

# Employment: DOL Issues Military Family Leave Rules

By Hope Eastman

In a notice published on February 15th in the Federal Register, the Department of Labor (DOL) finally issued proposed regulations to implement the 2009 statutory amendments to the Family and Medical Leave Act (FMLA). A number of the 2009 requirements are already in effect, but the DOL regulations both confirm and expand some of them. Employer policies need to be reviewed now, although some changes will not be mandatory until the final regulations are implemented.

In recent years, Congress has made changes several times to the military service portion of the FMLA. The intent of the changes was to expand the protections for those who serve or served in the military and their families. The original amendments to the FMLA provided for military caregiver leave and leave for families dealing with various exigencies that arose in connection with a family member's deployment. The most recent statutory changes included (1) extending FMLA military caregiver leave to care for veterans who were honorably discharged in the last five years, in addition to current service members, and (2) expanding the "qualifying exigency" leave provisions to cover members of the Regular Armed Forces as well as the Reserves and National Guard, but only in situations in which members are deployed to a foreign country (i.e., international waters and areas outside of the United States, D.C. or any territory or possession of the U.S.). It's interesting to note that the five-year limitation could exclude veterans of the War in Afghanistan and Operation Iraqi Freedom.

Although the expansion of the qualifying exigency leave is in effect now, the DOL takes the position that the requirement for employers to provide caregiver leave for veterans will not be in effect until there are final regulations that define "serious injury or illness." Pursuant to the 2009 amendment, the DOL has defined a qualifying serious injury or illness, but the regulations containing the definitions are not yet in effect.

Under the proposed regulation, a "serious injury or illness" includes illnesses and injuries that occur during military service. Also covered are conditions that existed before active duty, but were aggravated in the line of duty. For current service members, the serious illness or injury must "render the member medically unfit to perform the duties of the member's office, grade, rank or rating." For a veteran, the illness or injury must have manifested itself either before or after the member became a veteran and also:

- Rendered the member unfit to perform the duties of the member's office, grade, rank or rating; or
- Provided the basis for the member receiving a Department of Veterans Affairs Service-Related Disability Rating of 50% or higher; or
- Been a condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation.

Once the regulations are final, these definitions will apply to veterans as well as those on active duty, allowing caregivers leave for veterans who continue to suffer from the same illness or injury and will apply both to conditions that were noted at the time of entrance into military service and conditions the military was unaware of but are later determined to have existed at that time. "Aggravated" will mean an increase in the severity of such illness or injury during service, unless there is a specific finding that the increase in severity is due to the natural progression of the injury or illness.

The commentary on the regulations, of course, encourages the employer community to go ahead and provide the caregiver leave for those caring for veterans. The leave, however, would not be FMLA-protected and would not count against the employee's FMLA entitlement.

The proposed regulations were published in the Federal Register on February 15, 2012. The regulations seek comment on the proposed definitions from a variety of stakeholders, so whether the final regulations will change is still to be determined.

If you have any questions about the proposed changes and how they might affect your existing FMLA policies, please contact me or Jim Hammerschmidt.