



HEALTH CARE REFORM – SPECIAL EDITION

FMLA Final Rules: Action Required by March 8, 2013

LEGISLATIVE BRIEF

March 6, 2013

On February 6, 2013, the Department of Labor (DOL) published Final Rules implementing statutory amendments to the Family Medical Leave Act (FMLA). The Final Rules expand the military family leave provisions and incorporate a special eligibility provision for airline flight crew employees, as well as making some additional regulatory changes. The 424-page Final Rules require covered employers to comply by March 8, 2013, including the posting of the newly updated FMLA poster. A side-by-side comparison of current and final regulations is available [here](#).

Background

As you may recall, Congress amended FMLA in 2008 to contain leave rights for family members associated with a call to service for members of the National Guard or Military Reservists. That law provides up to 12 weeks of “Exigency Leave” as well as 26 weeks of unpaid leave for a caregiver to provide care for a family member who was injured while on active military duty.

In 2009, President Obama signed the 2010 National Defense Authorization Act (NDAA) into law which included an additional expansion of family leave rights under FMLA. At that time, the NDAA’s FMLA provisions contained no specific effective date and most practitioners advised employers to treat the expansion as being effective immediately. With the release of the Final Rules, we now have clarity and additional guidance on the NDAA’s changes to FMLA.

Final Rule

Covered Active Duty

Eligible employees may take FMLA leave for a qualifying exigency while a military member is on covered active duty, call to covered active duty status, or has been notified of an impending call or order to covered active duty. “Active duty” is defined by the Final Rules as duty during deployment to a foreign country.

Exigency Leave

The Final Rules implement the NDAA's expansion of exigency Leave rights to family-member employees to care for the urgent needs of active duty service members, not just reservists. Family members include the employee's spouse, son, daughter, or parent. For purposes of qualifying exigency leave, an employee's son or daughter on covered active duty refers to a child of any age. The Final Rules include a new exigency category for leave taken to care for parents:

- An employee may take leave to care for a military member's parent who is incapable of self-care, such as arranging for alternative care, providing care on a non-routine, urgent, immediate need basis, admitting or transferring a parent to a new care facility, and attending certain meetings with staff at a care facility, such as meetings with hospice or social service providers. The employee taking this leave does not need to be related to the military member's parent. However, (1) the military member must be the parent, spouse, son or daughter of the employee taking FMLA leave, and (2) the parent must be the parent of the military member.

The other categories of qualifying exigencies as defined prior to the Final Rule include:

- **Short notice deployment (i.e., deployment within seven or less days of notice).** For a period of up to seven days from the day the military member receives notice of deployment, an employee may take leave to address any issue that arises from the deployment.
- **Attendance in military events and related activities.** Attending official ceremonies, programs, events and informational briefings, or family support or assistance programs sponsored by the military, military service organizations, or the American Red Cross related to deployment.
- **Child care and school activities.** Arranging for alternative childcare, providing childcare on a non-routine, urgent, immediate need basis, enrolling in or transferring a child to a new school or day care facility. The employee taking this leave does not need to be related to the military member's child.
- **Financial and legal arrangements.** Making or updating financial and legal arrangements to address a military member's absence while on covered active duty, including preparing and executing financial and healthcare powers of attorney, enrolling in the Defense Enrollment Eligibility Reporting System (DEERS), or obtaining military identification cards.
- **Counseling.** Attending counseling for the employee, the military member, or the child of the military member when the need for that counseling arises from the covered active duty of the military member and is provided by someone other than a health care provider.
- **Rest and Recuperation.** Taking up to 15 days of leave to spend time with a military member who is on short-term, temporary Rest and Recuperation leave during deployment. The Final Rules extended the amount of time available for this category of leave from 5 days to 15 calendar days.
- **Post-deployment activities.** Certain post-deployment activities within 90 days of the end of the military member's covered active duty, including attending arrival ceremonies, reintegration briefings and events, and other official ceremonies or programs sponsored by the military, and addressing issues arising from the death of a military member, including attending the funeral.
- Any other event that the employee and employer agree is a qualifying exigency.

Caregiver Leave

Military caregiver leave entitles an eligible employee who is the spouse, parent, son, daughter, or next of kin of a covered service member with a serious illness or injury to take up to a total of 26 workweeks of unpaid, job-protected leave during any single 12-month period to care for the service member. The

NDAA expanded the definition of covered service members to include veterans who are undergoing medical treatment, recuperation or therapy for serious injury or illness that occurred while on active duty any time during the five years preceding the date of treatment. The Final Rules add the following changes to caregiver leave:

- **Expands the definition of “serious injury or illness.”** The definition of “serious injury or illness” is revised to include injuries that pre-existed a service member’s active duty that were aggravated by service in the line of duty on active duty. The injury or illness may manifest itself either before or after the member became a veteran and must fit one of four categories of injuries/illnesses as defined by the Final Rules.
- **Five year period calculation.** The "five-year period" during which caregiver leave must begin for the care of a covered veteran will not exclude the period of time between the enactment of NDAA (October 28, 2009) and the effective date of the Final Rules (March 8, 2013). For veterans discharged after October 28, 2009, but before March 8, 2013, they will have five years beginning on March 8, 2013, within which the leave must begin. Note that while the leave must begin during the five-year period, it does not need to be completed within the five years.

[Updated FMLA Poster](#)

The DOL has released a newly revised FMLA poster which reflects the changes made by the NDAA and the Final Rules, including the broadened definition of a veteran to include those discharged within the past five years, the expanded definition of serious injury or illness, and a statement about special hours of service eligibility requirements applying to flight crew members. The DOL has also revised several of its [optional FMLA forms](#).

[Air Flight Crew Technical Corrections Act](#)

In 2009, Congress also passed additional legislation to clarify the hours of service requirements for FMLA rights for airline pilots and flight attendants. As you may know, FMLA generally requires employees to have worked for their employers a minimum of 12 months and for at least 1,250 hours during the previous 12-month period, as determined under the terms of the Fair Labor Standards Act (FLSA). Airlines pay pilots and flight attendants for being on mandatory standing as well as for flight time. The FLSA does not recognize “mandatory stand-by pay.” As a result, airline flight crews will be eligible for FMLA calculated on the basis that he/she had worked or been paid for 504 hours during the previous 12-month period.

[Action Plan for Covered Employers](#)

1. The Final Rules increase the leave options available to the families of service members. In light of these new regulations, covered employers (50 employees working within a 75 mile radius) should review their existing FMLA policies to ensure compliance with the Final Rules.
2. Amend plan documents to reflect the additional changes to FMLA promulgated by the Final Rules. I have prepared a [sample amendment](#) and [SMM](#) for use with our wraparound documents.
3. Replace the previously-posted FMLA poster with the DOL’s [updated version](#) no later than Friday, March 8, 2013.

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