

# LEGISLATIVE BRIEF

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## DOL Proposes Regulations on FMLA Military Family Leave

On Jan. 30, 2012, the Department of Labor (DOL) announced the release of proposed regulations under the Family and Medical Leave Act (FMLA). Primarily, the proposed regulations implement and interpret the FMLA's military family leave provisions. The proposed regulations also cover other aspects of FMLA leave, such as the special eligibility rules for airline flight crew members, and address anticipated revisions to the model FMLA forms.

Because the regulations are in proposed form only, they are not yet effective. However, they do serve as an indicator of how the DOL may interpret the FMLA's expanded military family leave provisions.

This FAS-EBA, Inc. Legislative Brief highlights key aspects of the proposed FMLA regulations. A copy of the proposed regulations is available from the DOL at: [www.dol.gov/whd/fmla/index.htm](http://www.dol.gov/whd/fmla/index.htm).

### 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 servicemember with a serious injury or illness (**military caregiver leave**).

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

Under the Act, 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.

The Act extended military caregiver leave 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.

### PROPOSED REGULATIONS

The regulations propose to implement the Act's changes to military family leave. For example, the proposed regulations extend military caregiver leave to eligible family members of recent veterans with serious injuries or illnesses and expand qualifying exigency leave to cover eligible employees with covered family members in the Regular Armed Forces.

In addition, the proposed regulations interpret the Act's military family leave provisions. For example, the proposed regulations:

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- Clarify the eligibility requirements for military caregiver leave for family members of veterans;
- Create a three-part definition for the serious injury or illness of a veteran; and
- Expand the amount of qualifying exigency leave an eligible employee may take to spend time with a covered family member during rest and recuperation leave to up to 15 days (currently, this leave is limited to five days).

The regulations also propose to implement the Flight Crew Act's changes to the FMLA's eligibility rules for airline flight crew members, and add specific rules for calculating the amount of FMLA leave used by airline flight crew members.

In addition, the regulations propose a new recordkeeping standard under the FMLA that would require employers to comply with the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA). To the extent that records and documents created for FMLA purposes contain "family medical history" or "genetic information," the DOL reminds employers that they must maintain the records in accordance with GINA's confidentiality requirements.

## EFFECTIVE DATE

The regulations are in proposed form; they **will not take effect** until the DOL issues a final rule. Interested parties may submit comments on the proposed regulations to the DOL. Based on the comments submitted, the DOL may make revisions to the proposed regulations before they are issued in final form.

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

**According to the DOL, the only Act provision that is not yet in effect is the extension of military caregiver leave to family members of veterans with serious injuries or illnesses.** This portion of the Act requires the DOL to define what injuries or illnesses qualify as a "serious injury or illness" for a veteran. Thus, according to the DOL, this leave requirement will not go into effect **until the DOL issues a final rule.**

In the meantime, eligible employees can take up to 12 weeks of FMLA leave to care for a veteran with a serious health condition who is their spouse, parent or child (if under age 18 or disabled). Employers may also provide employees with leave to care for an injured or ill veteran beyond the leave required by the FMLA. However, this type of leave would not be FMLA-protected and could not be counted against an employee's FMLA entitlement.

## MODEL FMLA FORMS

The DOL has issued model forms for employers to use when administering FMLA leaves. The forms are available on the DOL's website at: [www.dol.gov/whd/fmla/index.htm](http://www.dol.gov/whd/fmla/index.htm).

In the proposed regulations, the DOL states that it intends to update the following model forms for changes made by the Act and the Flight Crew Act:

- The FMLA poster (WHD publication 1420);
- The Notice of Eligibility and Rights and Responsibilities (Form WHD-381);
- The Certification for Qualifying Exigency Leave for Military Family Leave (Form WHD-384); and
- The Certification for Serious Injury or Illness of a Covered Servicemember for Military Family Leave (Form WHD-385).

The DOL is also considering creating a new model form for the certification for the serious injury or illness of a covered veteran.

FAS-EBA, Inc. will continue to monitor FMLA developments and will provide updated information as it becomes available.

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