers flexibility in the application and tracking of increments of time. Clarifying language is added noting that the physical impossibility provision is to be applied in only the most limited circumstances.

## Final Rules on FMLA (cont.)

Finally, there are several updates to forms, such as template certification forms. For example, there are now two distinct military caregiver leave forms which will make clear the information that must be provided for employees to care for current service members and covered veterans. Certain optional-use forms and posters are removed from the regulations and no longer available in the appendices.

It would be best for practitioners to become knowledgeable of the final regulations and understand how they may impact current processes, procedures, recordkeeping, documentation and communications for their organizations.