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NATIONAL MILITARY FAMILY ASSOCIATION
Together we're stronger

April 30, 2012

Mary Ziegler
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3510
200 Constitution Avenue, NW
Washington, DC 20210

Re: Implementation of the military leave provisions of the FMLA and the Airline Flight Crew Technical Corrections Act, RIN 1235-AA03

Dear Ms. Ziegler:

On behalf of the National Partnership for Women & Families, the National Military Family Association and the undersigned organizations, we thank you for the opportunity to respond to the Department of Labor's Notice of Proposed Rulemaking relating to legislative expansions of the Family and Medical Leave Act (FMLA). The proposed rules would implement changes to the military leave provisions of the FMLA, as well as the Airline Flight Crew Technical Corrections Act, which makes it easier for airline crews to meet the FMLA's eligibility requirements. The leave provided by the expansion of the FMLA will be of great assistance to military families and airline employees alike.

The FMLA's passage in 1993 was a watershed moment for support of working families in the United States. Since the law's enactment, the FMLA has been used more than 100 million times by workers taking unpaid time off to care for themselves or their families. The law makes job-protected leave available to eligible workers and enables both men and women to meet their responsibilities for their families without sacrificing their jobs. Prior to 2008, the FMLA empowered eligible workers to take up to twelve weeks of leave each year to care for immediate family members or to address serious personal health conditions. In 2008, the law was expanded to provide certain military families members up to 26 weeks of leave to help care for service members injured in combat and up to twelve weeks to address qualifying exigencies arising out of the deployment of a close relative.

1875 connecticut avenue, nw ~ suite 650 ~ washington, dc 20009 ~ phone: 202.986.2600 ~ fax: 202.986.2539

email: info@nationalpartnership.org ~ web: www.nationalpartnership.org

In October 2009, Congress again expanded the FMLA's reach. This expansion allowed family members to take time off to care for a veteran with a serious illness or injury, extended the applicability of qualifying exigency leave provisions to families of active duty service members, expanded military caregiver leave to cover serious injuries or illnesses that result from the aggravation of a preexisting condition in the line of duty, and clarified the procedures under which such leave can be accessed. The proposed regulations upon which we comment here would implement that expansion.

The proposed regulations also implement the 2009 Airline Flight Crew Technical Corrections Act, which addresses the unique circumstances of flight crews so that flight crew members can more easily qualify for time off under the FMLA. The FMLA's requirement that workers perform 1,250 hours of service before they are eligible for leave has adversely impacted flight crews whose schedules do not fall within the traditional 9 to 5 work day and whose work hours are calculated in a way unique to the airline industry. The new law and the proposed regulations establish different FMLA eligibility criteria for flight crews, by taking specific airline industry practices into account. The proposed regulations will better facilitate the use of FMLA leave by airline workers who need time off to care for a new baby, sick parent, child, or spouse or to care for their own serious health condition.

The proposed regulatory changes will positively impact tens of thousands of people, benefitting the service members who need care and their caregivers, the family members whose lives are interrupted by military deployments, and the airline workers who have previously been unable to take critical leave because airline industry practices limited their eligibility under the FMLA.[1]

This letter responds to the specific questions posed by the Department of Labor in the Notice of Proposed Rulemaking and offers additional recommendations regarding improvements that can be made to the proposed rule before it is finalized. We focus in particular on the regulatory provisions impacting military personnel. With regards to the draft regulations implementing the Airline Flight Crew Technical Corrections Act, we encourage the Department to carefully consider the comments submitted on behalf of airline employee groups. The regulations make important changes and should be tailored to the realities of those working in the airline industry.

A. Comments Responding to Specific Questions Posed in the Notice of Proposed Rulemaking

1) **The proposed rule appropriately ensures coverage for those service members whose military roles do not fall under the traditional definitions of foreign deployment.** The proposed rule affirmatively acknowledges that deployments to

[1] 77 Fed. Reg. 8960, 8991 (Feb. 15, 2012) (The regulations stand to benefit approximately 193,000 employees who will be eligible to take the time necessary to address qualifying exigencies arising out of a family member's military service. Approximately 59,000 family members will now be eligible to take time off to care for an injured service member or veteran. And approximately 90,560 crew members who are not already covered by an FMLA-type leave policy under a collective bargaining agreement will now have access to the FMLA's guarantees.)

international waters should be considered a foreign deployment for the purposes of the FMLA.[2] Such coverage was clearly intended when Congress passed the National Defense Authorization Act of 2010 and Navy, Marine Corps and Coast Guard service members are no less deserving of FMLA protection than are their counterparts who are deployed to foreign lands. We encourage the Department of Labor to work with the Department of the Navy and Department of Homeland Security to ensure that families of sailors, Marines and Coast Guardsmen are able to access the qualifying exigency benefit.

2) **Veterans must be able to establish that they suffer from a qualifying serious injury or illness without having to rely on the Veterans Affairs Schedule for Rating Disabilities (VASRD) or on their ability to fulfill occupational requirements.** Reliance on the VASRD system or on a veteran's ability to fulfill occupational requirements as the determinants of whether a veteran's illness or injury qualifies as serious for the purposes of the FMLA poses several serious concerns.

First, while reliance on a 50 percent VASRD rating may work for some, it should not be the only method by which veterans may establish serious health conditions. The VASRD system is used by the Department of Veterans Affairs (VA) to evaluate the severity of disabilities. A veteran's VASRD rating may not correlate with the need for family care. A private doctor may, for example, determine that a veteran is physically unable to drive because of an eye injury. That veteran is consequently likely to need assistance to get to and from doctor's appointments. The veteran's VASRD rating, however, could be below 50 percent Without an alternative process through which to establish a serious illness or injury, the VASRD system would therefore bar the veteran's family from qualifying for FMLA leave, despite the veteran's need for such care.

Second, the VASRD system does not adequately account for the range of injuries currently facing today's veterans. Many of the most common injuries to arise out of the Iraq war, for example, include Traumatic Brain Injuries and Post-Traumatic Stress Disorder. According to the National Council on Disability, "an estimated 25-40 percent" of those service members returning from Iraq and Afghanistan suffer from "psychological and neurological injuries associated with post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI), which have been dubbed 'signature injuries' of the Iraq War."[3] When the VASRD rating was developed, these disorders were neither well understood nor accounted for in the design of the rating system. Consequently, overreliance on the VASRD rating could leave veterans who need care with no access to it.

Third, overreliance on the VASRD rating could leave veterans for whom a rating has not yet been assigned without access to the FMLA's benefits. Many of the

[2] 77 Fed. Reg. 8960, 9012 (Feb. 15, 2012) (§825.126(a)(2)(iii)).
[3] National Council on Disability, *Invisible Wounds: Serving Service Members and Veterans with PTSD and TBI* (2009), *available* at http://www.ncd.gov/NCD/publications/2010/03312009#d325ef55_a45d_4065_b71a_e9a4ca8f656b.

injuries associated with active duty do not manifest themselves until years after the completion of service. A service member who is exposed to burn pit fumes, for example, may later need family care as a veteran after being diagnosed with lung cancer. That veteran would not have been assigned an Integrated Disability Evaluation System rating from the Department of Defense, which rates the seriousness of an injury incurred while on active duty. Moreover, the assignment of a VASRD rating would take time and effort to secure. While the veteran waits for such a rating, it is critically important that his or her family be eligible for leave.

Fourth, while Section 825.127(c)(2)(iii) offers some flexibility to veterans seeking to qualify their injuries or illnesses as serious enough such that their family members can take leave to care for them, it is unnecessarily narrow and consequently fails to provide an appropriate alternative to the VASRD rating requirements. Section 825.127(c)(2)(iii) requires that veterans seeking care from their family members establish that they suffer from a "physical or mental condition that substantially impairs" their "ability to secure or follow a substantially gainful occupation by reason of a service connected disability or disabilities, or would do so absent treatment."[4]

The reliance on the veteran's ability to fulfill occupational requirements sets a standard that many veterans who need care may have difficulty meeting. The current draft language does not elaborate on what it means for someone to be unable to "secure or follow a substantially gainful occupation." Furthermore, it demands that veterans meet more stringent requirements than are required of their civilian counterparts who were not injured in service of this country; FMLA regulations currently define a serious health condition as an "illness, injury, impairment or physical or mental condition that involves inpatient care … or continuing treatment by a health care provider…"[5] Rather than forcing veterans to meet a more difficult standard, the regulations should allow veterans to have access to care under the FMLA when they meet this same standard and their illness or injury was caused by or aggravated in the line of duty.

We are pleased that the Department has proposed flexible guidelines for assessing whether a veteran has a serious illness or injury, by providing three separate ways for the serious illness or injury to be assessed. However, we recommend that the Department remove language tying the seriousness of a veteran's illness or injury to her ability or inability to work and replace it instead with the standard referenced above.

3) **The Department's interpretation of the five-year coverage limit for veterans is appropriate.** Although we believe that the limit on FMLA eligibility should be extended beyond five years, we recognize that this is a statutory limitation and that the Department must interpret within existing statutory confines. We

[4] 77 Fed. Reg. 8960, 9012 (Feb. 15, 2012) (§825.127(c)(2)(iii)).
[5] 29 C.F.R. 113 (2012).

appreciate the Department's effort to give broad applicability to the five-year limit by allowing family members who commenced their leave within the five-year deadline to continue their leave after the five years have expired, provided that the leave began prior to its expiration.[6]

4) **The documentation that employers may require of family members of active duty service members who are seeking qualified exigency leave should explicitly allow family members to supply a letter from the service members' command.** The language as drafted requires that

> the first time an employee requests leave because of a qualifying exigency arising out of the covered active duty or call to covered active duty status of a military member, an employer may require the employee to provide a copy of the military member's active duty orders or other documentation issued by the military which indicates that the military member is on covered active duty or call to active duty status, and the dates of the military member's covered active duty service.[7]

Active duty military members do not receive "active duty orders" or a "call to active duty." In addition to proposed regulations' allowance for "other documentation," the regulatory language should specify that the documentation requirement will be satisfied by a letter from the service member's command indicating that the active duty member is being deployed.

Despite our concerns about the documentation that may be used to prove the need for leave, we are pleased that the Department has explicitly stated that family members are not required to provide such information unless the employer requests it.

5) **The rule appropriately extends the amount of time a family member may take for qualifying exigency leave when the reason for leave is a service member's rest and recuperation.** The Department rightfully acknowledges that service members are often sent home to rest and recuperate for up to fifteen days. We applaud the decision to extend the amount of time for which a family member may take leave from five to fifteen days. Given the sacrifice military families make for the country, it is appropriate to grant service members and their families time together when the service member is home for a limited time from a foreign deployment. Allowing for such leave not only positively impacts family members at home, but improves the morale of those serving our country abroad.

6) **We applaud the Department's decision to allow any FMLA health care provider to certify a serious injury or illness for military caregiver leave.**

[6] 77 Fed. Reg. 8960, 9012 (Feb. 15, 2012) (§825.127(b)(2) ("An eligible employee must commence leave to care for a covered veteran within five years of the veteran's active duty service but the 'single 12 month period' described in paragraph (e)(1) of this section may extend beyond the five year period"), pg. 9012).
[7] 77 Fed. Reg. 8960, 9015 (Feb. 15, 2012) (29 C.F.R. § 825.309(a)).

This is an especially important step forward for veterans. The statute itself makes no distinction between veterans treated through the Veterans Administration and those who are not. Veterans are frequently treated in private facilities. The regulations properly acknowledge that veterans should be able to receive certifications from both government agencies and private health care providers.

Permitting treatment by private health care providers is an important step forward, but the rules must also include a process by which those health care providers can assess whether the veteran was injured in the line of duty. Private health care providers on their own are unlikely to be able to determine whether an injury was incurred in the line of duty because they are not permitted access to the veteran's service record, which generally provides the relevant information necessary to such a determination. In an effort to empower private health care providers to make assessments about the source of a veteran's injury, the regulations should allow for private health care providers to speak with veteran service officers, provided that the service member approves. Veteran service officers are familiar with the veteran's service record and are frequently called upon to make similar assessments for their clients. Consequently, they will be able to advise the private health care provider about whether the injury was or was not incurred in the line of duty.

7) **Rather than creating an additional optional form for employers to use when an employee requests FMLA leave, the Department should immediately adapt the current WH-385 and update WH-384 to reflect the fact that family members of veterans now qualify for military family leave entitlements and qualifying exigency leave.** Sample form WH-385 is provided to employers to use when employees request time off to care for an injured or ill family member who serves in the armed forces. To avoid confusion and unnecessary complications, the current form should be changed to include leave for the family members of veterans. The new regulations allow for situations where a family member may take time off to care for a sick active duty service member who separates from his or her military component and transitions into being a veteran. Family members should not have to submit to their employers an additional form to access leave that the employer has already granted. Instead, the same form should serve to establish the need for leave both when the service member is on active duty and when he or she retires or is discharged.

   In addition to updating the WH-395 form to include veterans, the form must also be changed so that the language on the form accurately reflects the regulations; references to contingency operations should now refer to "deployments to foreign countries."

   The Department should also immediately update WH-384, the sample form used by employers whose employees request leave pursuant to the qualifying exigency leave provisions of the FMLA. Specifically, the form should be updated to include reference to veterans and active members of the armed forces who are now eligible to take leave under the FMLA.

It is imperative that the WH-384 and 385 forms be updated quickly to reflect the expanded rights to FMLA leave for military families and airline workers. The forms play an important role in establishing appropriate lines of communication between employers and employees, and their accuracy is vital to ensuring that workers can exercise their rights under the FMLA and that employers comply with the law.

B. Additional Recommendations for Improving the Regulations Proposed in the Notice of Proposed Rulemaking

1) **The Department should provide a straightforward explanation of what is meant by the phrase "qualifying exigency."** The FMLA bestows important rights upon America's military families. Military families must understand their rights in order to take advantage of them. The term "qualifying exigency" does not facilitate such an understanding. It is confusing and does not lend itself to a ready comprehension of how the FMLA applies in a military context. We recommend that the Department clarify the meaning of "qualifying exigency" at the beginning of 29 C.F.R. § 825.126 by inserting the following after the first sentence: "A qualifying exigency is a situation that arises when a service member has been notified of an impending call or order for active duty or foreign deployment."

2) **For qualifying exigency leave related to childcare, we urge the Department to explicitly include additional categories of childcare and school activities that would qualify a military family member to take leave.** The regulations as currently drafted permit military family members to take qualifying exigency leave in order to "arrange for alternative childcare," "provide care for a child of a military member on an urgent, immediate need basis," to "enroll in or transfer to a new school or day care facility a child of the military member when enrollment or transfer is necessitated" by the call to active duty, or finally to "attend meetings with staff at a school or daycare facility."[8] There are, however, many other needs that a child of a military member might have and the families of military service members should be entitled to take leave for those reasons. Those reasons might include, but are not limited to, the need to arrange for summer care, to attend medical appointments for children, or to negotiate an individual education plan for a child with a disability in accordance with the Individuals with Disabilities Education Act. The Department should clearly indicate that these types of childcare needs might also necessitate qualifying exigency leave.

3) **The Department should ensure that gay and lesbian service members have equal access to family care by amending the definition of "next of kin."** The repeal of "Don't Ask Don't Tell" means that service members who have put their lives in danger in service of their country may serve openly in the military. Many of those service members are in domestic partnerships or marriages. Though the Defense of Marriage Act (DOMA) prohibits same-sex couples from being

[8] 77 Fed. Reg. 8960, 9012 (Feb. 15, 2012).

considered spouses for the purposes of FMLA leave, many service members would likely prefer, and perhaps be better off, if they were cared for by their partners. As one military spouse puts it:

> My wife is a member of the armed forces and she considers us a military family. I support her service unconditionally. She returned safely from Afghanistan, but I often fretted about what I would do if she was injured. I played out the scenarios in my head... Would I quit my job to take care of her if she needed my full-time care? I'm already her support system and we already share a home. Her father is 74 years old and lives 3,000 miles away. The current law puts the burden of care on her father even though I am already integral to her daily life. Taking care of Soldiers means providing ***all military families*** the flexibility to realistically plan for the worst in a dangerous profession.[9]

In light of the repeal of Don't Ask Don't Tell, the Department should expand upon the current definition of next of kin in order to explicitly include domestic partners. The term "domestic partner" should be defined as:

> the person recognized as the domestic partner of the employee under any domestic partner registry or civil union laws of the State or political subdivision of a State where the employee resides, or who is lawfully married to the employee under the laws of the State where the employee resides; or, in the case of an unmarried employee who lives in a State where a person cannot marry a person of the same sex under the laws of the State, an unmarried adult person of the same sex as the employee who is in a committed, personal relationship with the employee, is not a domestic partner to any other person, and who is designated to the employer by such employee as that employee's domestic partner.

4) **The Department should explicitly note that all FMLA regulations are interpreted to include the children of parents standing in loco parentis and should ensure consistent and uniform administration of these new FMLA provisions.** There are approximately 48,000 lesbian, gay, and bisexual service members on active duty today, and 22,000 more on standby and in retired reserve forces. Many of these active duty service members and reservists are raising children, while numerous other service members have been raised by two mothers or two fathers.

As the Department recognized in June 2010, "many employees and employers are unsure of how the FMLA applies when there is no legal or biological parent-child

[9] Tracey Hepner, Co-Founder, Military Partners and Families Coalition, in Washington, D.C. (Mar. 28, 2012) (Military Partners and Families Coalition provides support, resources, education and advocacy for lesbian, gay, bisexual and transgender military partners and their families.)

relationship." In an effort to address this concern, the Wage and Hour Division of the Department of Labor issued an Administrator's Interpretation of the definition of "son or daughter" in section 101(2) of the Family and Medical Leave Act (FMLA). The Interpretation specifies that day-to-day care or financial support could establish a person as a parent "in loco parentis" if that person intended to assume the responsibilities of a parent. The implications of this interpretation are profound. For example, a grandparent or uncle who has assumed care of a child is now able to take FMLA leave to care for that child. This interpretation also has widespread impact on the LGBT community.

With the repeal of Don't Ask Don't Tell and the growing number of LGBT service members who are now starting families, and with the extension of FMLA leave to members of the Regular Armed Forces it must be made clear that the June 2010 Administrator's Interpretation regarding the definition of "in loco parentis" also applies in this situation. It is critical for commanding officers, employers and others responsible for granting leave to understand the scope of FMLA leave. We recommend issuing explicit regulations to ensure consistent and uniform administration of these new FMLA provisions.

5) **Veterans whose family members would have qualified for caregiver leave but for the fact that regulations had not yet been promulgated should be given a special dispensation so that they can take leave to care for veterans who still need such assistance.** The Department has taken the position that "employers are not required to provide employees with military caregiver leave to care for a veteran until the department defines a qualifying serious injury or illness of a veteran through regulation."[10] Though the NDAA was signed by the President in October 2009, the process of establishing a rule takes years. This means that veterans who would otherwise have been eligible to benefit from the FMLA have not and will not be able to until the final rule is promulgated. By that time, many family members who would otherwise have taken time off will no longer be able to do so because the veterans for whom they need to care will have served in active duty more than five years prior to the request for leave. An exception should be made for those particular family members so that veterans can realize the intended benefits of the law.

6) **The Department should insert language identifying the discharge date provided on form DD-214 as the date when the veteran officially transitioned from being an active duty service member.** This would clarify exactly what makes a veteran's discharge effective such that a person is considered a veteran for the purposes of the FMLA.

We appreciate this opportunity to submit comments the proposed changes to the FMLA regulations. If you have any questions, please contact Sarah Crawford or Vicki Shabo of the National Partnership for Women & Families at 202-986-2600.

[10] 77 Fed. Reg. 8960, 8962 (Feb. 15, 2012).

Sincerely,

National Partnership for Women & Families
National Military Family Association
9to5, National Association of Working Women
9to5 Atlanta Working Women
9to5 Bay Area (CA)
9to5 Colorado
9to5 Los Angeles
9to5 Milwaukee
A Better Balance
African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Medical Student Association (AMSA)
Business and Professional Women's Foundation
Catalyst
Center for Law and Social Policy (CLASP)
Coalition on Human Needs
Direct Care Alliance
Disciples Home Missions, Christian Church (Disciples of Christ)
Disciples Justice Action Network
Equal Rights Advocates
Families USA
Family Caregiver Alliance
Family Equality Council
Family Forward Oregon
Family Values @ Work
Federally Employed Women (FEW)
Gay, Lesbian & Straight Education Network (GLSEN)
Hadassah, The Women's Zionist Organization of America, Inc
Human Rights Campaign
Interfaith Worker Justice
Jewish Alliance for Law & Social Action
Labor Project for Working Families
Lawyers' Committee for Civil Rights Under Law
The Legal Aid Society Employment Law Center
Maine Women's Lobby
Military Partners and Families Coalition
MomsRising
Mothering Justice
National Association for the Advancement of Colored People (NAACP)
National Council of Jewish Women
National Council of La Raza
National Council of Women's Organizations
National Employment Law Project
National Family Caregivers Association

National Fatherhood Initiative
National Gay and Lesbian Task Force
National Guard Association of the United States
National Latina Institute for Reproductive Health
National Organization for Women
National Respite Coalition
National Women's Law Center
National Workrights Institute
New York Paid Leave Coalition
Partnership for Working Families
PathWays PA
Restaurant Opportunities Center of Washington, DC
RESULTS
Wider Opportunities for Women
Women's Law Project
Women's Research & Education Institute (WREI)