



New FMLA Rule in Effect on March 8
by Laura L. Edwards

In early February, the U.S. Department of Labor (DOL) issued a new final rule on the Family and Medical Leave Act (FMLA). The new rule relaxes the requirements for obtaining military "qualifying exigency" leave or "military caregiver" leave, addresses disclosure of family history for FMLA purposes under the Genetic Information Nondiscrimination Act (GINA), describes what minimum increment to use for intermittent leave, and contains provisions for members of airline flight crews. The DOL has also made revisions to its FMLA forms and poster, which go into effect March 8, 2013. The following paragraphs summarize these changes.

Model FMLA Form and Poster Changes. The DOL has issued new forms and posters that go into effect March 8, 2013. If your organization uses the DOL's model forms, the updated model forms can be found on the DOL [website](#). The new forms expire on February 28, 2015. If your organization adapts the DOL's model forms to create its own custom forms, then your forms and procedures should be updated to reflect changes imposed by the new rule, including, but not limited to, the following:

- Form WH-384 was modified to use the term "covered active duty," which now includes the requirement that the member be deployed to a foreign country
- Form WH-385 was revised to include the expanded definition of "serious injury or illness" for current service members
- There is a new certification form, WH-385-V, to be used specifically for the "serious injury or illness" of a covered veteran
- The maximum number of calendar days allowed to bond with a military member on rest and recuperation leave increased from five to 15 days
- To certify a need for military caregiver leave under the new rule, an employee can provide documentation from health care providers who are not affiliated with the Department of Defense, TRICARE, or the Department of Veterans Affairs. If the service member is a veteran enrolled in the Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers, documentation of enrollment is sufficient certification of the employee's serious injury or illness.

The new FMLA poster is located on the DOL [website](#). Employers must display the poster at all locations even if there are no employees eligible for FMLA at the location (*e.g.*, there are fewer than 50 employees employed within a 75-mile radius of the worksite). Finally, remember that an employer's custom forms cannot require an employee or health care provider to disclose more information than is required by FMLA regulations.

Military Family Leave. The new rules regarding military family leave essentially restate the requirements of the National Defense Authorization Act for fiscal year 2010. However, there are three provisions worth noting pertaining to caregiver leave and qualifying exigency leave. First, caregiver leave is now available to care for a military service member for up to five years after the service member is discharged from the military. Second, the protections afforded by the Uniformed Services Employment and Reemployment Rights Act (USERRA), including qualifying exigency leave, now extend to all military members, including the National Guard and Reserves, returning from any USERRA-covered service. Such service includes most forms of active and inactive duty. Third, the new rule expands the definition of serious injury or illness for current service members to include preexisting conditions that were aggravated by military service.

Calculation of Leave for Intermittent or Reduced Schedule Leave. The new rule makes changes to the "varying increments" rule. The previous rule allowed employers to track FMLA leave by using different increments of leave at different times of the day or shift, provided that the increment used for FMLA leave was no greater than the smallest increment used for other types of leave during the period in which the FMLA leave was taken. Under the new rule, employers must track FMLA leave using the smallest increment of time used for other forms of leave subject to a one hour maximum.

Airline Flight Crew Family Leave. The FMLA requires that employees work at least 1,250 hours in a 12-month period in order to be eligible to take FMLA leave. However, due to the unique schedules of flight crews, such individuals were often unable to acquire the hours necessary to qualify for FMLA. Under the new rule, an airline flight crew employee will meet the FMLA hours of service eligibility requirement if s/he has worked or been paid for not less than 60 percent of the applicable total monthly guarantee (the minimum number of hours an employer has agreed to schedule the employee) and has worked or been paid for not less than 504 hours during the previous 12 months. This calculation excludes time spent commuting, on vacation, or on medical or sick leave.

Employer Obligations Under GINA. In general terms, GINA prohibits employers with 15 or more employees from discriminating against employees or applicants on the basis of genetic information. GINA also prohibits employers from requesting or requiring disclosure of genetic information of an individual—or an individual's family member—with limited exceptions. The new FMLA rule confirms employers' obligations under GINA but also reaffirms that GINA allows employers to request disclosure of genetic information or family history if such disclosure does not violate the FMLA. For example, GINA allows employers to request family medical history as part of obtaining certification for FMLA leave if the employee is requesting leave to care for a family member. This exception would not apply were the employee requesting FMLA leave to care for his or her own serious health condition.

If you have any questions concerning the information addressed in this note, or would like assistance in making sure your notices and policies comply with the new FMLA Rule, please feel free to contact Laura Edwards at (425) 450-3383.

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