



# EXPERT UPDATE



## DOL Releases Final FMLA Regulations



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On Feb. 6, 2013, the Department of Labor (DOL) marked the 20th anniversary of the signing of the Family and Medical Leave Act (FMLA) by releasing a set of **final FMLA regulations**. The final regulations, which become effective on **March 8, 2013**, implement two statutory expansions of FMLA leave protections. According to the DOL:

- The first expansion provides families of eligible veterans with the same job-protected FMLA leave currently available to families of military service members, and it also enables more military families to take leave for activities that arise when a service member is deployed.
- The second expansion modifies existing rules so that airline personnel and flight crews are better able to make use of the FMLA's protections.

In connection with the final regulations, the DOL indicated that it has updated some of its model FMLA forms, including the model FMLA poster. The model FMLA forms are available on the DOL's [FMLA webpage](#).

Prior to the regulations' effective date, employers covered by the FMLA (those with 50 or more employees) should review their FMLA policies and procedures to confirm that they are consistent with the final regulations. Employers should also begin using the DOL's updated model forms.

## BACKGROUND

The FMLA allows eligible employees to take job-protected leave for certain family and medical reasons. In 2008, the FMLA was expanded to provide for military family leave. Under the FMLA's military family leave provisions, an eligible employee may take:

- Up to 12 weeks of leave in a 12-month period for qualifying exigencies related to a family member's covered active military duty (**qualifying exigency leave**); and
- Up to 26 weeks of leave during a single 12-month period to care for a family member who is a covered service member with a serious injury or illness (**military caregiver leave**).

The National Defense Authorization Act for Fiscal Year 2010 (2010 Act) expanded the FMLA's military family leave provisions. Most of the Act's changes became effective on Oct. 28, 2009.

Qualifying exigency leave was expanded to include members of the Regular Armed Forces, in addition to members of the National Guard and Reserves. Also, a requirement was added that for all qualifying exigency leave, the military member must be deployed to a foreign country.

Military caregiver leave was extended to eligible employees whose family members are recent veterans with serious injuries or illnesses. The FMLA's definition of "serious injury or illness" was also broadened to include serious injuries or illnesses that result from preexisting conditions.

In addition, the Airline Flight Crew Technical Corrections Act (Flight Crew Act) established a special FMLA eligibility requirement based on hours of service for airline flight crew members. This special provision was added to take into account the unique scheduling requirements of the airline industry. The Flight Crew Act's FMLA changes became effective on Dec. 21, 2009.

## MILITARY FAMILY LEAVE

### *Qualifying Exigency Leave*

The final regulations expand qualifying exigency leave to include eligible employees with family members serving in the Regular Armed Forces and also add the foreign deployment requirement. In addition to implementing the statutory changes, the final regulations:

- Increase the amount of qualifying exigency leave an eligible employee may take to spend time with a covered family member during rest and recuperation leave from **five days up to a maximum of 15 days** to match the military member's rest and recuperation leave orders; and
- Create a new qualifying exigency leave category for **parental care**. Under this type of leave, an eligible employee may take qualifying exigency leave to care for the parent of a military member, or someone who stood in loco parentis to the military member, when the parent is incapable of self-care and the need for leave arises out of the military member's covered active duty or call to covered active duty status.

### ***Military Caregiver Leave***

The final regulations implement the 2010 Act's changes to military caregiver leave. The regulations expand the definition of "serious injury or illness" to include pre-existing injuries or illnesses of current service members that were aggravated in the line of duty, and the regulations expand military caregiver leave to care for covered veterans.

The regulations define a "covered veteran" as an individual who is undergoing medical treatment, recuperation or therapy for a serious injury or illness and who was discharged or released under conditions other than dishonorable at any time during the **five-year period** prior to the first date the eligible employee takes FMLA leave to care for the covered veteran. Thus, the final regulations permit eligible employees to begin taking military caregiver leave up to five years after their family member was discharged or released from the military.

The five-year period of eligibility for a covered veteran excludes the period between the enactment of the 2010 Act on Oct. 28, 2009, and the effective date of the final regulations to protect the military caregiver leave entitlement of family members of veterans whose five-year period has either expired or has been diminished during that time.

The final regulations define a "serious injury or illness of a covered veteran" as:

- 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 service member unable to perform the duties of the service member's office, grade, rank or rating;
- A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or higher, and this VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave;

- A physical or mental condition that substantially impairs the covered 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 of treatment; or
- 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.

In addition, the final regulations permit eligible employees to obtain certification of a service member's serious injury or illness (both current service members and veterans) from any health care provider as defined in the FMLA regulations, not only those affiliated with the Department of Defense, the Department of Veteran Affairs, or TRICARE networks.

## **AIRLINE FLIGHT CREW EMPLOYEES**

The final regulations also implement the amendments to the FMLA made by the Flight Crew Act. The regulations create a unique method of calculation of leave for airline flight crew employees. Eligible airline flight crew employees are entitled to 72 days of leave during any 12-month period for FMLA-qualifying reasons other than military caregiver leave, and 156 days of leave during any single 12-month period for military caregiver leave.

Also, if an airline flight crew employee takes leave intermittently or on a reduced schedule, the employer must account for the leave using an increment no greater than one day.

In addition to the existing FMLA recordkeeping requirements, covered employers of airline flight crew employees must maintain records or documents containing information specifying the applicable monthly guarantee for each category of employee to whom the guarantee applies, including copies of any relevant collective bargaining agreements or employer policy documents. Covered employers of airline flight crew employees must also maintain records of the airline flight crew employees' hours worked and hours paid.

## **EFFECTIVE DATES**

The regulatory changes contained in the final regulations become effective on **March 8, 2013**, (30 days after publication of the final regulations), including an eligible employee's entitlement to take military caregiver leave to care for a veteran with a serious injury or illness.

Although the regulations are not yet effective, most of 2010 Act's changes to the FMLA took effect on Oct. 28, 2009, and the Flight Crew Act's changes took effect on Dec. 21, 2009. For example:

- Eligible airline flight crew employees were entitled to take FMLA leave beginning on Dec. 21, 2009.
- As of Oct. 28, 2009, eligible employees were entitled to take FMLA leave for qualifying exigencies related to their spouse, parent, or child's deployment to a foreign country with the Regular Armed Forces. The foreign deployment requirement is also in effect as of that date for eligible employees taking qualifying exigency leave due to the call-up of a covered family member in the National Guard or Reserves.
- Additionally, as of Oct. 28, 2009, eligible employees were entitled to take military caregiver leave to care for a current service member whose serious injury or illness is caused by the aggravation in the line of duty of a preexisting condition.

*Source: Department of Labor*

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