Advisory

MARCH 2013

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Department of Labor Issues New FMLA Regulations Expanding Leave for Military Families, Clarifying Intermittent Leave

The Department of Labor has issued a final rule, effective March 8, 2013, expanding the protections of the Family and Medical Leave Act of 1993 ("FMLA") for military family members, and clarifying the regulations on intermittent leave. The Federal FMLA entitles eligible employees of covered employers to take job-protected, unpaid leave, or to substitute appropriate accrued paid leave, for up to a total of 12 work weeks in a 12-month period for specified family and medical reasons. The National Defense Authorization Act of 2008 amended the FMLA to create two new leave entitlements: (1) military caregiver leave, and (2) qualifying exigency leave. Please visit http://www.wiggin.com/5967 to see our prior Advisory describing these 2008 amendments.

LEAVE FOR MILITARY FAMILIES

The rule expands the availability of FMLA leave for military families for activities that arise when a service member is on active duty. While this leave was previously only available to family members of reservists and members of the National Guard, family members of those serving in the regular armed forces are now eligible. An eligible employee whose spouse, parent, son, or daughter is on active duty with the regular armed forces, or has been notified of an impending call or order to active duty, may take FMLA leave for a qualifying exigency arising out of that active duty or call to duty. Under the new regulations, the term "covered active duty" requires deployment to a foreign country.

"Qualifying exigency" includes leave taken to:

- Address any issue arising from a short-notice deployment;
- Attend military events and related activities;
- Arrange for or provide childcare and school activities;
- Make or update financial or legal arrangements;
- Attend counseling;
- Spend time with the military member who is on Rest and Recuperation Leave, up to a maximum of fifteen days, taken continuously or intermittently;
- Attend post-deployment activities;
- Address issues arising from the death of the military member while on covered active duty status;
- Arrange for, or in some situations provide, alternative care for the parent of the military member who is incapable of self-care; and
- Address any other events which arise out of the military member's covered active duty that the employer and the employee agree shall qualify as an exigency.

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Department of Labor Issues New FMLA Regulations Expanding Leave for Military Families, Clarifying Intermittent Leave CONTINUED

Eligible employees may take up to 26 weeks of leave to care for current service members with a serious injury or illness. The final rule also expands this military caregiver leave in two significant ways. First, the caregiver may now take leave to care for a current service member with an injury or illness that existed before the beginning of the member's active duty and which was aggravated by service, as well as an injury or illness that occurred in the line of duty. Eligible employees may obtain certification of a service member's serious injury or illness from any health care provider as defined in the FMLA regulations, and not just from those affiliated with the Department of Defense or Veterans Affairs, or TRICARE networks.

Second, leave can be taken by family members of eligible military veterans in the same manner as leave currently available to families of active military service members. Therefore, an eligible employee may take FMLA leave to care for a veteran who was discharged or released under conditions other than dishonorable, and who is undergoing medical treatment, recuperation, or therapy for a serious illness or injury, which is defined to include conditions that do not arise until after the veteran has left military service. According to the final rule, the leave must be taken within 5 years of the veteran's discharge; however, the employee may continue to take such leave throughout the "single 12-month period" of protected leave even if the leave extends beyond the 5-year period.

INTERMITTENT LEAVE

The final rule also modifies the regulation relating to intermittent leave by changing the way that employers calculate intermittent or reduced scheduled leave, and by adding clarifying language regarding the calculation of intermittent leave.

Specifically, the final rule continues to provide that the maximum increment for FMLA leave taken on an intermittent or reduced schedule basis is the shortest increment of time that the employer uses to account for other forms of leave, subject to a one-hour maximum. However, the revised regulations provide that an employer must allow FMLA leave to be used in at least one-hour increments and must permit use in shorter increments if shorter increments are permitted for any other form of leave. In other words, if an employer uses different increments to account for different types of leave, it must account for FMLA leave in the smallest increment used to account for any other type of leave, and if an employer accounts for leave in different increments at different times of the day or shift, the employer may also account for FMLA leave in varying increments, provided that the increment used for FMLA leave is no greater than the smallest increment used for any other type of leave during that period.

The final rule also affirmed that an employer can count an entire shift as FMLA leave if an employee misses part of the shift for FMLA leave purposes and, due to the constraints of the job it is physically impossible for the employee to start the shift late or end the shift early. However, the physical impossibility provision may only be applied in limited circumstances, and the employer must restore the employee to the same or equivalent position as soon as possible.

Finally, the final rule specifies that an employer may not require an employee to take more leave than necessary to address the circumstances that precipitated the need for leave, and that FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer.

With these changes, employers should prepare to receive an increased number of leave requests, and management employees should be trained on the expansions of qualifying military family leave and the clarifications to the calculation and use of intermittent leave. The Department of Labor has published FAQs on the new regulations, which can be found by visiting http://www.dol.gov/whd/fmla/2013rule/militaryFR_FAQs.htm. Employers should ensure that their FMLA forms and policies are in compliance with these changes. Additionally, a new poster relating to these changes must be in use by March 8, 2013. The Connecticut Department of Labor has not issued guidance on whether the application of the Connecticut Family and Medical Leave Act will follow the new regulations, but we will provide an update if guidance is issued.