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Labor and Employment Alert: Department of Labor Issues Final Rule Implementing Amendments to the Family and Medical Leave Act

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Recently, the Department of Labor (DOL) issued a final rule implementing and interpreting changes to the Family and Medical Leave Act (FMLA) enacted by the National Defense Authorization Act (NDAA) and the Airline Flight Crew Technical Corrections Act. The final rule will take effect on March 8, 2013.

Some of the more significant changes are summarized below.

Military Leave

- **Qualifying Exigency Leave** – The final rule expanded qualifying exigency leave to eligible employees with a spouse, son, daughter or parent in the Regular Armed Forces on covered active duty. The leave was previously limited to military members in the National Guard and the Reserves. The definition of "active duty" was also revised and now requires deployment to a foreign country.

The final rule added a new category of qualifying exigency leave for parental care which allows family members to take leave to arrange for the care of a military member's parent when the care is necessitated by the military member's active duty or call into active duty. The parental leave may include arranging for alternative care, attending meetings at a care facility, providing immediate care on an as-needed basis, or admitting or transferring the parent to a care facility.

The final rule also increased the amount of rest and recuperation leave an employee may take to spend time with his or her military member from five days to 15 days. The required information for certification of a rest and recuperation leave was also expanded to include a copy of the military member's rest and recuperation leave orders, or other military documentation setting forth the dates of the military member's leave.

- **Caregiver Leave** – The final rule expanded military caregiver leave to eligible employees whose family members are covered veterans who are undergoing recuperation, medical treatment, or therapy for a serious illness or injury. The covered veteran must have been

released from the Armed Forces (other than for dishonorable reasons) during the five-year period preceding the date of the recuperation, medical treatment or therapy. When calculating the five-year period, the time between the enactment of the NDAA on October 28, 2009 and the effective date of the DOL's final rule (March 8, 2013), should not be counted.

The final rule also expanded the definition of a serious injury and illness for current servicemembers and covered veterans. A "serious injury or illness" now includes any injury or illness that existed before the beginning of the current servicemember or covered veteran's active duty and was aggravated by his or her service. For covered veterans, the injury or illness must also meet one of the following conditions:

- (1) the injury or illness was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the veteran unable to perform his or her duties;
- (2) the injury or illness is a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability (VASRD) ranking of 50% or greater and such ranking is based, at least in part, on the condition precipitating the need for military caregiver leave;
- (3) the injury or illness is a physical or mental condition that substantially impairs the covered veteran's ability to secure gainful occupation by reason of a disability related to military service, or would do so absent treatment; or
- (4) the covered veteran has been enrolled in the U.S. Department of Veterans Affairs Program of Comprehensive Assistance for Family Caregivers (the VA Assistance Program) on the basis of his or her injury, including a psychological injury.

The final rule also modifies certification requirements for military caregiver leave. Certification forms can now be signed by any health care provider who meets the definition in 29 C.F.R. § 825.125. Previously, certification forms could only be filled out by health care providers affiliated with the Department of Defense (DOD), the U.S. Department of Veterans Affairs (VA) or the TRICARE network. If a certification is filled out by a health care provider who is not associated with the DOD, VA or TRICARE, then the employer may request second or third opinions. The final rule also allows eligible employees to submit a copy of a VASRD rating or enrollment documentation from the VA Assistance Program to certify that the veteran has a serious injury or illness. If an employee submits such documents, then the employer may still require the employee to provide additional information which confirms a familial relationship to the veteran or documentation of the veteran's discharge date, reason for separation and current status.

Calculating Intermittent Leave

The final rule also clarified the measurement of increments of intermittent or reduced schedule leave. The final rule makes clear that employers may not require an employee to take more leave than is necessary to address the circumstances that precipitate the need for leave and must track FMLA leave using the smallest increment of time used for other forms of leave, subject to a one hour maximum. Additionally, FMLA leave may only be counted against an employee's FMLA entitlement for leave taken and not for time that is worked for the employer.

The final rule also affirmed the physical impossibility rule which permits an employer to count the entire period an employee is forced to be absent as FMLA leave when it is physically impossible for the employee to start or end work in the middle of a shift. The final rule clarified, however, that the physical impossibility provision may only be applied in the most limited circumstances and that the employer must restore the employee to the same or equivalent position as soon as possible.

FMLA Eligibility Requirements for Airline Flight Crew Employees

The final rule provides additional guidance for airlines on how to calculate FMLA leave for flight crew employees. To meet the hours service eligibility requirement, a flight crew employee must have worked or been paid for at least 60% of the applicable total monthly guarantee and 504 hours during the previous 12-month period. The final rule also establishes a maximum FMLA leave entitlement of 72 days for one or more FMLA qualifying reasons and 156 days for military caregiver leave. The final rule additionally requires an employer to account for intermittent or reduced work week leave in increments no greater than one day.

FMLA Poster and Forms

Lastly, the final rule announced that the DOL's mandatory poster and optional-use FMLA forms will no longer be available in the appendices of the regulations. The poster and forms will be available on the DOL's Wage and Hour Division website as well as local Wage and Hour district offices.

If you have questions regarding the DOL's final rule, please contact your Vorys attorney.