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# DOL ISSUES FINAL RULE ON FMLA COVERAGE FOR FLIGHT CREWS

On February 6, 2013, the U.S. Department of Labor ("DOL") published its Final Rule on the treatment of airline flight crews under the Family and Medical Leave Act, 29 U.S.C. § 2601 *et seq.* ("FMLA"). The rules were issued pursuant to the Airline Flight Crew Technical Corrections Act, Pub. L. 111-119 (Dec. 21, 2009) (the "AFCTCA"), a statute enacted in recognition that existing rules on FMLA coverage did not adequately account for the manner in which flight crews were paid, leaving them without FMLA rights because they did not reach the threshold of 1,250 hours per year necessary for FMLA coverage. The rules take effect on March 8, 2013.

Unfortunately, DOL's final rule reflects a clear misunderstanding of how flight crews are scheduled and compensated, creating a rule that is likely to result in substantial confusion and litigation and that, if applied literally, would give airline flight crews a significantly lower threshold for FMLA coverage and a higher entitlement to leave than other employees. Moreover, while DOL accepted the airline industry's position that leave should not be available for less than a day and that airlines and railroads have no obligation to return an employee to work where it is "physically impossible" to do so, DOL's discussion of these issues raises potential conflicts between DOL's view of a carrier's obligations under FMLA and the terms of existing collective bargaining agreements that would otherwise govern duty assignments in this circumstance.

## COMPENSATION OF FLIGHT CREWS AND FMLA COVERAGE

Airline flight crews are typically compensated based on "credit time," a concept that incorporates both "flight time" and "duty time" and, under many contracts, trip time or other factors. Credit hours are the basic currency of flight crew compensation and do not necessarily bear any direct relationship to hours flown or duty hours. "Flight time" is typically determined from the time the aircraft departs until it "blocks in" at its destination, while "duty time" is the

period between when a crew member reports to work, generally 30 to 60 minutes before the first flight departure, and is released from any further obligations to the carrier following the last flight of the period. Credit hours are based primarily on flight time, but where the duty period does not include a sufficient amount of flight time, the crew member may also be entitled to compensation based on what are called "rigs," a ratio of flight time to duty or trip time. For example, if the carrier had a 1:2 duty rig, the crew member would be entitled to credit hours for the greater of flight hours or 50 percent of duty hours. If a 12-hour duty period included eight flight hours, the crew member would receive eight credit hours. If the duty period included only four flight hours, the crew member would be paid for six credit hours. Some contracts also include "trip rigs," which set forth a similar ratio of flight hours to "time away from base," and may result in increased credit hours for the trip.

Moreover, pilot and flight attendant agreements typically include a "guarantee" of a minimum number of hours per month, typically ranging between 65 and 80 hours per month, with guarantees almost always stated in terms of credit hours. For example, a pilot or flight attendant on reserve status could go an entire month without being assigned to any trip but would be entitled to payment at the guaranteed rate. Similarly, a pilot or flight attendant might have a duty period of 12 hours but have no assignments that could fairly be described as "work" for several hours during the duty period, or an entitlement to credit where a flight was cancelled and the crew member was released from duty.

Enacted in 1993, FMLA requires that an employee work at least 1,250 hours during the prior 12-month period to qualify for FMLA rights, a number that reflects 60 percent of a typical full-time employee's schedule of 40 hours per week, or 2,080 hours per year. While the legislative history of FMLA indicates that Congress did not intend to exclude airline flight crews from FMLA rights "simply because of their industry's timekeeping methods," 136 Cong. Rec. H2198 (daily ed., May 10, 1990), the requirement that an employee work at least 1,250 hours during the period year effectively excluded many flight crew members because even at 70 or 80 credit hours per month, clearly a full-time schedule, a crew member would not have been paid for 1,250 hours per year and may not have been on duty for 1,250 hours during the year. *See Knapp v. America West Airlines, Inc.*, 207 Fed. Appx. 896 (10th Cir. 2006) (reserve days did not qualify as hours of service for FMLA purposes); *Rich v. Delta Air Lines, Inc.*, 921 F. Supp. 767 (N.D. Ga. 1996) (time spent on layover, not work time, for purposes of FMLA coverage).

While unions representing flight crew members have successfully negotiated the right to FMLA leave at some carriers, they also pushed for legislation establishing the right of flight crew members to FMLA leave.

## THE AIRLINE FLIGHT CREW TECHNICAL CORRECTIONS ACT

The Airline Flight Crew Technical Corrections Act ("AFCTCA"), passed almost unanimously by Congress in 2009, was intended to extend FMLA coverage to airline flight crews by recognizing that crews were compensated based on credit hours that reflected more work time than the number of credit hours for which they were paid. It was described as a "technical correction" because it amended FMLA to ensure that flight crews were provided with the same rights as other employees despite the industry practice under which flight crews were compensated in credit hours. *See* 155 Cong. Rec. S7320 (daily ed., July 9, 2009) (bill was designed only to put airline flight crews in same position as other employees entitled to FMLA rights).

The amendment provided that an airline pilot or flight attendant met the hours of service requirement under FMLA if, during the previous 12-month period, he or she (1) "has worked or been paid" for not less than 60 percent of the applicable total monthly guarantee (or its equivalent), and (2) has "worked or been paid" for not less than 504 hours—a figure represents the equivalent of 60 percent of a 70-hour monthly guarantee—not including personal commute time, or time spent on vacation, medical, or sick leave. 29 U.S.C. § 2611(2)(D). For crew members not on reserve status—what the industry commonly calls "line holders"—the "applicable monthly guarantee" is defined under the AFCTCA as "the minimum number of hours for which an employer has agreed to schedule such employee

for any given month." 29 U.S.C. § 2611(2)(D)(iii)(I). For crew members on reserve status, the guarantee is defined as "the number of hours for which an employer has agreed to pay such employee on reserve status for any given month," 29 U.S.C. § 2611(2)(D)(iii)(II), recognizing that reserves may not actually work during any given reserve period but are paid for being on reserve status. Thus, under both tests for determining coverage, the reference to "hours" can only be construed to mean credit hours because credit hours are what carriers use when establishing guarantees. Therefore, the phrase "has worked or been paid," which parallels the separate definitions of "applicable monthly guarantee" for line holders and reserves, must also be construed as a reference to credit hours.

## DOL'S FINAL RULE IMPLEMENTING THE AFCTCA

**The Qualifying Standards for Flight Crews.** In the AFCTCA, Congress did not attempt to determine how the entitlement of 12 weeks of FMLA would be applied to flight crew members but, rather, delegated to the Secretary of Labor the authority to "provide, by regulation, a method for calculating the leave." Pub. L. 111-119 § 2(b). In February 2012, DOL issued a Notice of Proposed Rule-Making ("NPRM"), 77 Fed. Reg. 8960 (Feb. 15, 2012), in which it proposed that for lineholders, "the employee's scheduled workweek (defined as the number of scheduled duty hours for that workweek) would serve as the basis for calculating FMLA leave usage" and that for reserves, "an average of the greater of the applicable monthly guarantee or actual duty hours worked in each of the prior 12 months would be used to calculate the employee's average workweek." 78 Fed. Reg. 8863. These proposals were roundly criticized by both carriers and unions on the basis that they were inconsistent with industry practice for compensating and scheduling flight crews. *Id.* In the final rule, DOL modified its position in light of these criticisms, adopting a rule that calculates leave usage on a daily basis with a fixed availability of 72 days per year. Unfortunately, DOL's analysis still fails to recognize airline industry practices, and DOL's rule permitting 72 days of FMLA leave per year results in significant anomalies between flight crews and other employees with regard to use of family and medical leave.

The final rules are contained in Subpart H of DOL's FMLA regulations, Special Rules Applicable to Airline Flight Crew Employees, 29 CFR §§ 825.800 *et seq.* Section 825.801(b) provides that "[a]n airline flight crew employee will meet the hours of service requirement during the previous 12-month period if he or she has worked or been paid for not less than 60 percent of the employee's applicable monthly guarantee and has worked or been paid for not less than 504 hours." Section 825.800(b)(2) defines "worked," however, as "the employee's duty hours during the previous 12-month period." Because the phrase "worked or been paid" is disjunctive, a flight crew member can qualify if his or her duty hours during the relevant period were at least 504 hours and 60 percent of the monthly guarantee. Thus, the test compares apples (duty hours) to oranges (the "applicable monthly guarantee," which is stated credit hours), making it much easier to reach the 60 percent of guarantee/504 hour threshold than Congress appears to have intended because the number of duty hours to which a flight crew member is assigned will always be substantially higher than the number of credit hours earned each month.

DOL stated in its final rule that there was overwhelming support among both carriers and unions for use of duty hours as the best measure of "hours worked" by a flight crew member. While this may be accurate in the abstract, it fails to account for the fact that the denominator in the calculation is credit hours, not duty hours, and that duty hours have no direct relationship to credit hours. This anomaly may not have great practical significance, however, because even if the denominator was stated in credit hours the vast majority of flight crew members would qualify for FMLA coverage because they received at least 504 credit hours and 60 percent of the carrier's guarantee during the prior 12 months, and the administrative burden of ascertaining which employees have failed to meet the test may not justify the practical benefit. In other words, most carriers may find that it is easier to treat all flight crew members at qualifying based on hours worked. Nonetheless, the test seems to distort the Congressional intent of measuring whether flight crew members worked 60 percent of a "full time" schedule.

**The Entitlement to 72 Days of FMLA.** The more significant flaw in the final rule is Section 825.802, DOL's rule on calculation of flight crew member qualified leave. There are two major problems with how DOL decided to address when a flight crew member takes leave under the FMLA. While DOL sensibly concluded that use of hours to calculate use of FMLA leave for flight crew members was impractical, DOL ignored the differences in airline operating environments that Congress recognized in the AFCTCA by setting the amount of FMLA leave using a premise—the "uniform six-day work week"—that has no factual basis and failing sufficiently to consider the practical implications of accommodating an employee's return to work when FMLA leave is taken for only one day of a scheduled trip.

In determining that the aviation industry cannot reasonably accommodate an hourly minimum leave period for flight crew members, DOL recognized that if a flight crew member misses a single hour of work for an FMLA-qualifying reason, the employee must miss an entire duty period because a pilot or flight attendant cannot leave work for an hour and then return. Accordingly, DOL set the minimum leave period as one calendar day.

The real flaw in the final rule is DOL's conclusion that providing flight crew members with 72 days of FMLA leave each year is the equivalent of the 12 weeks of leave provided to employees who work a traditional, 40-hour work week. The relevant section of the new rule, Section 825.802(a)(1), explains DOL's conclusion as follows:

> An eligible airline flight crew employee is entitled to 72 days of FMLA leave during any 12-month period…. This entitlement is based on a uniform six-day workweek for all airline flight crew employees, regardless of time actually worked or paid, multiplied by the statutory 12-workweek entitlement for FMLA leave. For example, if an employee took six weeks of leave for an FMLA-qualifying reason, the employee would use 36 days (6 days × 6 weeks) of the employee's 72-day entitlement.

The reference to a "uniform six-day workweek for all airline flight crew employees" is mystifying because there is no such thing, either as a matter of federal regulations or industry practice. The average number of days worked per month generally carries between 12 and 18 days, with a typical flight crew member working roughly four days a week, or 16 days per month. The apparent basis for DOL's reference to "a uniform six-day workweek for all airline flight crew employees" was the assertion by labor groups that six-day work weeks were possible under the regulations promulgated by the FAA for pilots, which prohibit a carrier from scheduling a pilot without at least a 24-hour period free of duty during any seven-day period. In fact, the concept of a "uniform six-day workweek" is plainly inconsistent with both industry practice and with FAA regulations governing cumulative limits on flight and duty time.

The FAA regulation upon which DOL relied is the outer limit for scheduling pilots for consecutive duty periods, one that is seldom used and triggers a requirement of extended rest periods. Under both current FAA regulations and more stringent regulations that take effect in 2014, it would be impossible to schedule a pilot for consecutive weeks in which the pilot was on duty six days each week because doing so would run afoul of other FAA restrictions, including prohibitions on scheduling a pilot for more than 100 flight hours in any 28-day period, 90 flight duty period hours in any seven-day period, or 190 flight duty period hours in any 28-day period. *See* 14 CFR § 117.23. If one assumes that the six duty periods envisioned by the DOL regulation were fairly typical duty periods of 10 to 12 hours each, of which six to eight hours were actual flight time, the pilot would exhaust his or her entire 28-day maximum in slightly more than two weeks, requiring that the pilot remain off duty for the remainder of the month. Moreover, most collective bargaining agreements require at least 12 days off each month, requiring an average of 2.75 days off each week.

The regulation would be less of a problem if FMLA leave could be taken only in week-long increments because the regulations would appear to permit the carrier to deduct six days from the total bank of 72 days for each week taken. In fact, some carriers have negotiated provisions for the equivalent of FMLA leave that allow as many as 84 days per year for "block" leaves because 84 calendar days of leave is equivalent to 12 weeks of leave. Even these carriers,

however, generally have smaller banks (e.g., 54 to 60 days) for intermittent leave. The problem is that there is nothing in the final rule or FMLA itself that would prohibit a pilot or flight attendant from requesting up to 72 days of leave on an intermittent basis—that is, only for the days during which the employee is assigned to work. By doing so, flight crew members would obtain substantially greater amounts of leave than that to which other employees are entitled. While a carrier might argue that the intent of the DOL regulations requires that leave be "bridged" when leave extends over more than one duty period, counting the days off in between the duty periods of FMLA usage, doing so could run afoul of the FMLA rules allowing intermittent leave.

To illustrate the problem, consider that a sufficiently senior pilot or flight attendant may be able to bid a line of flying with only 12 to 14 days of duty each month, and fewer if the carrier provides a reduced-hours option. By using 72 days of leave on a duty-period or trip basis, such an employee could effectively use 72 days of FMLA leave to obtain up to six months free of duty, or more if the crew member has elected a reduced-hours option. Many carriers already have significant numbers of flight crew members—particularly flight attendants—who seek to maintain health insurance and flight benefits while minimizing the amount of flying they actually do, creating significant expense for the carriers. By using a combination of FMLA leave for the crew member's own serious health condition or that of a spouse or child, vacation, and sick leave for non-FMLA covered conditions, a crew member quite plausibly could obtain full benefits while working only a small portion of a normal schedule each year.

**The Return to Work Requirement.** The second significant issue under DOL's final rule—one that may affect both airlines and railroads—is that although leave may be taken only in intervals of at least one day, the crew member is immediately entitled to return to the "same or equivalent position" unless it is "physically impossible" to do so. 29 C.F.R. § 825.205(a)(2). "The physical impossibility provision," DOL wrote, "is intended to make a limited allowance for the practical realities of the airline, railroad, and other industries with unique workplaces in which it is physically impossible for employees to leave work early or start work late." 78 Fed. Reg. 8869. DOL failed to consider, however, the impact of the common practice, particularly among major airlines, of scheduling flight crew members for "trips" that include duty periods away from base over multiple days where it may be physically *possible* to "deadhead" the pilot or flight attendant to resume the trip but doing so would create additional cost and potential operational issues, including questions about whether the crew member would be "legal" to resume the trip. Accordingly, the legal issue is whether the requirement of placing an employee in "the same or equivalent position" means the specific duty assignment that the employee would have held but for the leave or whether it merely requires the employer to return the employee to work subject to the duty assignment procedures that would apply to any other employee who was unable to take the original duty assignment.

In the airline industry, that question typically will be whether the carrier must restore an employee to the remainder of a previously assigned trip. While practices differ among carriers, if a crew member misses a trip due to illness, one common practice would be to reassign the crew member to another trip or place him or her on reserve status for the remainder of the period-covered trip. In the railroad industry, that question typically will be whether the carrier must place an employee who misses a trip due to intermittent FMLA leave at the top of the pool or board rotation for the next available assignment or at the bottom of the rotation. Collective bargaining agreements in the railroad industry generally provide that if an employee misses a trip for any reason, he or she is placed at the bottom of the pool or board rotation.

One would assume that returning an employee to the same or equivalent position means only returning the employee to active status in the same position, and that duty assignments would be governed by the carrier's agreements or practices. In explaining the physical impossibility rule, however, DOL provided the following caveat.

> [T]he Department does not consider contractual or other scheduling restrictions to be appropriate reasons to delay an employee's return to the same or an equivalent position. The FMLA regulations provide that the rights established by the Act may not

> be diminished by any employment benefit program or plan. The FMLA would supersede a provision of a collective bargaining agreement that allows seniority to take precedence over an employee's reinstatement to an equivalent position.

78 Fed. Reg. 8869.

With an effective date of March 8, 2013, this is an issue carriers will have to quickly address. If DOL's statement were construed to mean that an air carrier must return a crew member who missed only a portion of that trip because of FMLA leave to the same trip to which the employee was assigned, or that a rail carrier was required to restore a similarly situated employee to the top of the rotation, it would create significant operational and contractual problems for air and rail carriers. The more reasonable interpretation of DOL's comments is that returning an employee to the job he or she held, subject to the same assignment and reassignment provisions as any other employee, is sufficient because the entire premise of this discussion is that the employer must return the employee to the same "or equivalent position." The right to place an employee in an "equivalent position" would appear, by definition, to preclude any conclusion that the carrier must restore the employee to the precise trip or rotation placement the employee would have had but for the leave.

Moreover, a requirement that a carrier violate the scheduling provisions of its collective bargaining agreement—provisions that not only affect the carrier's rights but the negotiated rights of other employees—would also appear to violate Section 2614(a)(3) of FMLA, which provides that a "restored employee" is not entitled to "any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave." 29 U.S.C. § 2614(a)(3)(B). If an employee returning from any other form of leave has no contractual right to be restored to the original trip or to be inserted at the top of any pool or board, an employee returning from FMLA intermittent leave should not be entitled to claim such rights. Nonetheless, given DOL's discussion, it is likely that some employees may assert such rights, and that the issue will have to be litigated.

**Prospects for Judicial Review.** In promulgating the final rule, DOL had a duty under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*, to engage in reasoned decision-making. The agency must, at a minimum, articulate a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). While this standard is deferential in many respects, courts applying it have invalidated regulations where the agency reasoned from inconsistent premises, ignored important evidence, or failed to adequately respond to comments generated during notice-and-comment rulemaking. *See, e.g., American Radio Relay League, Inc. v. FCC*, 524 F.3d 227 (D.C. Cir. 2008).

Here, there are credible arguments that in promulgating the rule, DOL "failed to provide a reasoned explanation" for its choices, including by mischaracterizing the effect of the FAA regulations upon which it purportedly relied and ignoring the record evidence with regard to airline industry scheduling practices. *Id.* at 231. In its explanation of the final rule, DOL acknowledged that its role—and, DOL said, its intent—was to establish regulations that would treat airline flight crews the same as other employees and, in particular, to provide the equivalent of 12 weeks of FMLA leave to qualifying employees. DOL, however, plainly did not understand scheduling and compensation of flight crews, and the sole justification in the regulation for providing 72 days of leave—that "[t]his entitlement is based on a uniform six-day workweek for all airline flight crew employees"—is plainly inaccurate. Moreover, the agency ignored concerns raised by industry groups that a one-day minimum leave period, without more, was insufficient to address the possible disruption to industry scheduling practices. The result is directly contrary to the AFCTCA's purpose to give flight crews the same benefits as other workers, and not greater benefits. Thus, while challenging an agency's regulatory choice is always difficult, this may well be a case where the agency's choice "is not one that Congress would have sanctioned." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984) (internal quotation marks omitted).

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