February 26, 2013

New FMLA Regulations Effective March 8, 2013

On February 6, 2013, the U.S. Department of Labor ("DOL") issued new regulations in connection with the Family and Medical Leave Act ("FMLA"). The new regulations ("Regulations") take effect on March 8, 2013.

The Regulations are primarily tailored to reflect statutory changes to the FMLA in the National Defense Authorization Act for Fiscal Year 2010 ("FY 2010 NDAA") and the Airline Flight Crew Technical Corrections Act, both which became law in late 2009. In summary, the new Regulations:

- clarify the scope of exigency leave to include relatives of members of the regular Armed Forces (rather than only members of the National Guard or Reserves)
- allow for up to 15 calendar days for exigency leave to spend time with a military member who is home for Rest and Recuperation (rather than only five days)
- create a new category of qualifying exigency for parental care
- extend military caregiver leave to relatives of certain veterans with a qualifying serious injury or illness
- permit an employer to request a second and third opinion for medical certifications obtained from a healthcare provider who is not affiliated with the Department of Defense, the Department of Veteran Affairs, or the TRICARE network, in connection with military caregiver leave
- clarify calculation of increments of intermittent FMLA leave
- describe an employer's obligation to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA)

Additionally, the DOL revised its model forms and created a new form for the certification of a veteran's serious injury or illness (Form WH-385-v). Employers also should be aware that on January 14, 2013, the DOL issued an Administrator's Interpretation regarding the definition of "son or daughter" as it applies to an employee seeking FMLA leave to care for a son or daughter with a disability who is 18 years of age or older.

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Highlights of the Regulations and the Administrator's Interpretation are discussed below.

Qualifying Exigency Leave

The FMLA allows eligible employees to take leaves of absence for certain qualifying "exigencies" while a relative is on active duty or called to active duty status. Exigency leave previously had been available only to relatives of National Guard or Reserves members, but now includes relatives of the Regular Armed Forces. The Regulations clarify that, for members of the Regular Armed Forces, "active duty" requires that the service member be deployed to a foreign country and, as it relates to Reservist members, the member must be deployed to a foreign country under a Federal call or order in support of a contingency operation.

The Regulations also now specify parental care as a qualifying exigency warranting leave, which allows spouses, children, or parents of a military member to request leave to provide or arrange alternative care for the parent of the military member, to admit or transfer the parent to a care facility, or to attend meetings at care facilities. For the leave to be deemed a qualifying exigency, the parent of the military member must be incapable of self-care and require assistance with activities of daily living.

The Regulations also increase the number of days of leave an eligible employee may take to spend time with a military member home for Rest and Recuperation from five to fifteen days.

Military Caregiver Leave

Military caregiver leave provides 26 weeks of leave for eligible family members to care for a seriously ill or injured military member, and the Regulations now expand or clarify definitions of several of the terms used to determine eligibility for this form of leave. For example, military caregiver leave is now available for the provision of care to former members of the military who are deemed "covered veterans"; previously, only care to current members of the military was protected. A "covered veteran" is defined, in part, as a former member of the Armed Forces (including a member the National Guard or Reserves) who was discharged or released under conditions other than dishonorable at any time during the five (5) year period prior to the first date the eligible employee takes FMLA leave to care for the veteran. The Regulations exclude all dates between October 28, 2009 and March 8, 2013 from this qualifying five-year period.[1] The Regulations also now provide that a serious injury or illness can include a preexisting condition aggravated by military service and specify different definitions of "serious injury or illness" for current members of the Armed Forces and veterans.

The Regulations also provide employees with greater flexibility in obtaining medical certifications to support applications for military caregiver leave, in that healthcare providers other than those affiliated with the U.S. Department of Defense

[1] This exclusion results from an issue concerning the effective date of changes to the FMLA by FY 2010 NDAA.

("DOD") may now certify a serious injury or illness. Private healthcare providers will be allowed to rely on determinations from an authorized DOD or Veterans Affairs ("VA") representatives as to whether the serious injury or illness is related to military service. Additionally, employers will be allowed to seek a second or third opinion on certifications provided by non-DOD / VA providers. As previously, however, employers are not permitted to require second or third medical opinions in order to challenge medical certifications completed by DOD / VA authorized providers.

Increments of Intermittent FMLA Leave

The Regulations also clarify increments of intermittent FMLA leave. The minimum increment of FMLA 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. Some employers had been applying one-hour increments for FMLA leaves regardless of whether they allowed shorter increments for other forms of leave, like vacation or sick time. For example, some employers had allowed employees to take vacation time in 30-minute increments, but applied one-hour increments for FMLA leave. The DOL clarified that employers must use the shortest time increment and that the reference to one-hour increments is simply a maximum.

Compliance with Genetic Information Nondiscrimination Act

The Regulations remind employers of their confidentiality obligations under the Genetic Information Nondiscrimination Act of 2008 (GINA). If FMLA-related documentation contains "family medical history" or "genetic information," as those terms are defined by GINA, employers must abide by GINA's confidentiality requirements. However, GINA allows for disclosure consistent with the FMLA's requirements.

Administrator's Interpretation No. 2013-1

In a separate publication, on January 14, 2013, the DOL issued an Administrator's Interpretation concerning the definition of "son or daughter" as it applies to an employee seeking FMLA leave to care for a son or daughter with a disability who is 18 years of age or older. By way of background, the FMLA defines "son or daughter" as a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in *loco parentis* who is 1) under 18 years of age; or 2) 18 years of age or older and incapable of self-care because of a mental or physical disability.

A child under 18 years of age is a "son or daughter" for purposes of the FMLA without regard to whether the child has a disability. As a result, an eligible employee requesting FMLA leave to care for a minor child need only show that the care to be provided relates to a serious health condition.

For FMLA leave to be available for an employee to care for an adult child, however, that child must have a physical or mental disability and be incapable of self-care because of that disability. As in the Americans with Disabilities Act, the FMLA defines "physical or mental disability" as a physical or mental impairment that substantially limits one or more major life activities. The term "incapable of self-care" means that, as a result

of the disability in question, the adult son or daughter requires active assistance or supervision to provide self-care in three or more "activities of daily living" (such as grooming and hygiene, dressing, bathing or eating) or "instrumental activities of daily living (such as cooking, cleaning, shopping or paying bills).

Therefore, a parent will be entitled to take FMLA leave to care for a son or daughter 18 years of age or older if the son or daughter: 1) has a disability as defined by the Americans with Disabilities Act,[2] 2) is incapable of self-care due to that disability, 3) has a serious health condition, and 4) is in need of care due to the serious health condition.[3] In most instances, the serious health condition prong will be satisfied if the disability prong is satisfied.

In the Administrator's Interpretation, the DOL clarifies that the age of onset of disability for a son or daughter 18 years of age or older is irrelevant. In the past, there has been confusion as to whether the disability must have existed before the child turned 18 years of age.

Moreover, the Interpretation clarifies that parents of adult children who have been wounded or sustained serious injury or illness during military service may take FMLA leave beyond that provided by the military caregiver provisions of the FMLA (which provides 26 weeks in a single 12-month period). If a servicemember's injury or illness lasts beyond the single 12-month period covered by the military caregiver entitlement, a parent may take FMLA leave in subsequent years due to the child's serious health condition provided that all other FMLA requirements are met.

Conclusion

Employers are encouraged to review their current FMLA policies and forms to ensure compliance with the new Regulations, and to download the revised DOL model forms. If you have any questions or need assistance with review of your documentation, please call Farah Mollo or any other attorney at the Firm at (212) 758-7600.

[2] The Administrators Interpretation spent considerable time addressing the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") which generally defines "disability" broadly so as to expand coverage of the Act.

[3] Care for the adult child would include physical care, transportation to healthcare, and psychological comfort and reassurance.