

# Checklist for Complying with the New FMLA Regulations

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**Insight — March 8, 2013**

On Friday, March 8, 2013, new regulations take effect implementing changes to the Family and Medical Leave Act (FMLA). Covered employers need to take action to ensure compliance with the new rules. We offer this summary of the changes as well as a checklist to make FMLA compliance easy.

### What Has Changed in the New FMLA Regulations?

Recently published by the U.S. Department of Labor (DOL), the final rule clarifies a number of existing FMLA requirements and implements changes to the military leave provisions. It also addresses new rules that apply to airline flight crews. The DOL provides a useful side-by-side comparison of 2008 vs. 2013 regulations on its website (<http://www.dol.gov/whd/fmla>). Highlights of the changes resulting from the new regulations are outlined below.

**Existing FMLA Requirements Clarified.** The following changes clarify how employers must comply with certain existing FMLA requirements:

- Intermittent or reduced schedule FMLA leave must be tracked using the smallest increment of time used for tracking other types of leave, provided that it is not greater than one hour.
- An employer may not require the employee to take more leave than necessary to address the FMLA issue.
- If FMLA documents contain family information, employers must keep such information confidential pursuant to the Genetic Information Nondisclosure Act (GINA).
- Any absence from work due to military service covered under the Uniformed Services Employment and Reemployment Rights Act (USERRA) must be counted toward the employee's 12-month employment period when determining FMLA eligibility.

**Military Caregiver Leave Expanded to Include Care for Covered Veterans.** The new regulations expanded military caregiver leave so that a covered servicemember now includes veterans who are undergoing medical treatment, recuperation or therapy for a serious injury or illness, rather than covering only current servicemenbers. A covered veteran is defined as an individual who was discharged or released at any time during the five (5) year period prior to the first date the eligible employee takes FMLA to care for the covered veteran. A dishonorable discharge disqualifies the veteran from coverage. The period between the October 28, 2009 enactment of the law and the March 8, 2013 effective date of the

Final Rule is excluded in the determination of the five (5) year period for covered veteran status.

**Serious Injury or Illness of Military Members and Veterans Broadly Defined.** The new regulations expand the definition of serious injury or illness incurred by a current servicemember to include injuries or illnesses that existed prior to the member's active duty but were aggravated in the line of active duty. With new FMLA leave for the care of covered veterans, the definition of a serious injury or illness for a covered veteran includes four alternatives, only one of which must be met: (1) a continuation of a serious injury or illness that was incurred when the covered veteran was a member of the Armed Forces; (2) a physical or mental condition for which the covered veteran has received a VA Service Related Disability Rating of 50% or greater; (3) a physical or mental condition that substantially impairs the veteran's ability to secure or follow a gainful occupation; or (4) an injury for which the covered veteran has been enrolled in the VA's Program of Comprehensive Assistance for Family Caregivers.

**Qualifying Exigency Leave Broadened.** Prior to the new regulations, FMLA leave for qualifying exigencies arising out of a covered military member's active duty or impending call to active duty was limited to family members of National Guard and Reserve military members called to duty in support of a contingency operation. The 2013 regulations expand exigency leave to include members of the Regular Armed Forces. Active duty now requires deployment to a foreign country. A new qualifying exigency leave category was added for parental leave so that eligible employees may take leave to care for a military member's parent who is incapable of self-care when necessitated by the member's covered active duty. Finally, exigency leave to spend time with a military member on Rest and Recuperation is expanded from five (5) to fifteen (15) days.

**Airline Flight Crews Covered by FMLA.** The Airline Flight Crew Technical Corrections Act (AFCTCA) was enacted to tailor the FMLA's hours of service requirements and leave benefits to reflect the unusual working schedules and monthly hour guarantees of airline pilots and flight attendants. The new regulations implement special rules applicable to airline flight crew employees. The hours of service requirement for such employees will be met if the crew member has worked or been paid for not less than 60% of the applicable monthly guarantee and has worked or been paid for not less than 504 hours in the previous 12-month period. Eligible crew employees are entitled to 72 days of FMLA leave and 156 days of FMLA military caregiver leave. Airlines must maintain appropriate records specifying crew member monthly guarantees including relevant collective bargaining agreements as well as records of hours scheduled.

**New FMLA Forms and Posters.** As a result of the 2013 regulations, the DOL updated four of its optional-use forms and the mandated FMLA poster.

### **Checklist for FMLA Compliance**

To ensure compliance with the new 2013 FMLA regulations, complete the steps in the following checklist: (Note: links are provided to the new FMLA

poster and all new FMLA forms.)

- Update your written FMLA policy in your employee handbook (and wherever else published) to reflect expanded leave entitlements, including:
  - Military caregiver leave available to care for covered veterans;
  - Military caregiver leave definitions of serious injury or illness broadened;
  - Qualifying exigency leave now applies to members of the Regular Armed Forces;
  - Qualifying exigency leave for active duty requires deployment to a foreign country;
  - New category of qualifying exigency leave for parental leave; and
  - Rest and Recuperation exigency leave allows for up to fifteen (15) days.
- Update FMLA procedures as follows:
  - Calculate eligibility hours of service during previous 12-months to include any period of absence for military service protected under USERRA;
  - Track intermittent and reduced schedule leave in the smallest increment you allow for other types of leave (increments must not be greater than one hour);
  - Do not require an eligible employee to take more FMLA leave than is necessary for the FMLA covered reason.
- Institute a process to keep confidential any family information found on FMLA documents as required by GINA.
- Post the 2013 FMLA Poster in a conspicuous area in your workplace.
- Use the updated 2013 FMLA Forms (or update your forms accordingly):
  - WH-381 Notice of Eligibility and Rights & Responsibilities
  - WH-384 Certification of Qualifying Exigency for Military Family Leave
  - WH-385 Certification for Serious Injury or Illness of a Current Servicemember for Military Family Leave
  - WH-385V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave
- Train human resources personnel, leave administrators, managers and supervisors on all changes.
- Airlines must implement procedures to meet the special rules

governing FMLA leave for airline flight crew employees.

Please contact us with any questions regarding the new FMLA regulations or if you would like us to review your FMLA policies, forms and procedures for compliance.

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