On February 6, 2013, the U.S. Department of Labor (DOL) published a final rule to implement amendments to the Family and Medical Leave Act (FMLA) made by the National Defense Authorization Act for Fiscal Year 2010 (NDAA) and the Airline Flight Crew Technical Corrections Act (AFCTCA). To assist employers with compliance, the DOL has created a web page with a FAQ sheet on the final rule, a new FMLA poster, and a new Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave—Form WH-385-V.

As most employers are aware, the FMLA regulations were modified by the DOL in 2008, and the new regulations took effect in early 2009. In late 2009, Congress amended the text of the FMLA statute twice—once to expand the scope of some FMLA rights for leave associated with military family leave and military caregiver leave and a second time to establish new leave eligibility standards for airline flight crew members and flight attendants. The final rule will take effect on March 8, 2013.

Key Provisions

Two of the key provisions in the final rule include:

- **Qualifying Exigency Leave**

Under the final rule, eligible employees with a spouse, son, daughter, or parent in any branch of the Armed Forces can take FMLA leave to deal with exigencies related to their loved one's deployment to a foreign country. Thus, qualifying family members are entitled to FMLA leave for qualifying exigencies in connection with the foreign deployment of members of the regular Armed Forces. This type of leave previously was available only to eligible employees with family members in the National Guard and Reserves.

The FMLA leave may be used to deal with exigencies involving financial, legal, or child care issues related to the family member’s call-up or deployment, as well as to attend certain military events, spend time with the family member during rest and recuperation leave, and for other exigencies. The amount of FMLA leave an eligible employee may take to spend time with his or her covered family members during rest and recuperation leave has also been extended to a maximum of 15 days. Currently, such leave is limited to five days.

- **Serious Illness or Injury of a Covered Service Member**
The final rule expands military caregiver leave to cover eligible employees whose family members are recent veterans with a serious injury or illness. Before the NDAA, only eligible employees who were the spouse, parent, son, daughter, or next of kin of a current service member with a serious injury or illness were entitled to the special 26-week FMLA leave to provide care to members of their family. The NDAA extended military caregiver leave to eligible employees caring for veterans with serious injuries or illnesses. The final rule includes a definition of a covered veteran undergoing medical treatment, recuperation, or therapy for a serious illness or injury, which is defined to include conditions that do not arise until after the veteran has left military service. The law also expanded the definition of a serious injury or illness for current service members and veterans to include serious injuries or illnesses that resulted from a condition that existed before the service member's active duty service and was aggravated by service in the line of duty.

There are limits to the FMLA military caregiver leave. The final rule permits an eligible employee to take FMLA leave to care for a veteran who was discharged within the five-year period prior to the date the employee first takes military caregiver leave. According to the final rule, the employee's first date of leave must occur within the five-year period; however, the employee may continue to take such leave throughout the “single 12-month period” of protected leave even if the leave extends beyond the five-year period. The calculation of the five-year period varies for those veterans who were discharged before the effective date of the final rule.

Other Changes

In addition to the provisions addressing military caregivers, the final rule also modifies the work hour annual threshold for airline flight crew members to qualify for FMLA leave. Under the final rule, a flight crew employee will meet the FMLA hours of service eligibility requirement if he or she has worked or been paid for not less than 60 percent of the applicable total monthly guarantee and has worked or been paid for not less than 504 hours during the previous 12 months. Airline employees who are not flight crew members continue to be covered under the general hours-of-service eligibility standard that requires 1,250 hours of service in the previous 12 months.

Finally, the DOL did make several changes to section 825.205, which addresses the measurement of increments of leave when an employee takes intermittent or reduced schedule leave, but the agency did not include in the final rule some of the changes that it had proposed or considered. For example, while it appeared that the DOL would make certain changes to section 825.205(a)(2), the agency did not eliminate the physical impossibility rule that allows an employer to count the entire period an employee is forced to be absent as FMLA leave when an employee uses intermittent leave and it is physically impossible for the employee to start or end work mid-way through a shift. Also, in section 825.205(a)(3), the DOL kept the provision that allows employers to use varying increments of leave at different times of the work day or shift. Fortunately for employers, the DOL did not eliminate these two options.

What This Means for Employers

According to Alfred B. Robinson, Jr., a shareholder in Ogletree Deakins' Washington, DC office: "As the FMLA marks its 20th anniversary, it has enabled employees to balance their family and work responsibilities so that they are successful in both areas. This final rule furthers this balance between family and work by implementing Congressional mandates in the area of military leave and for airline flight crews. While it makes some other changes in the regulations,
compliance with the regulatory scheme of the FMLA remains a challenge for employers and this final rule does little to address the administrative burdens caused by the FMLA regulations."