Department of Labor Issues Proposed FMLA Regulations on Military Leaves, Airline Flight Crews, and Other Topics

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On February 15, 2012, the U.S. Department of Labor (DOL) issued a proposed rule to revise certain Family and Medical Leave Act (FMLA) regulations. Proposed regulations would implement amendments to the military leave provisions of the FMLA made by the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA), which extended qualifying exigency leave to family members of servicemembers in the Regular Armed Forces, redefined the deployments that allow qualifying exigency leaves, and extended military caregiver leave to family members of certain veterans with serious injuries or illnesses. Other proposed regulations would implement the Airline Flight Crew Technical Corrections Act (AFCTCA), which established new leave eligibility requirements for airline flight crewmembers and flight attendants. Additional proposed regulations address the Genetic Information Nondiscrimination Act (GINA), the DOL’s template FMLA forms, and the measurement of intermittent leaves.

This bulletin summarizes the qualifying exigency leave, military caregiver leave, airline flight crew, and other proposed changes, and also contains Aon Hewitt commentary.

Proposed Qualifying Exigency Leave Changes

In January 2008, the FMLA was amended to cover leaves for “qualifying exigencies.” That is, leave by an eligible employee whose spouse, child, or parent is called up for active duty in the National Guard or Reserves because of certain exigencies related to the call-up of their family member. On October 28, 2009, the law was changed when Congress passed the 2010 NDAA, which expanded the family relationships covered. Specifically, eligible employees could then take qualifying exigency leave related to family members serving in the Regular Armed Forces as well as the National Guard and Reserves. The 2010 NDAA also clarified that the family member in the military must be deployed to a foreign country in order for eligible employees to take FMLA. The DOL’s newly proposed regulations would implement and interpret the 2010 NDAA amendments, and make changes to a few current qualifying exigency categories.

Proposed Regulations

Broadening the Definition to Include Active Duty

The DOL addresses the change in the 2010 NDAA that expanded qualifying exigencies to cover active duty military members. Under proposed Section 825.126(a)(1), the DOL defined that term for purposes of “Regular Armed Forces” as duty under a call or order to active duty (or notification of an impending call or order to covered active duty) during the deployment of the Armed Forces member to a foreign country.

Under proposed Section 825.126(a)(2), the DOL similarly defined the rule for “Reserve components”—the family members covered prior to the 2010 NDAA amendments—as duty under a call or order to active duty (or notification of an impending call or order to covered active duty) during the deployment of the military member to a foreign country under a federal call or order to active duty in support of a
contingency operation. In short, the qualification is based as before on a contingency operation, but now one where the military member is deployed to a foreign country. In proposed Section 825.126(a)(3), the DOL defined deployment to a foreign country as including one in international waters.

Clarifying Childcare and School Activities Leave and the Relevant Relationships
The DOL proposes a clarifying provision related to qualifying exigencies for an employee taking leave to arrange childcare or attend certain school activities. The DOL notes confusion regarding this provision given the three relationships at hand: 1) the employee taking the leave; 2) the military member (whose service triggers the FMLA); and 3) the child, whose childcare or school activities necessitate the leave by creating the exigency. In Section 825.126(b)(3), the DOL proposes adding language to clarify that the military member must be the spouse, son, daughter, or parent of the employee requesting leave, and that the child must be the military member’s child, but that the child would not also need to be the child of the employee.

For example, an employee, Anna, takes leave triggered by the service of her daughter in the military, Bernice. Anna’s leave is to find childcare for Bernice’s son, Cesar. Even though Cesar is Anna’s grandson, she may still take the leave. The critical relationship is that of the military member (Bernice) to the child (her son—a qualifying relationship—Cesar).

Expanding Rest and Recuperation Leave From Five to 15 Days
The third proposed change to qualifying exigency leaves relates to employees taking leave with the military member while that family member is on rest and recuperation leave during his/her deployment. In the January 2008 amendments to the FMLA, which created qualifying exigency leaves, Congress provided no limitations or parameters to the leaves. However, in the 2009 regulations, the DOL not only created the “rest and recuperation” category, but also limited the amount of time available for such leave to five days. Now, however, the DOL proposes expanding the limitation of time in Section 825.126(b)(6) from five to 15 days. The DOL notes that the Department of Defense (DOD) “advised” the DOL that Rest and Recuperation leave provided by the military varies, but some military members receive up to 15 days.

Adding “Attending Funeral Services” to Post-Deployment Activities
Finally, the DOL proposed adding the example “attending funeral services” to reasons covered by the post-deployment activities category of qualifying exigency leave. The regulations already have provisions related to the death of a military member in Section 825.126(b)(7). This just provides one further example.

Aon Hewitt Commentary
The DOL’s proposals to add Regular Armed Forces in accordance with the 2010 NDAA, to add the requirement that the family member be deployed to a foreign country, and to define deployment to a foreign country as including one in international waters, are all based on reasonable interpretations of the law.

The proposal to clarify that “child” for purposes of childcare and school activities leave is the child of the military member, and not necessarily the employee taking leave, is welcome. Although there has been little usage of this category (and the other categories) of qualifying exigency leave among our clients, this is a helpful clarification.
The proposal to expand “Rest and Recuperation” leaves from five to 15 days makes sense. While Aon Hewitt would generally be reluctant to agree with an expansion of the leave, there are mitigating factors. First, the DOD advised the DOL that Rest and Recuperation can be up to 15 days. Deference to the DOD seems not only prudent, but likely more in line with Congress’s intent in 2008. Also, qualifying exigency leaves have had a minimal impact on Aon Hewitt’s clients to date, and they have not experienced workforce management issues as a result of these leaves.

Finally, the proposed addition of “attending funeral services” to post-deployment activities that already related to the death of a servicemember is logical and would likely be inferred without the proposed change. In that sense, this change is practical.

Proposed Military Caregiver Leave Changes

As with qualifying exigencies, the FMLA was amended in January 2008 to cover military caregiver leaves. Military caregiver leave allows eligible employees an expanded period of FMLA leave—up to 26 workweeks in a single 12-month period—to care for a covered family member who is a current servicemember with a serious injury or illness incurred in the line of duty. In the 2010 NDAA, military caregiver leave was expanded to eligible employees with a family member who is a recent veteran with a serious injury or illness. The expansion included conditions that do not manifest until after the veteran has left the military, as well as new definitions of serious injury or illness for both current servicemembers and veterans. The new definitions include a serious injury or illness that results from a condition that existed before the servicemember’s active duty service, but was aggravated by service in the line of duty.

Proposed Regulations

Broadening the Definition of Veteran to Include Those Discharged/Released Within the Previous Five Years

The 2010 NDAA expanded military caregiver leave to cover leave to care for certain veterans within five years of their discharge or release from the Armed Forces. Under Section 825.127(b)(2), the DOL proposes a definition of “covered veteran” as one who was discharged (honorably) or released within five years of the date the requested leave is to begin. Thus, for an employee requesting leave for a veteran on April 16, 2012, the veteran must have been discharged or released from the military on or after April 16, 2007. As long as the leave starts within five years of the discharge or release, the employee would be able to take the leave (even if it extends past the five-year period).

Expanding the Definition of “Serious Injury or Illness” to Include Preexisting Conditions

The proposed changes would expand the “serious injury or illness” definition to include not only conditions sustained during the tour of duty but also preexisting conditions that were aggravated by serving in the line of duty. As also required in the proposed Section 825.127(c), the conditions would have to render the military member medically unfit to perform the duties of the member’s office, grade, rank, or rating. The DOL notes, however, that there are high medical standards for entering military service. It seeks comments on the types of injuries or illnesses that may exist prior to service that may be aggravated to such an extent as to render the military member unfit to perform these duties.
Defining a “Serious Injury or Illness” for Veterans

The 2010 NDAA expanded military caregiver leave to cover veterans, and required the DOL to define a qualifying serious injury or illness for veterans. The DOL has proposed three alternative definitions for serious injury or illness:

- First, under proposed Section 825.127(c)(2)(i), it could be a continuation of one incurred or aggravated when the veteran was a member of the Armed Forces and rendered him/her unable to perform the duties of his/her office, grade, rank, or rating.

- Second, under proposed Section 825.127(c)(2)(ii), it could be one for which the veteran received a Veterans Affairs Service Related Disability Ranking (VASRD) of 50% or higher, and such VASRD rating is based (in whole or in part) on the condition precipitating the need for military caregiver leave. This is a lower threshold than a “total disability” under the VASRD rating system, but the DOL believes that a “serious injury or illness” standard does not require that high of a VASRD rating.

- Third, under proposed Section 825.127(c)(2)(iii), it could be a condition that impairs the veteran’s ability to secure or follow a substantially gainful occupation by reason of a service-connected disability, or would do so absent treatment. The DOL stressed that this definition should be “similar in severity” to the other two definitions.

Finally, the DOL is considering and invites comments on the possibility of adding a fourth alternative definition of serious injury or illness of veterans, identified as the enrollment in the Department of Veterans Affairs (VA) Program of Comprehensive Assistance for Family Caregivers. This program provides health care, travel, training, and financial benefits to certain eligible caregivers of veterans.

Including Definitions and Certification Standards for Covering Veterans

The last proposed regulation related to military caregivers revises the standards for certifying these leaves. Under the current regulations, certification can only be procured through an “authorized health care provider,” which is a provider associated with the DOD or VA. These are a DOD health care provider, a VA health care provider, a DOD TRICARE network authorized private health care provider, or a DOD non-network TRICARE authorized private health care provider. The proposed rule would also allow for certifications by non-military healthcare providers (HCPs). Section 825.310(d) also would introduce allowing second and third opinions for military caregiver certifications, but only for certifications from non-military HCPs, not military HCPs.

Aon Hewitt Commentary

On the whole, Aon Hewitt believes that the proposed military caregiver regulations are sensible and accord with the 2010 NDAA amendments, including the five-year limit on covered veterans. This limit may invite negative comments to the DOL given that the family military additions to the FMLA were, in large part, a reaction to the wars in Afghanistan and Iraq. The idea that many such veterans will be precluded because of how long ago they served (despite the length of the injuries or illnesses incurred) may be poorly received by veterans’ groups, but the five-year limit is in the FMLA. On another note, given the expansion of the leave to veterans, the decision to broaden the definition of HCPs to non-military HCPs seems necessary. From Aon Hewitt’s point of view, definitive guidance on who can provide military caregiver certifications is welcome. Finally, the proposed 825.127(c)(2)(iii) is interesting in that it defines the veteran’s injury or illness as one in which the condition affects his/her ability to work, or would “do so absent the treatment.” This suggests that a military caregiver (employee) would be able to take leave to care for a veteran whose injury or illness is not debilitating.
Proposed Airline Flight Crew Changes

The proposed regulations also address AFCTCA, which as of December 21, 2009 established new FMLA eligibility requirements for airline flight crewmembers and flight attendants. The main purpose of AFCTCA was to harmonize FMLA eligibility requirements with the way flight crews work. That is, flight crews do not typically work 1,250 hours in 12 months and therefore cannot meet the usual FMLA eligibility requirements.

AFCTCA defines “hours of service” under the FMLA for purposes of flight crews. AFCTCA prescribes that flight crew employees are eligible if they work or are paid for 60% of the applicable full-time amount or “monthly guarantee,” as long as they work or have been paid for at least 504 hours during the previous 12 months. The DOL’s proposed regulations delineate the hours by:

- Airline employees on reserve status for whom the monthly guarantee is the number of hours for which an employer has agreed to pay the employee in a given month; and
- “Line holders”—a term used to refer to employees not on reserve status—for which the monthly guarantee is the minimum number of hours an employer has agreed to schedule such employee for any given month.

The proposed regulations also define the terms “hours worked” (using the same Fair Labor Standards Act standard) and “hours paid” (as applicable per employer airline). They also would prescribe recordkeeping requirements specific to AFCTCA, such as keeping collective bargaining agreements and policies that establish monthly guarantees.

Aon Hewitt Commentary

These proposals would incorporate the statutory changes of AFCTCA into the DOL’s regulations. Aon Hewitt believes that adding industry terminology such as “line holders” is a sensible, if not substantive, change.

Other Proposed Changes

The DOL has also proposed additional changes related to more “traditional” aspects of the FMLA—as opposed to recent legislation requiring guidance.

Proposed Regulations

Adding GINA Language to the Recordkeeping Requirements

Current Section 825.500 details the FMLA recordkeeping requirements. Since the DOL’s 2009 regulations were issued, the Equal Employment Opportunity Commission (EEOC) has issued regulations related to GINA. Among other things, the GINA regulations prescribe that an employer handling medical records for purposes of the FMLA must maintain confidentially all records that include “family medical history” or “genetic information.” The DOL is proposing to add language related to GINA.

Removing the Template FMLA Forms From the Regulations

Currently, the DOL’s optional FMLA forms for certifications and notices are appendices to the regulations. The DOL proposes to delete these appendices (and references throughout the regulations to them) and
instead make these forms available from the DOL, including on its website. The DOL believes that removing the forms from the regulations will allow them to be more expeditiously amended in response to statutory changes and suggestions from the public.

Emphasizing That Employers Cannot Measure Intermittent Leave in Ways That Reduce the Employee’s FMLA Entitlement by More Than What the Employee Actually Used

In what has probably been the most widely reported of the changes, the DOL proposes to clarify that when counting intermittent usage off an employee’s entitlement balance, an “employer may not require an employee to take more leave than is necessary to address the circumstances that precipitated the need for the leave.” Also, the employee’s FMLA entitlement may not be reduced beyond the actual amount of leave actually taken. In particular, if an employer uses different increments to account for different types of leave, the employer would be required to use the smallest of the increments to account for FMLA usage. This would be a change to the current regulation, which allows employers to use different increments at different times of day.

However, when an employee is “substituting paid leave” for the FMLA (i.e., using FMLA while concurrently using some paid leave), the employer is allowed to require the employee to use the FMLA in larger increments to satisfy a paid leave policy. In such instances, the entire period of leave is FMLA-protected and counts against the FMLA entitlement. For example, if an employer’s policy is to allow paid leave in increments as small as four hours, and an employee misses 45 minutes of work due to an FMLA-qualifying reason, the employee cannot be charged for more than 45 minutes of FMLA. However, if the employee wishes to take paid leave, the employer can require an employee to use four hours of FMLA—a larger amount than necessitated by the FMLA leave reason.

Aon Hewitt Commentary

The DOL’s proposal about GINA is sensible (given the EEOC’s GINA regulations) and provides needed guidance regarding the DOL’s position on GINA’s applicability to the FMLA.

Also, by removing the forms from the appendices, the DOL will better facilitate renewal of the forms.

Finally, with regard to the measurement and usage of intermittent leave, Aon Hewitt believes that, for most employers, the change will have little impact. The principle that employers cannot charge employees for more time than they use is codified in the FMLA. Thus, employers have never been able to charge employees for increments of FMLA leave greater than the time used. Indeed, this has created an incentive for employers to use the smallest increment possible so that they can deduct the time used from an employee’s entitlement. For example, if an employee is 24 minutes late to work for an FMLA-qualifying reason, an employer that uses six-minute increments may deduct the full amount of time from the employee’s entitlement. An employer that uses hour-long increments may not deduct any time unless the employer had the employee “sit out” for another 36 minutes—a practice most of our clients find impractical and burdensome. On the other hand, for employers that wish to use larger increments, the paid leave substitution provision affords a “carrot” to incentivize employees to take larger blocks. Under the proposal, an employer could still disallow paid leave usage for any smaller increments, thereby forcing employees to either use smaller amounts of leave without pay—or use their paid leave but also get charged for more FMLA use (e.g., a half day). Employers would need to be mindful, however, that an employee charged for a half day of paid leave would not be able to work during any part of that time.
Resources


The DOL press release is available at: http://www.dol.gov/opa/media/press/whd/WHD20120177.htm

Additional information on the FMLA, including information and fact sheets on the proposed revisions, is available at: http://www.dol.gov/whd/fmla/
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