

New Rules Extend FMLA Protections

By Jessica Summers

On Feb. 5, 2013, marking the 20th anniversary of the signing of the Family and Medical Leave Act (FMLA), the Department of Labor issued a long awaited final rule expanding FMLA protections for military members and their families and airline personnel. The new rule implements the expansion of the FMLA approved by Congress in the National Defense Authorization Act of 2010 and Airline Flight Crew Technical Corrections Act of 2009 (AFCTCA).

The new rule has significant implications for employers and FMLA eligible employees with a spouse, parent or child in the military.

Under the existing regulations, close family (spouse, child, and parent) of military members who are eligible for FMLA leave may take up to twelve weeks of leave per year to address certain exigencies arising out of the military member's deployment or call to active duty. The new rule alters the scope of who may take this leave by amending the definition of military members to include National Guard members and Reservists and adding the restriction that the deployment must be to a foreign country. The rule also expands the exigencies under which a military family member can take FMLA leave to include the need to care for a dependent parent of a deployed military member. Finally, the rule extends from five to fifteen the number of FMLA leave days that an eligible family member can take to be with a military member who is on Rest and Recuperation Leave.

The new rule also changes the existing regulations under which an FMLA-eligible employee is entitled to twenty-six weeks of leave to care for or assist a service member who is a spouse, parent, child, or next of kin dealing with serious injury or illness incurred in the line of duty. The rule amends the definition of service members to include veterans released (under conditions other than dishonorable discharge) within five years of the first day of the eligible employee's leave. The definition of serious injury or illness incurred in the line of duty is also expanded to include pre-existing injuries or illnesses aggravated in the line of duty. Finally, the rule articulates the circumstance under which a veteran's injury is considered to qualify as a serious illness or injury incurred in the line of duty.

The rule also presents changes to the types of certification and documents that an eligible employee may need to provide an employer to take either type of military related FMLA leave.

The new rule clarifies the interplay between the Uniformed Service Employment and Reemployment Rights Act (USERRA) and the FMLA.

Generally, in order to qualify for FMLA leave an employee, among other things, must have been employed for at least 1250 hours of service during the twelve-month period immediately preceding the leave. The new rule clarifies that absence from work due to USERRA-covered military service is included in determining an employee's eligibility for FMLA leave.

The new rule changes the FMLA eligibility requirement and leave entitlements for airline flight crew members and flight attendants.

The new rule replaces the 1250 hours of service requirement for FMLA eligibility for airline flight crew members and flight attendants. Under the rule, these employees' hours of service requirement for the purposes of FMLA eligibility will be met if the employee has worked or been paid for at least 60% of the applicable monthly guarantee and has worked or been paid for at least 503 hours (not including paid leave). Once they qualify for FMLA leave, these airline employees are entitled to 72 days of general FMLA leave and 156 days of leave to care for an injured service member (greater than the standard FMLA leave period).

The new rule also imposes requirements on the employers of airline flight crew members and flight attendants. The rule provides that if one of these employees uses FMLA leave to take a reduced or intermittent schedule the employer must account for this leave using increments no greater than one day. The rule also establishes recordkeeping requirements for these types of employers.