

# Department of Labor Issues Proposed Amendments to FMLA Regulations

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As most employers are aware, the Family and Medical Leave Act (“FMLA”) regulations were modified by the Department of Labor (“DOL”) in 2008. In late 2009, Congress amended the text of the FMLA statute twice to expand the scope of some FMLA rights for leave associated with military family leave, military caregiver leave, and special eligibility requirements for airline crewmembers. Since the 2009 amendments to the statute, rumors circulated about the release of revised regulations to address the changes. On January 30, 2012, the DOL released proposed revised regulations.

## The proposed changes to the FMLA regulations include:

### Qualifying Exigency Leave

- Individuals serving in the regular Armed Forces (not just the Reserves or National Guard) are military members. Family members of military members are eligible for qualifying exigency leave.
- Qualifying exigency leave requires that the military member is deployed to a foreign country (or international waters).
- Qualifying exigency leave for childcare does not require that the employee who is taking leave be the parent of the child so long as the child and the employee each has the requisite relationship with the military member. For example, a grandfather could take FMLA leave to address childcare for his granddaughter when the father is called to service.
- Rest and recuperation leave will extend up to 15 days (from 5 days) depending upon the amount of time granted to the military member.

### Serious Illness or Injury of a Covered Servicemember

- Definition of a covered servicemember includes veterans who have separated from active duty status within the last five years. The DOL acknowledges this will eliminate coverage for veterans of previous conflicts (e.g., Gulf War veterans).
- The DOL has proposed additional standards by which a veteran’s serious illness or injury could be measured.

- The DOL has proposed to expand the group of health care providers who can complete the certification for a serious illness or injury. This will, in turn, permit employers to obtain second and third opinions for certifications made by health care providers, other than those who are affiliated with the Department of Defense, Veterans Administration, or TRICARE.

### General FMLA Provisions

- Addition of language reflecting and employer's obligation to comply with the confidentiality requirements of the **Genetic Information Nondiscrimination Act of 2008** ("GINA"). For this purpose, disclaimers should be added to the employer's certification forms. The DOL model forms do not currently contain this information.
- Modified hours of service requirement for airline flight crew members.
- The DOL wants to move their model forms from outside the scope of the regulations. It appears this move is desired in order to expedite the process it must take to make modifications to the model forms. It is unclear whether this would have the effect of limiting the notice provided to employers when the DOL modifies its model forms.

Currently the regulations are in proposed form. It is unclear exactly when final regulations will be issued. In 2008, nine months passed between the issuance of the proposed regulations and the final regulations.

Several of the modifications that the DOL has proposed already apply to employers under statute. Therefore, employers who have not already modified their policies and forms to address the military leave and GINA issues addressed above should consider making modifications to policies and forms to comply with the statutory changes prior to the issuance of the final regulations.

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