COLLINS LOUGHRAN & PELOQUIN, P.C.
Legal Counsel to Employers and Schools

320 Norwood Park South
Norwood, MA 02062
www.collinslabor.com
781.762.2229 (phone)
781.762.1803 (fax)

Department of Labor Issues New FMLA Regulations

On February 6, 2013, one day after the twentieth anniversary of the Family and Medical Leave Act (FMLA), the U.S. Department of Labor issued its Final Rule implementing the 2010 FMLA amendments. The final rule amends FMLA regulations regarding issues related to qualifying exigency and military caregiver leave and incorporates a special eligibility provision for airline flight crew employees. The new regulations, which take effect March 8, 2013, also clarify DOL's position concerning calculation of intermittent leave and remind employers of their obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA).

In addition to implementing the new regulations, the DOL made minor changes updating its forms and issued a new medical certification form specifically for military caregiver leave for veterans.

Overview

Since 1993, the FMLA has allowed eligible employees of covered employers to take unpaid, job-protected leave for up to 12 weeks per year to care for a new child, a sick relative or to recover from their own serious health condition. In 2008, the FMLA was amended to include two new categories of leave for military families – Qualifying Exigency Leave and Military Caregiver Leave. Qualifying Exigency Leave permits eligible employees to take up to 12 weeks of FMLA leave to handle exigencies related to a family member's active duty military service or call to active duty. Military Caregiver Leave extends from 12 to 26 weeks the amount of FMLA leave available to an eligible employee seeking time off to care for an ill or injured relative when the relative incurred their serious health condition in the line of active duty.

In 2010, the FMLA was again amended, expanding the military-related leave protections. The new regulations implement the 2010 statutory changes, increase and clarify the scope of Military Exigency Leave and extend Military Caregiver Leave.

New FMLA Regulations

Military Family Leave

1. Qualifying Exigency Leave
    a. Under the new regulations, FMLA qualifying exigency leave has been expanded to cover employees with family members in the regular Armed Forces. Previously exigency leave was only available to relatives of National Guard or Reservist members.
    b. The regulations clarify that qualifying exigency leave is only available if the military member is on active duty or on call to active duty in a foreign country.

c. The amount of time an eligible employee may take for "Rest and Recuperation" (R & R) qualifying exigency leave has been extended from 5 days to a maximum of 15 days. This leave may be taken intermittently and should correspond to the length of leave given the military member. Employers may verify that the leave taken corresponds with the leave indicated on the military member's recuperation orders.
d. Parental care, a new category of exigency leave, has been added to the existing categories of leave. Parental care allows leave to make arrangements for the care of the parent(s) of a military member who is incapable of self-care when such care is necessitated by the military member's covered active duty (for instance, when the servicemember usually provides this care but is no longer able to do so due to his/her call to active duty). Similar to the "child care" provisions concerning qualifying exigency leave, this new type of leave cannot be used to provide routine day-to-day care. It can only be used to "make arrangements for such care" – such as making arrangements for on-going care, helping to move the parent to a nursing home or assisted living, attending meetings with staff at a care facility or providing temporary care on an immediate basis during a transition period while regular care arrangements are being finalized.

2. Military Caregiver Leave
    a. The new regulations expand caregiver leave to include leave to care for covered veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness.
    b. The definition of a "covered veteran" for purposes of FMLA military caregiver leave has been limited to an individual who was discharged or released under conditions other than dishonorable in the five-year period prior to the date the employee's military caregiver leave is requested to begin.
    c. The definition of a "serious injury or illness of a current service member" has been expanded to include injuries or illnesses that existed before the beginning of the servicemember's active duty and which were aggravated by service in the line of duty.
    d. The definition of a "serious injury or illness of a covered veteran" is broad and flexible and means an injury or illness that was incurred or aggravated by the servicemember in the line of duty and manifested itself before or after the member became a veteran, and can be any of the following:
        i. A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank or rating; OR
        ii. A physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating (VASRD) of 50 percent or greater and such VASRD rating is based, in whole or in part, on the condition precipitating the need for caregiver leave; OR
        iii. A physical or mental condition that substantially impairs the veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service or would do so absent treatment;
        iv. An injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers.

e. The regulations also expand the list of acceptable health care providers who can complete a medical certification form related to a request for military caregiver leave. Previously, only health care providers who were affiliated with the Department of Defense (DOD) were authorized to provide medical certifications for caregiver leave. The certification may now be completed by any health care provider qualified to complete the traditional FMLA certifications under Section 825.125, as well as others who are affiliated with the DOD, the Veteran's Administration or TRICARE. In addition, an employer may now obtain second and third opinions where the initial certification was provided by a non-DOD health care provider.

Intermittent Leave

The new regulations also provide clarification with respect to intermittent leave. The 2008 regulations had been interpreted to allow employers to require that FMLA leave be taken in one-hour increments, even if smaller increments were used for other types of leave such as sick leave or vacation. Through the revised regulations, DOL has clarified that the minimum increment of FMLA leave is defined as no greater than the shortest increment of time that the employer uses to account for other forms of leave, provided that it is not greater than one hour. For example, if an employer allows sick leave in 15-minute increments and vacation leave in half-day increments, the employer must allow FMLA leave to be used intermittently in 15-minute increments. If an employer accounts for all forms of leave in half-day or day increments, FMLA may be used in one-hour increments. According to the DOL, the one-hour increment is intended to be the maximum increment employers can require employees to use.

Under the new regulations, an employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for leave. Additionally, an employer may only count FMLA leave that is actually taken by the employer and may not also include time spent working for the employer. For example, if an employer requires half-hour increments of leave and an employee arrives to work 15-minutes late due to intermittent FLMA leave, the employer must either not allow the employee to work during the remaining 15-minutes of the leave increment, or it can only count 15-minutes of the leave against his/her FMLA entitlement.

Where is it physically impossible for an employee to commence or end work midway through a shift, the "physical impossibility" rule may apply allowing the employer to count the full day of work against the employee. The regulations emphasize that the physical impossibility provision is to be applied "in the most limited circumstances, " such as when it is "physically impossible" for a flight attendant to get on the plan to perform his/her job if he/she must miss the first few hours of a shift due to an FMLA-covered situation.

Recordkeeping Requirements and FMLA Forms

The DOL has made very minor revisions to a number of the model forms, including the mandatory general notice poster, Notice of Rights to Employees Under the FMLA, which has been revised to reflect the changes resulting from the new regulations. Many of the model or optional use forms, which were revised and published in February, 2012, remain unchanged. A new medical certification form (WH-385-V) has been created specifically for veteran care leave.

The FMLA optional-use forms and poster were removed from the regulations and are no longer available in the appendices. This will allow DOL to make changes to the forms without going through

the formal rulemaking process. The forms will be available on the Wage and Hour Division website (www.dol.gov/whd).

In addition, the regulations include a reminder to employers of their obligation to comply with the confidentiality requirements of GINA to the extent that records and documents created for FMLA purposes contain family medical history or genetic information.

Airline Flight Crew FMLA Requirements

The new regulations also implement changes previously made by the 2009 Airline Flight Crew Technical Corrections Act amendments to the FMLA. This alert does not include a summary of the detailed provisions concerning airline flight crew, as they are not applicable to our clients.

Practice Pointers Employers

From a practical perspective, the new regulations simply reiterate legislative changes that have been in effect since the statutory amendments to the FMLA. As a result, many employers will have already updated and revised their policies. Regardless, prior to the March 8, 2013, effective date of the regulations, all employers covered by FMLA should review all FMLA policies, forms and posters to ensure they are current and consistent with the regulations. It is important to download and use the new forms, and ensure that an FMLA notice of rights or an FMLA policy is included in the packet of materials you give to newly hired employees.

Additionally, employers should take a more deliberate approach to requests for FMLA leave in the weeks ahead, consulting counsel as needed to ensure that your policies and procedures continue to hold up under the new regulations.

As always, those having any questions concerning these regulations, or any other FMLA or general labor and employment law topic would feel free to contact one of our attorneys at Collins, Loughran & Peloquin, P.C.

The above is provided for informational purposes only and does not constitute legal advice.