Federal Register

Monday,
February 11, 2008

Part IV

Department of Labor

Employment Standards Adminstration
Wage and Hour Division

29 CFR Part 825
The Family and Medical Leave Act of 1993; Proposed Rule

DEPARTMENT OF LABOR

Employment Standards Administration

Wage and Hour Division

29 CFR Part 825

RIN 1215–AB35

The Family and Medical Leave Act of 1993

AGENCY: Employment Standards Administration, Wage and Hour Division, Department of Labor.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: The Department of Labor's Employment Standards Administration/Wage and Hour Division proposes to revise certain regulations implementing the Family and Medical Leave Act of 1993 (''FMLA''), the law that provides eligible workers with important rights to job protection for absences due to the birth or adoption of a child or for a serious health condition of the worker or a qualifying family member. The proposed changes are based on the Department's experience of nearly fifteen years administering the law, two previous Department of Labor studies of the FMLA in 1996 and 2001, several U.S. Supreme Court and lower court rulings, and the public comments received in response to a Request for Information (''RFI'') published in the **Federal Register** in December 2006 requesting information about experiences with the FMLA and comments on the effectiveness of these regulations.

The Department is also seeking public comment on issues to be addressed in final regulations regarding military family leave. Section 585(a) of the National Defense Authorization Act for FY 2008 amends the FMLA to provide leave to eligible employees of covered employers to care for injured servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as military family leave). The provisions of this amendment providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of this amendment providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because of the need to issue regulations under the military family leave provisions of the amendment as soon as possible, the Department is including in this Notice a description of the relevant military family leave statutory provisions, a discussion of issues the Department has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations.

DATES: Comments must be received on or before April 11, 2008.

ADDRESSES: You may submit comments, identified by RIN 1215–AB35, by either one of the following methods:

- *Electronic comments, through the Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.
- *Mail:* Address all written submissions to Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, N.W., Washington, DC 20210.

Instructions: Please submit one copy of your comments by only one method. All submissions must include the agency name and Regulatory Information Number (RIN) identified above for this rulemaking. Please be advised that comments received will be posted without change to *http://www.regulations.gov,* including any personal information provided. Because we continue to experience delays in receiving mail in the Washington, DC area, commenters are strongly encouraged to transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov* or to submit them by mail early. For additional information on submitting comments and the rulemaking process, see the ''Public Participation'' heading of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: For access to the docket to read background documents or comments received, go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Richard M. Brennan, Senior Regulatory Officer, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; telephone: (202) 693–0066 (this is not a toll free number). Copies of this proposed rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0675. TTY/TDD callers may dial toll-free 1–877–889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of the agency's current regulations may be directed to the nearest Wage and Hour Division District Office. Locate the nearest office by calling the Wage and Hour Division's toll-free help line at (866) 4US–WAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the Wage and Hour Division's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

SUPPLEMENTARY INFORMATION:

I. Electronic Access and Filing Comments

Public Participation: This notice of proposed rulemaking is available through the **Federal Register** and the *http://www.regulations.gov* Web site. You may also access this document via the Wage and Hour Division's home page at *http://www.wagehour.dol.gov.* To comment electronically on Federal rulemakings, go to the Federal eRulemaking Portal at *http://www.regulations.gov,* which will allow you to find, review, and submit comments on Federal documents that are open for comment and published in the **Federal Register**. Please identify all comments submitted in electronic form by the RIN docket number (1215–AB35). Because of delays in receiving mail in the Washington, DC area, commenters should transmit their comments electronically via the Federal eRulemaking Portal at *http://www.regulations.gov,* or submit them by mail early to ensure timely receipt prior to the close of the comment period. Submit one copy of your comments by only one method.

II. Background

A. What the Law Provides

The Family and Medical Leave Act of 1993, Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et. seq.*) (''FMLA'' or ''Act'') was enacted on February 5, 1993, and became effective for most covered employers on August 5, 1993. The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health

condition. *See* 29 U.S.C. 2612. The twelve weeks of leave may be taken in a block, or, under certain circumstances, intermittently or on a reduced leave schedule. *Id.*

Employers covered by the law must maintain for the employee any preexisting group health coverage during the leave period under the same conditions coverage would have been provided if the employee had not taken leave and, once the leave period has concluded, reinstate the employee to the same or an equivalent job with equivalent employment benefits, pay, and other terms and conditions of employment. *See* 29 U.S.C. 2614.

If an employee believes that his or her FMLA rights have been violated, the employee may file a complaint with the Department of Labor (''Department'' or ''DOL'') or file a private lawsuit in Federal or State court. If the employer has violated an employee's FMLA rights, the employee is entitled to reimbursement for any monetary loss incurred, equitable relief as appropriate, interest, attorneys' fees, expert witness fees, and court costs. Liquidated damages also may be awarded. *See*, 29 U.S.C. 2617.

Title I of the FMLA applies to private sector employers of fifty or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and Postal Rate Commission. Title II applies to civil service employees covered by the annual and sick leave system established under 5 U.S.C. Chapter 63, plus certain employees covered by other Federal leave systems. Title III established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. Title IV contains miscellaneous provisions, including rules governing the effect of the FMLA on more generous leave policies, other laws, and existing employment benefits. Title V originally extended leave provisions to certain employees of the U.S. Senate and House of Representatives, but such coverage was repealed and replaced by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

B. Who the Law Covers

The FMLA generally covers employers with 50 or more employees, and employees must have worked for the employer for 12 months and for 1,250 hours of service during the previous year to be eligible for FMLA leave. Based on 2005 data, the latest year for which data are available, the Department estimates that:

- There were an estimated 95.8 million workers in establishments covered by the FMLA regulations,
- There were approximately 77.1 million workers in covered establishments who met the FMLA's requirements for eligibility, and
- About 7.0 million covered and eligible workers took FMLA leave in 2005.
- About 1.7 million covered and eligible employees who took FMLA leave took at least some of it intermittently—and may have taken that intermittent leave multiple times over the course of the year.

C. Implementing Regulations

The FMLA required the Department to issue regulations to implement Title I and Title IV of the FMLA within 120 days of enactment, or by June 5, 1993, with an effective date of August 5, 1993. Given this short implementation period, the Department published a notice of proposed rulemaking in the **Federal Register** on March 10, 1993 (58 FR 13394), inviting comments until March 31, 1993, on a variety of questions and issues. The Department received a total of 393 comments at that time from a wide variety of stakeholders, including employers, trade and professional associations, advocacy organizations, labor unions, State and local governments, law firms, employee benefit firms, academic institutions, financial institutions, medical institutions, Members of Congress, and others.

After considering these comments, the Department issued an interim final rule on June 4, 1993 (58 FR 31794) that became effective on August 5, 1993. The Department also invited further public comment on the interim regulations through September 3, 1993, later extended to December 3, 1993 (58 FR 45433). During this comment period, the Department received more than 900 substantive and editorial comments on the interim regulations, from a wide variety of stakeholders.

Based on this second round of public comments, the Department published final regulations to implement the FMLA on January 6, 1995 (60 FR 2180). The regulations were amended on February 3, 1995 (60 FR 6658) and on March 30, 1995 (60 FR 16382) to make minor technical corrections. The final regulations went into effect on April 6, 1995.

D. Legal Challenges

The Ragsdale Decision

Since the enactment of the FMLA, hundreds of reported Federal cases have addressed the Act and/or implementing regulations. The most significant court decision on the validity of the regulations is that of the United States Supreme Court in *Ragsdale* v. *Wolverine World Wide, Inc.,* 535 U.S. 81 (2002). In its first case involving the FMLA, the Court ruled in March 2002 that the penalty provision in 29 CFR 825.700(a), which states ''[i]f an employee takes * * * leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement[,]'' was invalid because in some circumstances it required employers to provide leave to employees beyond the 12-week statutory entitlement. ''The FMLA guaranteed [Plaintiff] 12-not 42-weeks of leave[.]'' *Ragsdale,* 535 U.S. at 96. While the Supreme Court did not invalidate the notice and designation provisions in the regulations, it made clear that any categorical penalty for a violation of such requirements set forth in the regulations would exceed the Department's statutory authority. *Id.* at 91–96.

Other Challenges to ''Categorical Penalty'' Provisions

As the Department explained in its December 2006 RFI [1] and the subsequent 2007 Report on the RFI comments,[2] Ragsdale is not the only court decision addressing penalty provisions contained in the regulations. Another provision of the regulations, § 825.110(d), requires an employer to notify an employee prior to the employee commencing leave as to whether or not the employee is eligible for FMLA leave. If the employer fails to provide the employee with such information or the information is not accurate, the regulation bars the employer from challenging eligibility at a later date, even if the employee is not eligible for FMLA leave according to the statutory requirements. The majority of courts addressing this notice provision have found it to be invalid, even prior to the *Ragsdale* decision. *See, e.g., Woodford* v. *Cmty. Action of Greene County, Inc.,* 268 F.3d 51, 57 (2d Cir. 2001) (''The regulation exceeds agency rulemaking powers by making eligible under the FMLA employees who do not meet the statute's clear eligibility requirements.''); *Brungart* v. *BellSouth Telecomm., Inc.,* 231 F.3d 791, 796–97 (11th Cir. 2000) (''There is no ambiguity in the statute concerning eligibility for family medical leave, no gap to be

[1] *See* 71 FR 69504, 69505 (Dec. 1, 2006).

[2] *See* ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's request for Information,'' 72 FR 35550, 35560 (June 28, 2007).

filled.''); *Dormeyer* v. *Comerica Bank-Illinois,* 223 F.3d 579, 582 (7th Cir. 2000) (the regulation tries ''to change the Act'' because it makes eligible employees who, under the language of the statute, are ineligible for family leave; ''The statutory test is perfectly clear and covers the issue. The right of family leave is conferred only on employees who have worked at least 1,250 hours in the previous 12 months'').

Legal Challenges to the Definition of Serious Health Condition

Other regulatory provisions have been challenged as well. In particular, challenges to the regulatory section defining the term ''serious health condition'' as a condition causing a period of incapacity of more than three consecutive calendar days and continuing treatment, 29 CFR 825.114(a)(2)(i), has received significant attention. *See, e.g., Miller* v. *AT&T Corp.,* 250 F.3d 820 (4th Cir. 2001); *Thorson* v. *Gemini, Inc.,* 205 F.3d 370 (8th Cir. 2000).

As the Department explained in its December 2006 RFI [3] and subsequent Report on the RFI,[4] the Department itself has struggled with this definition. After the Act's passage, the Department promulgated § 825.114(c), which states that ''[o]rdinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.,* are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.'' This regulatory language was intended to reflect the legislative history of the FMLA and expresses the Congressional intent that minor, short-term illnesses for which treatment and recovery are very brief would be covered by employers' sick leave programs and not by the FMLA. *See* H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28–29 (1993). Consequently, in an early response about the proper handling of an employee's request for leave due to the common cold, the Department responded by stating ''[t]he fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).'' Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). More than a year and a half later, however, the Department reversed its interpretation, stating that Wage and Hour Opinion Letter FMLA–57 ''expresses an incorrect view, being inconsistent with the Department's established interpretation of qualifying 'serious health conditions' under the FMLA regulations.'' Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996). The Department further stated that such minor illnesses ordinarily would not be expected to last more than three days, but if they do meet the regulatory criteria for a serious health condition under § 825.114(a), they qualify for FMLA leave. The Department received significant commentary about its changing interpretations of the definition of serious health condition in response to its RFI. *See* Chapter III of the Department's 2007 Report on the RFI comments (72 FR at 35563).

Other Legal Challenges

Many other legal issues have arisen over the nearly thirteen years the final regulations have been in effect. For example, litigation has ensued under §§ 825.302–.303 as to what constitutes sufficient employee notice to trigger an employer's obligations under the FMLA. *See, e.g., Sarnowski* v. *Air Brook Limousine, Inc.,*—F.3d ,—2007 WL 4323259 (3rd Cir. 2007) (employee with chronic heart problems who informed employer of need for continuing medical monitoring and possible surgery provided sufficient notice); *Spangler* v. *Fed. Home Loan Bank of Des Moines,* 278 F.3d 847 (8th Cir. 2002) (employee who had made employer aware that she had problems with depression gave sufficient notice when she called in and indicated she was out because of ''depression again'').

Among other cases, the Tenth Circuit Court of Appeals considered the definition of ''worksite'' for determining whether an employee seeking FMLA leave was employed at a worksite where 50 or more employees were employed by the employer within 75 miles. Section 825.111(a)(3) states that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee has been assigned or to which the employee reports. In *Harbert* v. *Healthcare Services Group, Inc.,* 391 F.3d 1140 (10th Cir. 2004), the Court of Appeals invalidated § 825.111(a)(3), insofar as it is applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer. The First Circuit Court of Appeals looked at a different eligibility criterion, the requirement that the employee has been employed by the employer for at least 12 months, and addressed whether an employee who had a break in service may count previous periods of employment with the same employer toward satisfying the 12-month employment requirement (29 U.S.C. 2611(2)(A)(i); 29 CFR 825.110(a)(1) and (b)). *See Rucker* v. *Lee Holding Co.,* 471 F.3d 6 (1st Cir. 2006) (a complete break in service of a period of five years does not prevent the employee from counting previous employment to meet the 12-month employment requirement). Another regulation that has been the subject of litigation is § 825.220(d), which in part discusses the impact of a light duty work assignment on an employee's FMLA rights. Further, most recently, the Fourth Circuit Court of Appeals ruled in *Taylor* v. *Progress Energy,* 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed,* 76 U.S.L.W. 3226 (U.S. Oct. 22, 2007) (No. 07–539), that other language in § 825.220(d) prevents an employee and employer from independently settling past claims for FMLA violations without the approval of the Department or a court.

E. Prior Studies and Reports

Title III of the FMLA established a temporary Commission on Leave to conduct a study and report on existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies. The Commission surveyed workers and employers in 1995 and issued a report published by the Department in 1996, ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' [5] In 1999, the Department contracted with Westat, Inc.,[6] to update the employee and establishment surveys conducted in 1995. The Department published that report, ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update'' in January 2001.[7]

F. Request for Information

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** (71 FR 69504).

The RFI asked the public to comment on its experiences with, and

[3] *See* 71 FR at 69506.

[4] *See* 72 FR at 35563.

[5] *See http://www.dol.gov/esa/whd/fmla/fmla/1995Report/Family.htm.*

[6] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[7] *See http://www.dol.gov/esa/whd/fmla/fmla/toc.htm.*

observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. The RFI's questions and subject areas were derived from a series of stakeholder meetings the Department conducted in 2002–2003, a number of rulings of the U.S. Supreme Court and other Federal courts as discussed above, the Department's own experience administering the law, information from Congressional hearings, and public comments filed with the Office of Management and Budget (OMB) as described by OMB in three annual reports to Congress on the FMLA's costs and benefits.[8] More than 15,000 comments were received from workers, family members, employers, academics, and other interested parties.[9] This input ranged from personal accounts, legal reviews, industry and academic studies, and surveys to recommendations for regulatory and statutory changes to address particular areas of concern. The Department published its Report on the comments received in response to the Department's RFI in June 2007 (*see* 72 FR 35550 (June 28, 2007)).

G. Stakeholder Meeting

The Department also conducted a stakeholder meeting regarding the medical certification process on September 6, 2007. This meeting included representatives from employee organizations, employer organizations, and the health care provider community.

H. Other Statutory and Regulatory Developments

As discussed in the RFI and the Report on the RFI, in addition to developments in the courts, several important legislative and regulatory developments have occurred that either directly or indirectly impact the FMLA regulations. In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA), Public Law 104–191, which addresses in part the privacy of individually identifiable health information. On December 28, 2000, and as amended on August 14, 2002, the Department of Health and Human Services issued regulations that provide standards for the privacy of individually identifiable health information, codified at 45 CFR Parts 160 and 164 (''HIPAA Privacy Rule''). These standards apply to ''covered entities,'' defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic form in connection with a transaction as defined in the privacy regulations.[10]

The HIPAA Privacy Rule has had an impact on the FMLA's medical certification process in a number of ways. For example, the FMLA provides employers with the right to obtain medical information to determine that a requested leave qualifies as FMLA leave, and the employee is required to assure that this information, if requested, is provided to the employer to be entitled to FMLA leave for a serious health condition. If an employee does not do this, the absence does not qualify for FMLA leave.[11] While these rules are fairly straightforward, recent enforcement experience reveals that there is confusion with regard to the interaction of the HIPAA Privacy Rule and FMLA. For example, some employees incorrectly believe that the HIPAA Privacy Rule prevents employers from requiring FMLA certification. *See* discussion of §§ 825.306–.308 for further discussion of the impact of the HIPAA Privacy Rule on the medical certification process.

Similarly, since the final FMLA regulations were implemented in 1995, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing the Americans with Disabilities Act (ADA), has issued guidance with regard to the privacy of employee medical information. *See, e.g., Enforcement Guidance:* Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (EEOC 2000). The FMLA looks to the ADA for guidance on privacy of employee medical information.[12]

III. Proposed Changes to the FMLA Regulations

The following is a section-by-section discussion of the proposed revisions. Where a change is proposed to a regulatory section, that section is discussed below. *However, even if a section is not discussed, there may be minor editorial changes or corrections that did not warrant discussion.* The titles to each section of the existing regulations are in the form of a question. The proposal would reword each question into the more common format of a descriptive title and the Department invites comments on whether this change is helpful. In addition, several sections have been restructured and reorganized to improve the accessibility of the information (*e.g.*, guidance on leave for pregnancy and birth of a child is addressed in one consolidated section; an employer's notice obligations are combined in one section).

Section 825.102 (Effective date of the Act)

The proposal deletes this section, which discussed when the Act became effective, because it is no longer needed. The section number itself is reserved to avoid extensive renumbering of other sections in the regulations.

Section 825.103 (How the Act affects leave in progress on, or taken before, the effective date of the Act)

The proposal deletes and reserves this section, which discussed how the Act affected leave in progress on, or taken before, the Act's effective date, because it is no longer needed.

Section 825.106 (Joint employer coverage)

Sections 825.106 and 825.111(a)(3) of the existing regulations govern employer coverage and employee eligibility in the case of joint employment and set forth the responsibilities of the primary and secondary employers. Under § 825.106(d), employees jointly employed by two employers must be counted by both employers in determining employer coverage and employee eligibility. Thus, for example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by the FMLA. Likewise, if an employer with 15 permanent workers jointly employs 40 workers from a leasing company that employer is also covered by the FMLA.

Although job restoration is the primary responsibility of the primary employer, the secondary employer is responsible for accepting the employee returning from FMLA leave if the secondary employer continues to utilize an employee from the temporary or leasing agency and the agency chooses to place the employee with that secondary employer. The secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its

[8] These OMB reports may be found at the following Web sites: 2001 report at: *http://www.whitehouse.gov/omb/inforeg/costbenefitreport.pdf;* 2002 report at: *http://www.whitehouse.gov/omb/inforeg/2002_report_to_congress.pdf;* and 2004 report at: *http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.*

[9] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on *http://www.regulations.gov.*

[10] *See* 45 CFR 160.102(a) and 45 CFR 160.03.

[11] *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

[12] *See* 29 CFR 825.500(g).

temporary/leased employees, and thus may not interfere with an employee's attempt to exercise rights under the Act, or discharge or discriminate against an employee for opposing a practice that is unlawful under FMLA. *See* the existing § 825.106(e).

In Wage and Hour Opinion Letter FMLA–111 (Sept. 11, 2000), the Department considered the application of the FMLA regulations' ''joint employment'' test in current § 825.106 to a ''Professional Employer Organization'' (PEO). The PEO in question had a contract with the client company under which it appeared to enter into an employer-employee relationship with the client's employees (who were leased back to the client and continued to work at the client's worksite pursuant to the terms of the contract). The PEO in this case assumed substantial employer rights, responsibilities and risks, including the responsibility for personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Moreover, the PEO in this case had the right to hire, fire, assign, and direct and control the employees.

Based on the facts described in the incoming letter, the Opinion Letter concluded that the PEO was in a joint employment relationship with its client companies for these reasons:

1. The PEO was a separately owned and distinct entity under contract with the client to lease employees for the purpose of handling ''critical human resource responsibilities and employer risks for the client.''
2. The PEO was acting directly in the interest of the client in assuming human resource responsibilities.
3. The PEO appeared to also share control of the leased employees consistent with the client's responsibility for its product or service.

The Opinion Letter stated that ''it would appear that'' the PEO is the ''primary employer'' for those employees ''leased'' under contract with the client. Thus, under existing § 825.106, the PEO would be responsible for giving required FMLA notices to its employees, providing FMLA leave, maintaining group health insurance benefits during the leave, and restoring the employee to the same or equivalent job upon return from leave. The ''secondary employer'' (*i.e.*, the client company) would be responsible for accepting the employee returning from FMLA leave if the PEO chose to place the employee with the client company. The Opinion Letter concluded that the client company, as the ''secondary employer,'' whether a covered employer or not under the FMLA, was prohibited from interfering with a ''leased'' employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice that is unlawful under the Act.

While no specific questions concerning PEOs were contained in the RFI, the Department did seek information on ''any issues that may arise when an employee is jointly employed by two or more employers'' (71 FR at 69509). In response to the RFI, a number of stakeholders commented that it is not correct to consider PEOs (sometimes called ''HR Outsourcing Vendors'') to be joint employers with their client companies and explained the differences between a temporary staffing agency and a PEO. ''A temporary staffing agency is a labor supplier. It supplies employees to a client while a PEO is a service provider providing services to existing employees of a company.'' *See* comments by Jackson-Lewis. Unlike a temporary staffing agency, a PEO does not have the ability to place an employee returning from FMLA leave with a different client employer. *Id.*

The AFL–CIO commented that PEOs engage in a practice known as ''payrolling,'' in which the client employers transfer the payroll and related responsibilities for some or all of their employees to the PEO, and that typically, the PEO also makes payments on behalf of the client employer into State workers' compensation and unemployment insurance funds, but the PEO does not provide placement services. In contrast with temporary staffing agencies, the AFL–CIO commented, PEOs do not match people to jobs.

The law firm of Littler Mendelson advised that ''Employee leasing arrangements''—like those involving temporary services firms and other staffing companies—refer to arrangements in which the staffing firm places its own employees at a customer's place of business to perform services for the recipient's enterprise. The PEO, in contrast, assumes certain administrative functions for its clients such as payroll and benefits coverage and administration (including workers' compensation insurance and health insurance). The PEO typically has no direct responsibility over the employees of its clients including ''hiring, training, supervision, evaluation, discipline or discharge, among other critical employer functions.''

The law firm of Fulbright & Jaworski commented that PEO responsibilities vary by organization and contract, but that most are not involved in the day-to-day operations of their client's business and do not exercise the right to hire, fire, supervise or manage daily activities of employees. The firm urged the Department to clarify that opinion letter FMLA–111 (Sept. 11, 2000) is about an atypical PEO that actually exercised control over the client's employees.

The Department proposes to amend § 825.106(b) to clarify that PEOs that contract with client employers merely to perform administrative functions, including payroll, benefits, regulatory paperwork, and updating employment policies, are not joint employers with their clients, provided they merely perform such administrative functions. On the other hand, if in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client company.

Some of the comments concerning PEOs suggest confusion over how to count employees jointly employed for purposes of employer coverage (''over 50 workers'') and employee eligibility (''over 50 employees within 75 miles''). Some of these comments suggest that all of the employees of both the primary and secondary employers (and even those of other secondary employers) must be combined and counted together for purposes of these two tests. However, under the existing § 825.106(d) only those employees who are *jointly employed* by the primary and each of the secondary employers are included in the employee counts of both firms. The home office employees of the primary employer and the employees placed with other secondary employers are not included, for example, in the employee counts for each secondary employer.

For the reasons discussed above, existing paragraph (b) of § 825.106 is proposed to be changed to paragraph (b)(1) and a new paragraph (b)(2) is proposed to be added to clarify how the joint employment rules apply to PEOs. Under the proposal, PEOs that contract with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies—are not joint employers with their clients, provided: (1) They do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and (2) do not benefit from the work that the employees perform. On the other hand,

if in a particular fact situation a PEO has the right to hire, fire, assign, or direct and control the employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer. The proposal also includes a cross-reference in paragraph (d) to proposed § 825.111(a)(3), which, as discussed below, would change the determination of the ''worksite'' for purposes of employee eligibility with respect to employees who are placed by a primary employer at the worksite of a secondary employer for more than 12 months.

Section 825.108 (Public agency coverage)

This section addresses what constitutes a ''public agency'' for purposes of coverage under the Act. Under the current regulations, the dispositive test for determining whether a public agency is a separate and distinct entity (and therefore a separate employer for determining employee eligibility) or simply is part of another public agency is the U.S. Bureau of the Census' ''Census of Governments.'' *See* U.S. Census Bureau, 2002 Census of Governments, Volume 1, Number 1, Government Organization, GC02(1)–1, U.S. Government Printing Office, Washington, DC 20002 [13] (*http://www.census.gov/prod/2003pubs/gc021x1.pdf*). In contrast, regulations issued under the Fair Labor Standards Act (FLSA) use this test merely as *one factor* in determining what constitutes a separate public agency for its purposes. *See* 29 CFR 553.102. The Department proposes no changes to this section. Because the FMLA definition of ''public agency'' refers to the definition under the FLSA (29 U.S.C. 203(x)), however, the Department seeks public comment on whether this test in the FMLA regulations should be amended to conform with the test in the FLSA regulations.

Section 825.109 (Federal agency coverage)

This section of the existing regulations identifies the Federal agencies that are covered by the Department of Labor's FMLA regulations. Shortly after these regulations were promulgated, Congress enacted the Congressional Accountability Act of 1995, 2 U.S.C. 1301 (CAA), which in part amended the FMLA by repealing Title V of the FMLA pertaining to Congressional employees. *See* Section 504(b), Public Law 104–1. As a result, Congressional employees are now covered by the CAA as administered by the Office of Compliance created by the CAA.

Section 202(c) of the CAA also specifically provided that the General Accounting Office (now named the Government Accountability Office) (GAO) and Library of Congress (LOC) are subject to Title I of the FMLA. For those agencies, the FMLA is administered by the Comptroller General and the Librarian of Congress, respectively. *See* 29 U.S.C. 2611(4)(A)(iv) and 2617(f).

The CAA also called for a study of how the FMLA is administered for the Government Printing Office (GPO), as well as the GAO and LOC. 2 U.S.C. 1371. The Congressional Office of Compliance issued its study on December 31, 1996. The study concluded that the GPO is covered by Title II and the Office of Personnel Management's regulations, rather than Title I and the Department of Labor regulations. In a letter dated April 25, 2000, the GPO asked the Department to amend its FMLA regulations to delete the reference to GPO coverage, because that agency is covered by Title II. In its response of January 31, 2001, the Department concurred with the conclusion that the GPO is covered by Title II and stated that it would amend the regulations accordingly whenever they were next modified. The proposal would amend paragraphs (a) and (d) of this section to reflect these changes.

Pursuant to section 604(f) of the Postal Accountability and Enhancement Act, Public Law 109–435, Dec. 20, 2006, 120 Stat. 3242, the Postal Rate Commission was redesignated as the Postal Regulatory Commission, and the proposed rule would amend paragraph (b)(2) of this section to reflect this change.

Section 825.110 (''Eligible'' employee)

Current § 825.110 sets forth the eligibility standards employees must meet in order to take FMLA leave. Specifically, current § 825.110(a) restates the statutory requirement that to be eligible for FMLA leave, an employee must have been employed by an employer for at least 12 months, have been employed for at least 1,250 hours of service during the 12 months preceding the leave, and be employed at a worksite where 50 or more employees are employed by the employer within 75 miles of the worksite.

Current § 825.110(b) provides detail on the requirement that the employee must have been employed by the employer for at least 12 months, stating that the 12 months need not be consecutive. It further explains that if the employee was maintained on the payroll for any part of a week, that week counts towards the employee's fulfilling the 12 months employment requirement and that 52 weeks is deemed equal to 12 months.

In its RFI, the Department sought comment on whether and how to address the treatment of combining nonconsecutive periods of employment to meet the 12 months of employment requirement. (71 FR at 69508) This eligibility criterion has been the subject of litigation. In *Rucker* v. *Lee Holding, Co.,* 471 F.3d 6 (1st Cir. 2006), the court considered whether an employee's previous employment of five years counted toward the 12-month employment eligibility requirement even though it was separated by a five-year break in service from his current employment. The First Circuit Court of Appeals held that ''the complete separation of an employee from his or her employer for a period of years, here five years, does not prevent the employee from counting earlier periods of employment toward satisfying the 12-month requirement.'' *Id.* at 13. In regard to whether a break in service of more than five years would be permissible, the court stated that this important policy issue should be resolved by the Department in the first instance as a part of its exercise of its statutory authority. *Id.*

A number of commenters urged the Department to support the *Rucker* decision that prior months of service may be combined for eligibility purposes even when separated by breaks in service of many years. The National Partnership for Women & Families, for example, stated that ''an arbitrary time limit on how long a worker could leave the employment of a particular employer would operate as an unfair and disproportionate burden on women workers. Many women leave work for extended periods of time, for example, to stay home with young children during their formative years.'' (*See* comments by National Partnership for Women & Families.)

Employer comments received on this issue overwhelmingly disagreed with the First Circuit ruling on combining prior periods of service together. For example, the University of Notre Dame stated, ''There is a tremendous administrative burden associated with adopting the First Circuit Court of Appeals' interpretation of section 825.110 that an employer has the duty to aggregate non-consecutive service to establish '12 months of service.' As we understand this possible interpretation, the ability to aggregate past service with current service to equate to 12 months

[13] The Census of Governments is taken at five-year intervals.

is virtually unlimited.'' Other comments received on this issue included suggestions for amending the regulations to allow the employer to: disregard prior employment periods if all ties between the company and worker were severed; follow company policy or State law regarding the treatment of previous employment; and require that the 12 months of employment be consecutive. Employer commenters cited the administrative burden associated with combining previous employment periods as the rationale for their recommendations including that the FMLA itself only requires recordkeeping for three years and not indefinitely.

The Department received comments similar to these in response to the 1993 interim final regulations, which suggested limiting the period of time used in determining whether the employee had been employed by the employer for 12 months. In the final regulations, however, the Department declined to include such a limit, reasoning that ''[m]any employers require prospective employees to submit applications for employment which disclose employees' previous employment histories. Thus, the information regarding previous employment with an employer should be readily available and may be confirmed by the employer's records if a question arises.'' (60 FR at 2185) Furthermore, the Department did not find a basis under the statute or its legislative history for adopting the recommendations received in response to the Interim Final Rule. *Id.* Indeed, the statute does not directly address the issue of whether the 12 months of employment must be consecutive, and the legislative history provides limited insight into Congressional intent regarding extended breaks in employment. The Senate Committee Report in discussing the requirement that the employee must have worked for the employer for 12 months states ''[t]hese 12 months of employment need not have been consecutive.'' S. Rep. No. 103–3, at 23 (1993). The House Committee Report uses the same language in describing the 12-month requirement. *See* H.R. Rep. No. 103–8, pt. 1, at 35 (1993).

Based on the Department's experience in administering the FMLA, the First Circuit's ruling in *Rucker,* and comments received in response to the RFI, the Department proposes a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. Thus, under the proposed rule, if an employee in 2008 has worked five months for an employer and worked for the same employer for two full years in 1997–8, the employer would not have to consider the two years of prior employment in determining whether the employee currently is eligible for FMLA leave. The FMLA requires covered employers to maintain records for three years. 29 CFR 825.500(b) (''[E]mployers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request.''). The Department is not proposing to change the three-year record keeping requirements under FMLA. Thus, employers would have documentation to confirm previous employment for a former employee who at the time of rehiring had a break in service of three years or less. Where an employee relies on a period of employment that predates the employer's records, it will be incumbent upon the employee to put forth some proof of the prior employment. This is consistent with the employee's obligation to establish he or she is an eligible employee. *See Novak* v. *MetroHealth Medical Center,* 503 F.3d 572, 577 (6th Cir. 2007); *Burnett* v. *LFW, Inc.,* 472 F.3d 471, 477 (7th Cir. 2006). Of course, in determining whether an employee has met the eligibility criterion, an employer may have a policy to consider employment prior to a longer break in service, but in that event must do so in a uniform manner for all employees with similar breaks in service.

The Department considered several alternatives in developing this proposed change to § 825.110(b). Because the legislative history states that the 12 months of employment need not be consecutive, the Department could not adopt suggestions that *any* break in service ''resets'' the count for determining whether the employee has met the 12 months employment eligibility criterion. On the other hand, the Department believes it is not reasonable that the time frame used for considering prior employment for eligibility should be without end. At the same time, the Department is mindful of the comment by the National Partnership for Women & Families about the burden on women workers who may leave and reenter the workforce after the formative years of their children. *But see* S. Rep. No. 103–3, at 16 (1993). The Department believes that the proposed outer limit of a five year break in service is a permissible interpretation of the statute and strikes an appropriate balance between providing re-employed workers with FMLA protections and not making the administration of the Act unduly burdensome for employers.

However, the Department also proposes new paragraph (b)(2) of this section to address two exceptions to the general rule contained in proposed new paragraph (b)(1): a break in service resulting from the employee's fulfillment of military obligations; and a period of approved absence or unpaid leave, such as for education or child-rearing purposes, where a written agreement or collective bargaining agreement exists concerning the employer's intent to rehire the employee. In these situations, employment prior to the break in service must be used in determining whether the employee has been employed for at least 12 months, regardless of the length of the break in service.

The current discussion of how weeks are counted for fulfilling the 12 months requirement is proposed to be re-designated as paragraph (b)(3) of this section.

Further, the Department proposes to add a new paragraph (b)(4) in this section to note that nothing prevents an employer from considering employment prior to a continuous break in service of more than five years when determining if an employee meets the 12-month employment criterion provided the employer does so uniformly with respect to all employees with similar breaks in service.

Paragraph (c) of § 825.110 is proposed to be revised to address hours an employee would have worked for his or her employer but for the employee's fulfillment of military service obligations. This revision codifies the protections and benefits offered by the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In addition, the Department proposes several changes to § 825.110 in light of the *Ragsdale* decision. Current § 825.110(c) may result in some instances in employees who are ineligible for FMLA leave nonetheless being ''deemed eligible'' because of an employer's failure to meet its burden of maintaining records needed to establish the employee's eligibility. Current § 825.110(d) may also result in an employee who is not eligible for FMLA leave being ''deemed eligible'' based on the employer's lack of (or incorrect) notice to the employee. Read in concert with *Ragsdale*, in which the U.S. Supreme Court invalidated a similar provision in the current § 825.700(a),

the Department believes these provisions in current § 825.110(c) and (d) need to be modified.

On the other hand, the Court in *Ragsdale* suggested that if an employer fails to notify an employee of his or her FMLA rights, the employee may have a remedy if the employee can show that the employer interfered with, restrained or denied the employee the exercise of his or her FMLA rights and that the employee suffered damages as a result. *See Ragsdale*, 535 U.S. at 89. Therefore, the Department has incorporated into the proposed text of § 825.300 a statement that in these situations if an employee shows individualized harm because the employer interferes with, restrains or denies the employee of his or her FMLA rights, the employee is entitled to the remedies provided by the statute. The Department also proposes to add this language to § 825.220, which addresses how employees are protected when they assert their FMLA rights, and proposed § 825.301, which addresses designation of FMLA leave.

For organizational purposes, the notice provisions contained in current § 825.110(d) have been moved to proposed § 825.300(b) with other notice requirements employers must provide to employees under the regulations. This organizational change should make it easier for employees and employers to locate these requirements by consolidating them into one section. The proposal includes a cross-reference to § 825.300 in paragraph (d) of § 825.110.

The Department also proposes to clarify the language in current § 825.110(d) stating that employee eligibility determinations ''must be made as of the date leave commences.'' This language has led to confusion when employees who have fulfilled the 1,250 hours worked requirement for eligibility, but not the 12 months of employment requirement, begin a block of leave. (Although periods of leave do not count towards the 1,250 hour requirement because leave is not ''hours worked,'' periods of leave do count towards the 12 months of employment requirement because the employment relationship continues, and has not been severed, during the leave.) For example, where an employee who has worked for an employer for 11 months and 1,300 hours commences a three month block of leave for birth and bonding, confusion exists as to whether that portion of the leave that occurs after the employee reaches 12 months of employment is FMLA protected. *Compare Babcock* v. *BellSouth Advertising and Publishing Corp.,* 348 F.3d 73 (4th Cir. 2003), with *Willemssen* v. *The Conveyor Co.,* 359 F.Supp.2d 813 (N.D. Iowa 2005). The proposal clarifies that when an employee is on leave at the time he or she meets the 12-month eligibility requirement, the period of leave prior to meeting the statutory requirement is non-FMLA leave and the period of leave after the statutory requirement is met is FMLA leave.

The Department proposes to delete current § 825.110(e), regarding counting periods of employment prior to the effective date of the FMLA, because the revisions proposed in § 825.110(b) discussed above render the provision unnecessary.

The Department proposes no changes to current paragraph (f) (paragraph (e) in the proposal) of this section, which states that whether an employee works for an employer who employs 50 or more employees within 75 miles of the worksite is determined as of the date the leave request is made. In the RFI, the Department sought comment on the differing regulatory tests used for determining employee eligibility: the determination of whether the employee has been employed for at least 12 months and for at least 1,250 hours in the 12 months preceding the leave is made as of *the date the leave is to commence;* however, the determination of whether 50 employees are employed by the employer within 75 miles of the worksite is made as of *the date the leave request is made* (emphasis added). (71 FR at 69508). Some of the comments received in response to the RFI urged the Department to make these tests the same, namely, to require the determination of employee eligibility in both cases as of the date the leave is to begin. The Department appreciates the difficulty experienced by many employers in complying with these different regulatory tests; however, the proposal does not adopt this suggestion for the reasons discussed in the preamble to the 1995 final regulations:

> [T]he purpose and structure of FMLA's notice provisions intentionally encourage as much advance notice of an employee's need for leave as possible, to enable both the employer to plan for the absence and the employee to make necessary arrangements for the leave. Both parties are served by making this determination when the employee requests leave. Tying the worksite employee-count to the date leave commences as suggested could create the anomalous result of both the employee and employer planning for the leave, only to have it denied at the last moment before it starts if fewer than 50 employees are employed within 75 miles of the worksite at that time. This would entirely defeat the notice and planning aspects that are so integral and indispensable to the FMLA leave process.

(60 FR at 2186)

Section 825.111 (Determining whether 50 employees are employed within 75 miles)

Current § 825.111 sets forth the standards for determining whether an employer employs 50 employees within 75 miles for purposes of employee eligibility. Paragraph (a)(3) of this section provides that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports.

In *Harbert* v. *Healthcare Services Group, Inc.,* 391 F.3d 1140 (10th Cir. 2004), the Court of Appeals held that § 825.111(a)(3), as applied to the situation of an employee with a long-term fixed worksite at a facility of the secondary employer, was arbitrary and capricious because it: (1) Contravened the plain meaning of the term ''worksite'' as the place where an employee actually works (as opposed to the location of the long-term care placement agency from which Harbert was assigned); (2) contradicted Congressional intent that if any employer, large or small, has no significant pool of employees nearby (within 75 miles) to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee; and (3) created an arbitrary distinction between sole and joint employers.

The court noted that Congress did not define the term ''worksite'' in the FMLA, and it concluded that the common understanding of the term ''worksite'' is the site where the employee works. With respect to the employee eligibility requirement of 50 employees within 75 miles, the court noted that Congress recognized that even potentially large employers may have difficulty finding temporary replacements for employees who work at geographically scattered locations. The court stated that Congress determined that if any employer (large or small) has no significant pool of employees in close geographic proximity to cover for an absent employee, that employer should not be required to provide FMLA leave to that employee. Therefore, the court concluded:

> An employer's ability to replace a particular employee during his or her period of leave will depend on where that employee must perform his or her work. In general, therefore, the congressional purpose underlying the 50/75 provision is not effected if the ''worksite'' of an employee who has a regular place of work is defined as any site other than that place.

391 F.3d at 1150.

In comparing how the regulations apply the term ''worksite'' to joint employers and sole employers, the court stated:

> The challenged regulation also creates an arbitrary distinction between sole employers and joint employers. For example, if the employer is a company that operates a chain of convenience stores, the ''worksite'' of an employee hired to work at one of those convenience stores is that particular convenience store. *See* 58 Fed. Reg. 31794, 31798 (1993). If, on the other hand, the employer is a placement company that hires certain specialized employees to work at convenience stores owned by another entity (and therefore is considered a joint employer), the ''worksite'' of that same employee hired to work at that same convenience store is the office of the placement company.

Id.

Importantly, the court did not invalidate the regulation with respect to employees who work out of their homes: ''We do not intend this statement to cast doubt on the portion of the agency's regulation defining the 'worksite' of employees whose regular workplace is his or her home. *See* 29 C.F.R. § 825.111(a)(2).'' *Id.* at 1150 n.1. Nor did the court invalidate the regulatory definition in § 825.111(a)(3) with respect to employees of temporary help companies: ''An employee of a temporary help agency does not have a permanent, fixed worksite. It is therefore appropriate that the joint employment provision defines the 'worksite' of a temporary employee as the temporary help office, rather than the various changing locations at which the temporary employee performs his or her work.'' *Id.* at 1153.

The RFI requested specific information, in light of the court's decision in *Harbert,* on the definition in § 825.111 for determining employer coverage under the statutory requirement that FMLA-covered employers must employ 50 employees within 75 miles.

Some commenters who argued that the current regulations are sound and do not require change pointed to the legislative history that the term ''worksite'' is to be construed in the same manner as the term ''single site of employment'' under the WARN Act and the regulations under that Act. *See* comments by AFL-CIO and National Partnership for Women & Families. The AFL-CIO agreed with the dissent in *Harbert* that the Secretary's interpretation of ''single site of employment'' under the WARN Act regulations as applying equally to employees with and without a fixed worksite is a ''permissible and reasonable interpretation'' and does not result in arbitrary differences between sole and joint employers under the FMLA. The National Partnership commented that the purpose of designating the primary office as the worksite is to ensure that the employer with the primary responsibility for the employee's assignment is the one held accountable for compliance with these regulations. The National Partnership stated that the same principles articulated in the regulations with regard to ''no fixed worksite'' situations also should apply to this factual scenario. ''In cases where employees have long-term assignments, we believe the purposes of the FMLA are best served by using the primary employer from which the employee is assigned as the worksite for determining FMLA coverage.''

On the other hand, the law firm of Pilchak Cohen & Tice commented that, under the current regulations, employees at the same size establishment are treated differently because one works for a traditional sole employer and the other works for a staffing firm:

> For example, where a small retail store chain may have many employees nationwide, each store could employ fewer than 50 employees. Those employees clearly would not be eligible for FMLA in the traditional employment context. Yet, under the current regulation, if that same retail chain utilized contract employees from an entity which employed more than 50 employees from its home office and that is where the contract employees received their assignments from or reported to, those contract employees could have FMLA rights at the retail chain. This creates an arbitrary distinction between sole and joint employers. . . .Under 29 C.F.R. § 825.106(e), an employer could contract for an engineer, Employee A, for a six-month project, and then find out after the employee has only been there for two weeks, that Employee A will need 12 weeks off due to the upcoming birth of his child. Upon Employee A's departure, the employer would then have to spend the time and expense training Employee B only to [be] forced to return Employee A to the position, even though it had already spent time training two individuals. The employer would then have to spend additional time and expense bringing Employee A ''up to speed'' on the project and complete the training initially started.

Pilchak Cohen & Tice stated that the regulation would be more palatable if, to qualify for FMLA job restoration with the client company, the contract employee had to have at least 12 months of service at that location.

The National Coalition to Protect Family Leave commented that the court in *Harbert* was correct in distinguishing between a jointly-employed employee who is assigned to a fixed worksite and a jointly-employed employee who has no fixed worksite and changes worksites regularly. ''As for the former, the worksite for purposes of determining whether they are eligible employees * * * would be the fixed worksite of the secondary employer. As for the latter, the worksite would continue as stated in the regulation[.]''

After weighing the comments on this issue submitted in response to the RFI, the Department believes it needs to amend the regulations to reflect the decision in *Harbert.* The proposed rule would modify § 825.111(a)(3) to state that after an employee who is jointly employed is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of employee eligibility is the actual physical place where the employee works. No changes are proposed with respect to employees whose worksite has not been fixed for at least one year. Also, no changes are proposed for § 825.111(a)(2) with respect to employees who work out of their homes, except to update the current language ''as under the new concept of flexiplace'' to give it a more modern meaning, ''as under the concept of flexiplace or telecommuting.''

The Department has not adopted the comment from Pilchak Cohen & Tice that in order to qualify for FMLA job restoration with the client company, a contract employee should have at least 12 months of service at that location. To do so would take away the job restoration protections for an employee who is entitled to FMLA leave under the law. However, the primary responsibility for placement following FMLA leave rests with the primary employer, the staffing firm in the example given. The client company must consent to the placement only if it has used another contract employee from the same staffing firm to temporarily fill the position during the period of the FMLA leave.[14]

Section 825.112 (Qualifying Reasons for Leave, General Rule)

To make it easier to find information in the regulations, the Department has

[14] *See* 29 CFR 825.106(e). In the preamble to the final rule, the Department agreed with comments that joint employment relationships present special compliance concerns for temporary help and leasing agencies in that the ease with which they may be able to meet their statutory obligations under FMLA may depend largely on the nature of the relationship they have established with their client-employers. However, the Department found there were no viable alternatives that could be implemented by regulation that would not also deprive eligible employees of their statutory rights to job reinstatement at the conclusion of FMLA leave. *See* 60 FR at 2182.

reorganized some sections, including portions of current § 825.112, which sets forth the qualifying reasons that entitle an eligible employee to FMLA-protected leave. For example, there is no single place in the current regulations for the provisions that address leave taken for the birth of a child or placement of a child for adoption or foster care. Rather, these provisions are scattered throughout several sections of the current regulations, including paragraphs (c) and (d) of current § 825.112.

No changes have been made to current paragraphs (a) and (b) of this section except for the addition of new paragraph titles. Language from current paragraphs (c) and (d) addressing leave taken prior to the birth of a child or placement of a child for birth or adoption has been moved to new sections in the proposed regulations that cover pregnancy, birth, adoption and foster care. *See* proposed §§ 825.120 and 825.121.

Current paragraph (e) of this section that addresses foster care has been moved to proposed § 825.122, which provides definitions for the various family relationships covered by the Act. Similarly, current paragraph (g) of this section, which addresses leave for substance abuse treatment and an employer's ability to take disciplinary action in connection with substance abuse, has been moved to proposed § 825.119 that specifically addresses leave in connection with substance abuse.

Sections 825.113, 825.114, and 825.115 (Serious Health Condition, Inpatient Care, and Continuing Treatment)

In response to the RFI, the Department received extensive commentary on the regulatory definition of a serious health condition. The full range of comments is discussed in detail in Chapters III and IV of the Department's 2007 Report on the RFI comments (*see* 72 FR at 35563; 35571). There are six separate definitions of serious health condition in the regulations. Many stakeholders addressed their comments toward what is called the ''objective test'' contained in the regulations at § 825.114(a)(2), which defines ''continuing treatment'' as:

(i) A period of incapacity * * * *of more than three consecutive calendar days* * * * that also involves:

(A) Treatment two or more times by a health care provider * * * or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 CFR 825.114(a)(2)(i)(A)–(B). Many of the comments—including several from health care providers—reported that the current regulatory definition is ''vague and confusing.'' The American College of Occupational and Environmental Medicine stated, ''The term 'serious health condition' is unnecessarily vague. Employees, employers and medical providers would be well served if the FMLA were to more clearly define the criteria for considering a health condition serious.'' The American Academy of Family Physicians agreed: ''The definition of a serious health condition within the Act creates confusion not only for the administrators of the program and employers but also for physicians. Requiring a physician to certify that a gastrointestinal virus or upper respiratory infection is a serious health condition in an otherwise healthy individual is incongruous with medical training and experience. * * * . [Moreover, t]he categories of 'Serious Health Conditions' are overly complicated and * * * contradictory.''

Many in the employer community focused their comments on the perceived lack of ''seriousness'' inherent in certain conditions the definition covers. The Coolidge Wall Company stated: ''The DOL needs to limit the definition of serious health condition to what it was originally intended by Congress. For example, while a common cold or flu were never intended to be serious health conditions, in case law courts have essentially done away with all the exclusions from the original definition by stating that 'complications' (without defining this) could cause virtually anything (a cold, an earache, a cut on finger) to become a serious health condition.'' ORC Worldwide concurred: ''Uniformly, employers have found the definition of 'serious health condition' and the criteria for determining whether or not an employee has a 'serious health condition' to be extremely broad and very confusing.'' The City of Philadelphia wrote, ''What constitutes a serious health condition? The definition is not clear.''

Stakeholders proposed a number of potential revisions to the current definition of serious health condition. First, many commenters focused on the list of ailments in § 825.114(c), which states ''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach * * * *etc.,* are examples of conditions that do not meet the definition of a serious health condition.'' These commenters recommended that, consistent with the legislative intent that these conditions are not FMLA-covered conditions, this list be converted into a *per se* rule whereby these conditions can *never* be covered under the Act. That is, the flu—no matter how severe—could not be a serious health condition. Second, some commenters recommended that the ''more than three days'' period of incapacity in the objective test be measured by *work* days as opposed to *calendar* days. Here, too, the commenters cited to legislative history to support their position: ''[w]ith respect to an employee, the term 'serious health condition' is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she *must be absent from work* on a recurring basis or for more than a few days for treatment or recovery.'' H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28 (1993) (emphasis added). Third, a number of stakeholders commented that the two health care provider visits in § 825.114(a)(2)(i)(B) must occur during the ''more than three days'' period of incapacity. Finally, a number of comments recommended that the required period of incapacity be extended from ''more than three days'' to five or seven or ten days or more.

At the same time, the Department also received many comments from employees and employee groups who felt that the current objective test is a good, clear test that is serving its intended purpose. For example, the National Partnership for Women & Families stated, ''[T]he current regulations are crafted appropriately to provide guidance on what constitutes a serious health condition without imposing overly rigid criteria that could hinder the ability of workers to take leave when necessary.'' Families USA concurred: ''To protect employers from employee abuse of this provision, the regulations establish an objective criteria to be used to determine whether conditions presented qualify for leave. This criteria creates a standard that can be applied in individual cases with sufficient flexibility to adjust for differences in how individuals are affected by illness. It also specifies that routine health matters cannot be considered serious health conditions, unless complications arise.''

After a review of the statute, the legislative history, and the significant feedback received from stakeholders in response to the RFI, the Department has not identified an alternative approach to the definition that would still cover all the types of conditions Congress intended to cover under the FMLA, but without also including some conditions that many believe the legislative history indicated should not be covered. The Department is well aware, as evidenced

by the extensive comments on this issue to the RFI, that many of the policy choices made in defining a serious health condition have not been without consequence. For example, the Department could put a higher degree of ''seriousness'' into the regulatory definition if we chose to adopt any one of the suggestions offered by employers to increase the required number of days of incapacity or to simply adopt a *work* days rather than a *calendar* days standard. Doing so would also go a long way to eliminate what many employers believe to be the ''weekend'' problem—that is, employers' inability to know or verify that an employee, who works a regular Monday through Friday schedule, is off on Saturday and Sunday, then calls in sick on Monday claiming an FMLA absence, was in fact incapacitated during the two days he or she was off work for the weekend, and meets the more than three consecutive calendar days standard (*see e.g.*, comment by Southwest Airlines Co., ''Unscheduled intermittent leave, which is typically based on recurring episodes of minor health conditions, gives employees many opportunities to misuse FMLA leave—to take vacations or a long weekend when they otherwise would be unable to do so * * *.''). However, Congress itself did not provide a statutory ''bright line'' of demarcation for ''seriousness.'' The Act defines serious health condition as either ''an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.'' 29 U.S.C. 2611(11). ''Continuing treatment'' is not further defined by the Act and Congress declined to establish any bright-line rules of what was covered and what was not. *See* discussion infra about chronic conditions specifically.

A review of the Preamble accompanying the current regulations reflects the struggle then, as now, to craft such an objective definition of serious health condition that covers all the conditions intended to be covered by the Act while still giving meaning to the legislative history that minor ailments like colds and flus generally not be covered. It also reflects the choice then, as now, between an objective test versus a list of types of health conditions that would qualify as serious. *See* 60 FR at 2191. There is no question, as explained by the legislative history, that Congress expected minor conditions (those that last less than a few days) to not be covered by the FMLA because they would likely be covered by a company's sick leave policy. *See* H.R. Rep. No. 103–8, at 40 (1993); S. Rep. No. 103–3, at 28 (1993). The difficulty is in adequately drawing the line between conditions that usually resolve in a few days, and those that are ''serious.'' Medical conditions that are benign to some may be truly incapacitating to others. For example, the Communication Workers of America submitted a comment to the RFI noting an employee who had a severe reaction to poison oak and was incapacitated for more than three days even though most individuals would have only a mild reaction to poison oak. As a result of all these factors, the Department has retained essentially the current definition of ''serious health condition,'' with some slight modifications as discussed below.

The Department has reorganized the structure of the definition so both employees and employers can better understand what constitutes a serious health condition. As noted above, serious health condition is currently defined in six different ways, and only one of the alternatives actually requires an absence of more than three consecutive calendar days under the current regulations. The Department believes that the new proposed structure will make the definition clearer.

Section 825.113 (Serious Health Condition)

Current § 825.113 addresses the definition of a parent, spouse, son or daughter. In the proposed regulations, the Department has moved this to § 825.122 for purposes of organization. Proposed § 825.113 is titled ''Serious health condition'' and provides the general rules and accompanying definitions governing what constitutes a serious health condition. Proposed § 825.113(a) provides the basic definition of what constitutes a serious health condition currently found in § 825.114(a). Proposed paragraph (b) contains a definition of what constitutes ''incapacity'' and incorporates language from current § 825.114(a)(2)(i) and (ii) without change. Proposed paragraph (c) contains the definition of ''treatment'' found in current § 825.114(b) without change.

Proposed paragraph (d) addresses the types of treatments and conditions not ordinarily expected to be covered by the definition and incorporates language from current § 825.114(c). As discussed above, this section has been the focus of considerable debate as to when the list of conditions enumerated (colds, flus, *etc.*) are or are not serious health conditions. The Department received many comments in response to the RFI on this issue from both employer and employee groups but has not been able to construct an alternative regulatory definition better than the objective test of more than three days incapacity plus treatment. The language of current § 825.114(c) listing common ailments and conditions—''Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, * * * *etc.,* are examples of conditions that do not meet the definition of a serious health condition''—was intended to be merely illustrative of the types of conditions that would not *ordinarily* qualify as serious health conditions. This sentence was not intended to create its own substantive definition of serious health condition that categorically excluded the listed conditions. Section 825.114(c) did not create a definition of covered conditions separate and apart from the regulatory definitions of serious health condition in § 825.114(a).

The Department's original opinion letter in 1995 stated that a minor illness such as the common cold *could not* be a serious health condition because colds were on the regulatory list of non-covered ailments. ''The fact that an employee is incapacitated for more than three days, has been treated by a health care provider on at least one occasion which has resulted in a regimen of continuing treatment prescribed by the health care provider does not convert minor illnesses such as the common cold into serious health conditions in the ordinary case (absent complications).'' Wage and Hour Opinion Letter FMLA–57 (Apr. 7, 1995). Unfortunately, this was an incorrect statement of the law. As the Department explained in its subsequent 1996 opinion letter:

> The FMLA regulations * * * provide examples, in section 825.114(c), of conditions that *ordinarily,* unless complications arise, would not meet the regulatory definition of a serious health condition and would not, therefore, qualify for FMLA leave: the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc. Ordinarily, these health conditions would not meet the definition in 825.114(a)(2), as they would not be expected to last for more than three consecutive calendar days and require continuing treatment by a health care provider as defined in the regulations. If, however, any of these conditions met the regulatory criteria for a serious health condition, *e.g.*, an incapacity of more than three consecutive calendar days that also involves qualifying treatment, then the absence would be protected by the FMLA.

Wage and Hour Opinion Letter FMLA–86 (Dec. 12, 1996) (emphasis in original). This objective regulatory definition was upheld as a reasonable implementation of the Act by two United States Courts of Appeals even though the definition may sweep into its coverage some conditions Congress did not necessarily anticipate would be covered. *See Miller* v. *AT&T Corp.,* 250 F.3d 820, 835 (4th Cir. 2001) (''It is possible, of course, that the definition adopted by the Secretary will, in some cases— and perhaps even in this one— provide FMLA coverage to illnesses that Congress never envisioned would be protected. We cannot say, however, that the regulations adopted by the Secretary are so manifestly contrary to congressional intent as to be considered arbitrary.''); *Thorson* v. *Gemini, Inc.*, 205 F.3d 370, 380 (8th Cir. 2000) (''Under the DOL's definition, it is possible that some absences for minor illnesses that Congress did not intend to be classified as 'serious health conditions' may qualify for FMLA protection. But the DOL reasonably decided that such would be a legitimate trade-off for having a definition of 'serious health condition' that sets out an objective test that all employers can apply uniformly.'').

The Department considered whether the list of examples of non-serious ailments such as colds and flus in current § 825.114(c) should be deleted as surplusage. Both the Fourth and Eighth Circuit courts treated the list of examples of non-serious ailments in current § 825.114(c) as merely clarifying that common ailments such as colds and flu normally will not qualify for FMLA leave because they generally will not satisfy the regulatory criteria for a serious health condition. The Department continues to believe that the § 825.114(c) list serves a baseline purpose as explanatory language similar to that which is included in a preamble. Therefore, the sentence has been retained in the proposed regulations. Nevertheless, the Department agrees with the Fourth and Eighth Circuit Courts of Appeals and restates its view that the Department's objective regulatory definition is dispositive.

Section 825.114 (Inpatient Care)

Proposed § 825.114, titled, ''Inpatient care,'' defines what constitutes inpatient care. As noted above, the Department proposes a stand-alone definition of ''incapacity'' in § 825.113(b) in contrast to the current regulations. Therefore, the definitional language of incapacity has been removed from the definition of ''inpatient'' care, but the requirement remains and a cross-reference to § 825.113(b) has been included.

Section 825.115 (Continuing Treatment)

Proposed § 825.115, titled ''Continuing treatment,'' defines continuing treatment for purposes of establishing a serious health condition. The five different definitions are contained in § 825.115(a)–(e). Proposed § 825.115(a) (''Incapacity and treatment'') incorporates language from current § 825.114(a)(2)(i)(A) and (B), which establishes that an employee can meet this definition if, in connection with a period of incapacity of more than three consecutive calendar days, the employee or family member has one visit to a health care provider and a regimen of continuing treatment, such as a prescription, or two visits to a health care provider.

As discussed further below concerning proposed § 825.125, the Department proposes a conforming change in the definition of ''continuing treatment'' to generally recognize physician assistants as health care providers, which eliminates the need to refer to them separately in this section as performing ''under direct supervision of a health care provider'' (*see* current §§ 825.114(a)(2)(i)(A) and (iii)(A)). Otherwise, the current definition has been retained with one further proposed clarification. The Department proposes to specify that the two visits to a health care provider must occur within 30 days of the beginning of the period of incapacity unless extenuating circumstances exist, instead of the completely open-ended time frame under the current regulations. Accordingly, if an ill employee visits his/her health care provider, is told not to report to work for more than 3 days due to the health condition but is not prescribed any medication, whether the condition is considered a serious health condition for FMLA purposes will depend on whether the health care provider determines that additional treatment is needed within 30 days of the beginning of the initial period of incapacity (for example, whether the provider determines that an additional follow-up appointment should be scheduled in two weeks or two months). The beginning of the period of incapacity will usually correspond with the date of the employee's first absence, however, as under the current regulations, the more than three calendar day period of incapacity may commence on a day on which the employee is not scheduled to work. See 60 FR 2195.

The Department proposes this clarification because it believes, as a practical matter, that leaving the treatment requirement open-ended does not provide sufficient guidance for determining when the employee has a qualifying serious health condition. For example, under the current definition, an employer could decide that an employee does not qualify for FMLA coverage a week after an employee has been to see a health care provider on one occasion and has had more than three days of incapacity but no follow-up visit during that week-long time period. If the employee had a follow-up visit three months later, however, the test would be met but the employer may not be aware of that fact. The Department does not believe the regulations should leave such determinations open-ended and unresolved indefinitely. Rather, the period of incapacity and the timing of the health care provider's treatment regimen should be connected in a temporal sense to meet the definitional requirement and not left undefined as under the current rule.

The Department received many comments to the record on this issue, including a number suggesting that the Department adopt into regulation the interpretation offered by the United States Court of Appeals for the Tenth Circuit that the two treatments actually occur during the period of more than three days' incapacity in order to qualify as a serious health condition. *See Jones* v. *Denver Pub. Sch.,* 427 F.3d 1315, 1323 (10th Cir. 2005) (''[U]nder the regulations defining 'continuing treatment by a health care provider,' the '[t]reatment two or more times' described in 825.114(a)(2)(i)(A) must take place during the 'period of incapacity' required by 825.114(a)(2)(i).''). However, the Department believes the proposed 30-day limitation is more appropriate in that it guards against employers making quick judgments that deny FMLA leave when employees otherwise should qualify for FMLA protections. The Department is also aware that occasionally an employee may need a second visit to a health care provider or further diagnostic testing within a 30-day period but may experience difficulty scheduling the second appointment in time. The regulations therefore acknowledge an ''extenuating circumstances'' exception to the 30-day rule in proposed § 825.115(a)(1).

The Department is not proposing to extend the 30-day rule to treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider. The Department's enforcement

experience suggests that the doctor visit which results in a regimen of continuing treatment generally occurs close in time to the more than three days of incapacity. Accordingly, the 30-day limitation is not needed and could, in fact, extend the time period for receiving the regimen of treatment well beyond what is current practice. The Department, however, seeks comments on this approach, and whether this regulatory provision should be changed.

Proposed § 825.115(b), titled ''Pregnancy or prenatal care,'' incorporates language from current § 825.114(a)(2)(ii) without change except for a reference to the new consolidated section found in proposed § 825.120 addressing leave for pregnancy and childbirth discussed in detail below. The Department wishes to emphasize, however, that the phrase ''incapacity due to pregnancy, or for prenatal care'' includes time spent with a health care provider for prenatal care purposes. By definition, while an employee is visiting a health care provider for prenatal care purposes (*i.e.*, a doctor's appointment), the employee is unable to work and therefore incapacitated. In contrast, however, an employee is not entitled to FMLA leave to visit the store to purchase infant clothes because the employee is not incapacitated in such circumstances. In a case where a male employee is needed to care for (as defined by proposed § 825.124) a pregnant spouse who is incapacitated or requires prenatal care, the male employee will be entitled to FMLA leave. For example, a male employee's pregnant spouse may have severe morning sickness and need his assistance. Similarly, a male employee may be entitled to FMLA leave to accompany his pregnant spouse to a doctor's appointment for prenatal care. In this case, physical care may not be needed, but psychological care may be involved.

Proposed § 825.115(c), titled ''Chronic conditions,'' incorporates language from current § 825.114(a)(2)(iii) with one modification. The Department received extensive comments about the definition of ''chronic'' serious health conditions in response to the RFI. As a result, the Department provided extensive discussion and explanation in its Report on the RFI to the evolution of the ''chronic'' serious health condition definition. *See* Chapter IV of the RFI Report, 72 FR at 35571.

As the Department explained in the Report on the RFI comments, ''[t]here is no definition or specific mention of a 'chronic' serious health condition in the Act. The House and Senate Committee Reports do, however, refer to conditions where 'the underlying health condition or treatment for it requires that the employee be absent from work on a recurring basis * * * [A] patient with severe arthritis may require periodic treatment such as physical therapy.' '' 72 FR at 35572 (internal citations omitted). Many employer commenters were highly critical of the choice made by the Department in the 1995 final rule to allow employees to ''self-treat'' for ''any'' period of incapacity due to chronic conditions. *See current* § 825.114(e): ''Absences attributable to incapacity under paragraphs (a)(2)(ii) or (iii) [chronic conditions] qualify for FMLA leave even though the employee or the family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three days.'' Indeed, many employer commenters believe that coverage for absences due to chronic conditions which are accompanied only by self-treatment impermissibly undercuts the statutory requirement that intermittent leave may be taken only when medically necessary (29 U.S.C. 2612(b)(1)) as there is no way to verify the medical necessity of an absence for self-treatment. (*See, e.g.*, discussion of Workplace Consequences of Unscheduled Intermittent Leave in the Report on the RFI comments, 72 FR at 35575.) Employee representatives commenting on the RFI, however, stressed that self-treatment is appropriate for many chronic conditions and that coverage for such absences is crucial to ensuring that employees with chronic serious health conditions are able to maintain their employment. *Id.* at 35575; 35580.

While many employers urged the Department to alter the definition so that only chronic conditions that they perceive to be ''serious'' will be covered, and to eliminate the self-treatment provision, the Department declines to do so. As explained in the preamble when the current rule was adopted in 1995,

> The Department concurs with the comments that suggested that special recognition should be given to chronic conditions. The Department recognizes that certain conditions, such as asthma and diabetes, continue over an extended period of time (*i.e.*, from several months to several years), often without affecting day-to-day ability to work or perform other activities but may cause episodic periods of incapacity of less than three days. Although persons with such underlying conditions generally visit a health care provider periodically, when subject to a flare-up or other incapacitating episode, staying home and self-treatment are often more effective than visiting the health care provider (*e.g.*, the asthma sufferer who is advised to stay home and inside due to the pollen count being too high). The definition has, therefore, been revised to include such conditions as serious health conditions, even if the individual episodes of incapacity are not of more than three days duration.

60 FR at 2195.

Although the Department acknowledges employers' concerns regarding the inability to verify the medical necessity for an absence involving self-treatment, to eliminate coverage for such absences at this time would, like changing the calendar days standard to a work days standard, effectively render many currently-covered employees who have received the protections of the law ineligible. As the Department acknowledged in the Report on the RFI, it has no way to distinguish between those employees with chronic conditions who may be, in their employers' views, taking advantage of the self-treatment standard and those who are not and for whom the standard has worked very well.

The Department does propose one modification to the definition of a chronic serious health condition. Current § 825.114(a)(2)(iii) provides that a chronic serious health condition ''[r]equires periodic visits for treatment'' (§ 825.114(a)(2)(iii)(A)). The current regulations do not define the term ''periodic.'' The Department understands that some employers have chosen to provide their own definition of the term ''periodic'' for FMLA purposes to the detriment of employees. For example, one employer defined the term to require a visit to a health care provider at least once a month in order to satisfy this prong of the continuing treatment definition. The Department believes that not all serious health conditions Congress intended to cover require such frequent visits. For example, an employee may have epilepsy, which renders the employee unable to work periodically but does not require monthly doctor visits since the employee knows how to self-medicate. At the same time, because ''periodic'' is left open-ended in the current regulations, employers have struggled with the ''periodic'' requirement. The Department believes such a lack of definition leaves employers and employees in an untenable situation. (*See* Executive Summary and Chapters IV and VI of the Department's 2007 Report on the RFI comments, 72 FR at 35550, 35571, 35588.) The Department proposes to define the term ''periodic'' as twice or more a year, based on an expectation that employees with chronic serious health conditions generally will visit their health care providers with that minimum

frequency, but they may not visit them more frequently, especially if their conditions are stable. The Department believes this is reasonable but seeks public comments on whether the proposed definition of the term ''periodic'' is appropriate.

Proposed § 825.115(d), titled ''Permanent or long-term conditions,'' incorporates language from current § 825.114(a)(2)(iv) without change. Proposed § 825.115(e), titled ''Conditions requiring multiple treatments,'' incorporates language from current § 825.114(a)(2)(v), which provides coverage for any period of absence to receive multiple treatments by a health care provider for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment for conditions such as cancer, severe arthritis, and kidney disease. Multiple treatments are required to satisfy this prong of the continuing treatment definition.

Sections 825.116 Through 825.118 (Reserved)

Provisions in current § 825.116 defining the phrase ''needed to care for'' a family member are moved to proposed § 825.124, discussed below. Provisions in current § 825.117 addressing the ''medical necessity'' for taking and scheduling intermittent or reduced schedule leave are moved to proposed §§ 825.202 and .203, discussed below. Current § 825.118 defining ''health care provider'' is renumbered as § 825.125 of the proposed rule. Section numbers .116–.118 of the current rule are, therefore, reserved to reflect these organizational changes, as discussed further below.

Section 825.119 (Leave for Treatment of Substance Abuse)

The Department proposes to create a single, consolidated section to address substance abuse, which is currently addressed in two different sections of the regulations, specifically §§ 825.112(g) and .114(d). Current § 825.112(g) provides that while FMLA leave is available for substance abuse treatment, treatment does not prevent an employer from taking employment action against an employee for violating the employer's substance abuse policy, such as being intoxicated at work. The section further explains when such action is appropriate. Current § 825.114(d) states that substance abuse treatment may be covered as a serious health condition in certain circumstances.

Section 825.120 (Leave for Pregnancy or Birth)

The Department proposes to create a single section that addresses FMLA rights and responsibilities related to pregnancy and birth of a child. The current regulations contain regulatory guidance pertaining to pregnancy and birth throughout a number of regulatory sections. This new proposed section collects the existing guidance from the various regulatory sections into one comprehensive section.

Section 825.120(a)(1) of the proposed rule, titled ''[g]eneral rules,'' restates language from current § 825.112(b) that both the mother and father are entitled to FMLA leave for the birth of their child. Proposed paragraph (a)(2) of this section restates language from current § 825.201 explaining that leave following the birth of a healthy child (''bonding time'') must be completed within a year from the birth unless State law provides for a longer period of time or with an employer's agreement. Based on the statutory requirements (*see* 29 U.S.C. 2612(a)(2)), if leave is extended beyond a year from the birth per State law or employment agreement, the additional leave would not receive the FMLA protections. Proposed paragraph (a)(3) of this section incorporates language from current § 825.202(a), that husbands and wives who work for the same employer may be limited to a combined 12 weeks of FMLA leave for the birth or placement for adoption or foster care of a healthy child, or to care for an employee's parent with a serious health condition. (*See* 29 U.S.C. 2612(f).) This limitation does not apply if only one spouse is eligible for FMLA leave. For example, if a wife commenced employment with the employer only 6 months earlier and therefore does not meet the 12-month/1,250-hour eligibility requirement, but the husband has worked for the employer for five years and otherwise meets the eligibility requirements, the husband could take twelve weeks of leave to be with the newborn child. However, if the husband and wife have both worked for the same employer for five years and the husband already has used six weeks of his entitlement to care for his parent, the wife may be limited to six weeks to be with the newborn child (the wife would also be entitled to leave for her own serious health condition related to the birth).

Proposed § 825.120(a)(4) combines language from current §§ 825.114(a)(2)(ii), 825.114(e), and 825.112(a) and (c) to make clear that a mother may be entitled to FMLA leave for both prenatal care and incapacity related to pregnancy, and the mother's serious health condition following the birth of a child.

Proposed § 825.120(a)(6) has been added to reemphasize that both spouses may each take their full 12 weeks of leave to care for a child with a serious health condition, regardless of whether the spouses work for the same employer.

Proposed § 825.120(b), titled ''[i]ntermittent and reduced schedule leave,'' combines language from current §§ 825.203(b) and 825.204(a) on the use of intermittent or reduced schedule leave for pregnancy and birth of a child. *See* 29 U.S.C. 2612(b)(1). Current § 825.203(b) provides that leave taken after the birth of a healthy newborn child may only be taken on an intermittent or reduced leave schedule if the employer agrees. Current § 825.204(a) explains that in these cases, an employer may temporarily transfer an employee to an available alternative position that better accommodates the need for intermittent or reduced schedule leave if the employer does in fact agree to such a leave schedule. *See* 29 U.S.C. 2612(b)(2). The hours not worked due to a reduced leave schedule in this situation are considered intermittent FMLA leave and are counted toward the employee's FMLA leave entitlement (*see* proposed § 825.205). Proposed § 825.120(b) emphasizes that if intermittent or reduced schedule leave is medically necessary for a serious health condition of the mother or the newborn child, no employer agreement is necessary.

Section 825.121 (Leave for Adoption or Foster Care)

For the same reasons discussed above, the Department also proposes a single section that discusses FMLA rights and obligations with regard to adoption and foster care. The current regulations contain guidance pertaining to adoption and foster care throughout a number of sections. This new proposed section collects the existing guidance from the various regulatory sections into one comprehensive section on adoption and foster care.

Proposed § 825.121(a) is titled ''[g]eneral rules'' and provides that leave for adoption or foster care may begin prior to the actual birth or adoption. Examples incorporated from current § 825.112(d) include leave to attend counseling sessions, appear in court, consult with an attorney or doctor, or submit to a physical examination. The proposed section also cross-references proposed paragraph (b) of this section, which explains the statutory limitation that leave following the placement for

adoption and foster care of a healthy child can *only* be taken on an intermittent or reduced schedule basis if the employer agrees. *See* 29 U.S.C. 2612(b)(1).

Proposed § 825.121(a)(2) contains language from current § 825.201 explaining that leave for adoption or foster care must be completed within a year from the placement unless State law provides for a longer period of time or with an employer's agreement. Such leave taken under State law or with an employer's agreement beyond the one year period is not protected as FMLA leave. Section 825.121(a)(3) also incorporates language from current § 825.202(a), that husbands and wives working for the same employer are limited to a combined 12 weeks of leave for purposes of bonding with the healthy adopted or foster child, to care for the healthy child following the birth of the child, and to care for an employee's parent with a serious health condition. As discussed above under proposed § 825.120, this limitation does not apply if only one spouse is eligible for FMLA leave. *See* 29 U.S.C. 2612(f).

Proposed § 825.121(a)(4) has been added to emphasize that both spouses may each take their full twelve weeks of FMLA leave to care for an adopted or foster child with a serious health condition, regardless of whether the spouses work for the same employer.

Proposed § 825.121(b), titled ''[u]se of intermittent and reduced schedule leave,'' combines language from current §§ 825.203(b) and 825.204(a) on the use of intermittent or reduced schedule leave for adoption and foster care. Current § 825.203(b) provides that leave taken after the placement of a healthy child for adoption or foster care may only be taken on an intermittent or reduced leave basis if the employer agrees. *See* 29 U.S.C. 2612(b)(1). Current § 825.204(a) explains that in such cases, an employer may temporarily transfer an employee to an available alternative position that better accommodates the need for intermittent or reduced schedule leave. *See* 29 U.S.C. 2612(b)(2). The hours not worked due to a reduced leave schedule in this situation are considered intermittent FMLA leave and are counted toward the employee's FMLA leave entitlement (*see* proposed § 825.205). Proposed § 825.121(b) provides that if intermittent or reduced schedule leave is needed for a serious health condition of the adopted or foster child, no employer agreement is necessary.

Section 825.122 (Definition of Spouse, Parent, Son or Daughter, Adoption and Foster Care)

Current § 825.113 provides definitions of spouse, parent, and son or daughter for purposes of determining whether an employee qualifies for FMLA leave. These definitions are repeated in current and proposed § 825.800. The Department proposes to move the existing section to proposed § 825.122 for purposes of organization. Proposed § 825.122(a) and (b) defining spouse and parent are unchanged except for minor editorial changes in paragraph (b) to the definition of ''parent.''

Proposed § 825.122(c) that addresses, and is now titled, ''[s]on or daughter,'' has been rewritten for clarity. The one substantive addition the Department proposes is to specify that the determination of whether an adult child has a disability should be made *at the time leave is to commence.* In *Bryant* v. *Delbar,* 18 F.Supp.2d 799 (M.D. Tenn. 1998), the court conducted an analysis of whether an adult child had a disability for purposes of FMLA coverage based on facts and circumstances that occurred *well after* the leave commenced. In the Department's view, employers should decide FMLA eligibility based on information at the time the leave begins. A rule that takes into account information acquired after-the-fact causes confusion about coverage for both employees and employers. The Department aims to eliminate such confusion by adding the proposed language.

Proposed § 825.122(c)(1), (2) and (3) remain unchanged from current § 825.113(c)(1), (2) and (3).

A new § 825.122(d) has been added that defines ''adoption.'' The current regulations do not define the term, and the Department believes that providing such guidance will benefit both employees and employers. Language from current § 825.112(d) has been retained to clarify that the adoption source is not relevant to FMLA leave eligibility.

Proposed § 825.122(e), titled ''[f]oster care,'' incorporates the definition of foster care from the current § 825.112(e) without change.

Proposed § 825.122(f) addresses the documentation of relationships and incorporates the current language from § 825.113(d) with two clarifications. First, the current regulation states that in addition to a child's birth certificate or a court document, a simple statement from an employee is sufficient to establish a family relationship. The Department adds language in proposed paragraph (f) to clarify that the example of a statement by the employee as documentation should be a sworn, notarized statement. This provides consistency with the other examples used in the current regulations. Second, the Department proposes to add the example of a submitted and signed tax return as evidence of a qualified family relationship because in the case of an *in loco parentis* relationship, it may be difficult to determine what kind of proof may be reasonable to establish such a relationship.

Section 825.123 (Unable to Perform the Functions of the Position)

The Department proposes to renumber current § 825.115 as § 825.123 in the proposed regulation due to other organizational changes made. Proposed paragraph (a), titled ''[d]efinition,'' defines the statutory requirement that an individual be unable to perform the functions of a job in order to qualify for FMLA leave. The current regulatory definition states that the employee must be ''unable to work at all'' or be unable to perform ''one or more of the essential functions of the job.'' The Department proposes no substantive changes to this definition.

The Department proposes no substantive changes to current paragraph (b), now titled ''[s]tatement of functions,'' except to include language from current § 825.115 to clarify that the employer may provide a statement of the employee's essential functions to the employee's health care provider, and to clarify that the employer may require that the health care provider's medical certification specify what functions the employee cannot perform. This information is part of the ''medical facts'' the statute states an employer may obtain as part of the medical certification. *See 29* U.S.C. 2613(b)(4)(B).

Section 825.124 (Needed to Care for a Family Member)

The current regulations define the phrase ''needed to care for'' a family member in § 825.116. The Department proposes to move this section to proposed § 825.124 and clarify that the employee need not be the *only* individual or family member available to care for the qualified family member. A number of comments received in response to the RFI recommended that the Department impose some sort of limitation on what it means for an employee to be ''needed to care for'' a family member. A number of commenters, including the National Council of Chain Restaurants suggested that ''care'' be limited to actual physical

care only. The National Council of Chain Restaurants also recommended that the employee be required to provide a written certification ''that explains why the employee cannot rely upon other family members to care for'' the qualifying family member. Similarly, the law firm of Blank Rome suggested that the regulations ''be modified to allow for leave under these circumstances only when there is no other alternative care giver or provider.'' The Pepsi Bottling Group recommended that employers be ''able to deny or delay leave if an employee has a family member at home who is available to provide necessary medical care.'' The United Parcel Service suggested ''add[ing] language requiring that requests for intermittent leave to care for a family member be supported by a representation that the employee is the only family member available to provide such care.'' Finally, Manufacturers Alliance recommended the Department clarify that the term ''needed to care'' for a family member means ''that it [is] necessary for the employee to actually be providing care during * * * work time.''

After review of these comments, the Department has declined to adopt any of these proposals. The statute provides leave ''[i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.'' 29 U.S.C. 2612(a)(1)(C). There is no additional limitation that the employee be the only available care giver in order to take FMLA leave. Indeed, it will often be the case that there are multiple potential care givers—none of whom is the only care giver without alternative—but all of whom would need to take FMLA leave in order to provide care. Moreover the legislative history to the Act indicates that the ''phrase 'to care for' * * * be read broadly to include both physical and *psychological* care.'' H.R. Rep. No. 103–8, at 36 (1993); S. Rep. No. 103–3, at 24 (1993). The Department intends to retain the psychological care language and to make clear that employers cannot impose an additional requirement upon employees for FMLA leave purposes that the employee needs to be the only individual, or even family member, available to provide care to the qualified family member with a serious health condition.

Section 825.125 (Definition of Health Care Provider)

Current § 825.118 is renumbered as § 825.125 in the proposed rule to reflect organizational changes. In its comments to the RFI, the American Academy of Physician Assistants noted that physician assistants (PAs) are usually recognized as authorized health care providers for FMLA purposes under the existing provision that recognizes ''[a]ny health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits'' (current § 825.118(b)(4)). Other language in § 825.118(c) of the current rule has created confusion over the status of PAs, however, where the phrase ''authorized to practice in the State'' is defined to mean that ''the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.'' The Department proposes to clarify the status of PAs as health care providers under proposed § 825.125(b)(2) (formerly § 825.118(b)(2) in the current rule) by adding ''physician assistants'' to the list of recognized health care providers and by deleting the requirement that PAs operate ''without supervision by a doctor or other health care provider.'' The Department has made corresponding changes to proposed § 825.115 (Continuing treatment) and § 825.800 (Definitions) to reflect this change that PAs would now generally be considered health care providers.

Section 825.200 (Amount of Leave)

This section explains the basic leave entitlement provided under the Act, as well as how to determine the 12-month period during which the FMLA leave entitlement may be used. The Department asked in its December 2006 RFI whether ''scheduled holidays [should] count against an employee's 12 weeks of FMLA leave when the employee is out for a full week as they do now?'' (71 FR at 69509) The Department heard from all sides on this issue. The Unum Group stated, ''Changing this process could add difficulty to the already complex method of calculating FMLA leave entitlements.'' The Pennsylvania Turnpike Commission agreed: ''We feel that scheduled holidays should continue to count against the 12 weeks of FMLA. That block of time is covered in the employee request—it is incidental that they would not have had to work due to a holiday. Because of differing holiday eligibility for different employee groups (*i.e.* mgmt/union), it would greatly complicate the calculation of eligible days if holidays were excluded. It would be more time consuming for an FMLA administrator to calculate the amount of time/days an employee [would] be off under FMLA if they had to make sure to subtract any holidays that the employee is eligible for during the time period they need to be off.'' The State of Ohio said it ''supports the current regulations in this area, and believes that scheduled holidays should continue to be counted against an employee's 12 weeks of FMLA leave when the employee is out a full week. This provision would allow employee's 12 weeks of FMLA leave to be treated consistently with employees participating in other Ohio benefit programs.'' The National Partnership for Women & Families disagreed: ''Under the current regulations, such holidays are counted as part of an employee's FMLA leave. We believe such a policy is inconsistent with how holidays are typically treated in other leave contexts. If an employee is out on FMLA leave and a scheduled holiday occurs, we believe the employee should be able to use holiday leave just like other employees rather than losing a day of FMLA leave. Thus, we would urge DOL to modify the regulations accordingly.''

A number of commenters noted a serious problem that would occur if holidays were not counted toward FMLA leave when an employee is out on a weekly block of leave; that is, such a rule could result in the employee obtaining greater than 12 weeks of FMLA leave per year. One commenter stated: ''For some employees counting holidays or days not worked during a full week of absence, may mean employees could be gone beyond the 12 weeks/60 days if it is determined that non-work days or holidays are not counted as part of the work week thus pro-longing an FMLA beyond the 60 days/12 weeks[.]'' The United Parcel Service concurred: ''DOL should maintain its current position that holidays occurring during an employee's scheduled work-week count against the 12 weeks of leave. That position is supported by the plain language of the FMLA, which provides for 12 weeks of unpaid leave, not 12 weeks of leave plus all holidays falling therein.'' The Commonwealth of Pennsylvania noted, ''Because the law references the absence period in terms of weeks, rather than days, and considers calendar days rather than work days, the practice of counting holidays seems to be within the spirit of the Act and regulations.''

Upon review of the comments received to the record, the Department believes it may lack the authority to change this regulation to not count against the FMLA entitlement holidays that fall within weeks-long blocks of FMLA leave. The statute grants

employees ''12 workweeks of leave'' which the Department has interpreted to mean 12 weeks of the employee's normal work schedule. See 60 FR at 2203. (''The statute uses the 'workweek' as the basis for the leave entitlement, and an employee's normal 'workweek' prior to the start of the FMLA leave is the controlling factor for determining how much leave an employee uses when switching to a reduced leave schedule.'') Holidays regularly occur during normal workweeks. Discounting the holidays that regularly fall within those weekly blocks of leave could well impermissibly extend an employee's leave period beyond the statutory 12 normal workweeks of leave that the Act permits. Moreover, the current rule is clear and apparently working well. *See, e.g., Mellen* v. *Trustees of Boston University*, 504 F.3d 21, 25 (1st Cir. 2007) (''[The Department's regulations governing] [w]hether holidays are to be counted against intermittent leave taken in an interval of a week or more * * * fit together naturally.'').

However, consistent with the discussion regarding § 825.205 below, when an employee is taking leave in increments of less than one week, the pertinent question for both overtime and holidays is whether the employee is required to be at work. If an employee is not required to be at work because of a holiday on the day he or she requested leave, then no leave would be charged to the employee's FMLA entitlement. Thus, the Department proposes language in § 825.200(f) to clarify that, if an employee needs less than a full week of FMLA leave, and a holiday falls within the partial week of leave, the hours that the employee does not work on the holiday cannot be counted against the employee's FMLA leave entitlement if the employee would not otherwise have been required to report for work on that day. If an employee needs a full week of leave in a week with a holiday, however, the hours the employee does not work on the holiday will count against the employee's FMLA entitlement. Accordingly, for an employee with a Monday through Friday work week schedule, in a week with a Friday holiday on which the employee would not normally be required to report, if the employee needs FMLA leave only for Wednesday through Friday, the employee would use only 2/5 of a week of FMLA leave because the employee is not required to report for work on the holiday. However, if the same employee needed FMLA leave for Monday through Friday of that week, the employee would use a full week of FMLA leave despite not being required to report to work on the Friday holiday.

Section 825.201 (Leave To Care for a Parent)

Current § 825.201 on leave for the birth or placement for adoption or foster care of a child has been incorporated into proposed §§ 825.120 and 825.121 discussed above. The current § 825.202 addresses how much leave a husband and wife may take if they are employed by the same employer, in situations where an employee wants to be with a healthy child following a birth or placement for adoption or foster care, or to care for a parent with a serious health condition. The portions of current § 825.202 pertaining to leave for birth or placement of a child have been moved to proposed §§ 825.120 and 825.121, respectively. The remainder of the section has been renumbered as § 825.201. Consistent with the current regulatory provisions, proposed § 825.201 now highlights when leave can be taken to care for a parent, as well as the statutory limitations on taking such leave when a husband and wife work for the same employer.

Section 825.202 (Intermittent Leave or Reduced Leave Schedule)

Current § 825.203 explains that FMLA leave can be taken in blocks or on an intermittent or reduced leave schedule basis. Current paragraph (a) of this section explains that FMLA leave can be taken intermittently or on a reduced leave schedule due to a qualifying reason, and defines what constitutes intermittent and reduced schedule leave. Current paragraph (b) explains that leave taken after the birth or placement for adoption or foster care of a healthy child may only be used intermittently or on a reduced leave schedule with the employer's agreement. Current paragraph (c) explains that leave may be taken on an intermittent or reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition or for recovery therefrom, and to provide care or psychological comfort to an immediate family member with a serious health condition. Current paragraph (d) explains what limitations exist with regard to tracking increments of intermittent leave and states that employers may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less.

This section has been renumbered as proposed § 825.202 for purposes of organization. Current paragraph (a) from § 825.203 is proposed to be titled ''[d]efinition,'' but no other changes are proposed.

Language from current paragraph (b) of § 825.203 governing the use of intermittent or reduced schedule leave after the birth, adoption, or foster care placement of a child has been moved to proposed paragraph (c), titled ''[b]irth or placement,'' in proposed § 825.202, which also cross-references the birth and adoption/foster care placement sections in proposed §§ 825.120 and 825.121.

Proposed paragraph (b) now defines ''medical necessity'' and is so titled. It combines existing language from current § 825.117 and illustrations from current § 825.203(c). A cross-reference to proposed § 825.306 also is proposed in paragraph (b), which explains what constitutes sufficient information on the medical certification form.

Current paragraph (d), which explains how to count increments of leave taken, has been moved to proposed § 825.205, to be explained below.

Section 825.203 (Scheduling of Intermittent or Reduced Schedule Leave)

Current § 825.117 discusses an employee's statutory obligation to schedule foreseeable intermittent or reduced schedule leave for planned medical treatment so as to not unduly disrupt an employer's operations. See 29 U.S.C. 2612(e)(2). The Department proposes to move this discussion to proposed § 825.203 for organizational purposes. The statute does not limit this obligation to intermittent or reduced schedule leave, but rather applies it to all foreseeable leave for planned medical treatment. Proposed § 825.302(e) (addressing employee notice requirements for foreseeable leave) sets forth the requirement as to any foreseeable leave for planned medical treatment.

Proposed § 825.203 clarifies that an employee who takes intermittent leave when medically necessary has a statutory obligation to make a ''reasonable effort'' as opposed to an ''attempt'' to schedule leave so as not to disrupt unduly the employer's operations.

The preamble accompanying current § 825.203 also discussed whether overtime hours not worked may be counted against an employee's FMLA entitlement. See 60 FR at 2202. This issue is discussed in the preamble below concerning proposed changes to § 825.205, which addresses how to determine the amount of leave used.

Section 825.204 (Transfer of an Employee to an Alternative Position During Intermittent Leave or Reduced Schedule Leave)

Current § 825.204 explains when an employer may transfer an employee to an alternative position in order to accommodate intermittent leave or a reduced leave schedule. The Department proposes no substantive changes to this section, but proposes to add subheadings for clarity. Specifically, proposed paragraph (a) is titled ''transfer or reassignment,'' proposed paragraph (b) is titled ''compliance,'' proposed paragraph (c) is titled ''equivalent pay and benefits,'' proposed paragraph (d) is titled ''employer limitations,'' and proposed paragraph (e) is titled ''reinstatement of employee.'' Other than editorial changes, the Department proposes no other changes to this section. The Department asked no questions about transfer in its RFI but received a number of comments criticizing the current regulations particularly as regards employees who have a recurring need for unscheduled intermittent leave. The full range of comments is discussed in Chapter VIII of the Report on the RFI comments (see 72 FR at 35608). Some commenters saw no basis to differentiate between foreseeable and unforeseeable need for leave in the context of this provision. ''We do not see any basis for distinguishing between foreseeable vs. unforeseeable leaves for purposes of such temporary transfers.'' *See* comments by United Parcel Service, Inc. Similarly, The Southern Company stated:

> [Section 825.204 provides n]o similar option * * * for employers to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave. Even if the employee's unscheduled intermittent absences may result in substantial safety risks to the public or co-employees, or could cause serious disruption to the operations of the employer, such employee's duties or position cannot be altered as a result of the unscheduled intermittent leave.

The Edison Electric Institute echoed the same concern that under the current regulatory scheme ''[e]mployers do not have [the option] to transfer or otherwise alter the duties of an employee who needs unscheduled or unforeseeable intermittent leave.'' The Department requests further comments on whether this regulatory provision should be changed and if so how.

Section 825.205 (Increments of Leave for Intermittent or Reduced Schedule Leave)

Current § 825.205 explains how to determine the amount of leave used when an employee takes intermittent or reduced schedule leave. Current paragraph (a) makes clear that ''only the amount of leave actually taken may be counted toward the 12 weeks of leave'' to which an employee is entitled. Current paragraph (b) explains how to calculate the use of intermittent or reduced schedule leave when an employee works part-time or variable hours. Current paragraph (c) explains how to calculate leave when an employee's permanent schedule changes and current paragraph (d) explains how to calculate leave when an employee's schedule varies from week to week.

The Department proposes to add language from current § 825.203(d), which explains how to count increments of intermittent FMLA leave, to paragraph (a) of this section, titled ''Minimum increment.'' Current paragraphs (b) through (d) of § 825.205 have been renumbered as § 825.205(b)(1), (2), and (3) for purposes of clarity, but no changes have been made to the text of those sections. Paragraph (b) is proposed to be titled ''[c]alculation of leave.''

The Department received comments expressing concerns about the size of increments of intermittent leave that may be taken. No issue received more substantive commentary to the RFI than employee use of unscheduled intermittent leave. Employers identified a number of problems with current § 825.203(d), which permits FMLA leave to be taken in increments as small as the employer's payroll system will capture. These difficulties include basic administrative problems. Several commenters, including a supervisor at International Auto Processing, noted that their payroll systems capture time down to one minute, ''Since our clocks track time to the minute, I find myself spending an unusual amount of time determining how many hours and minutes the employee has used by using his weekly time sheet. * * * This is a nightmare and I sometimes feel like the only thing I accomplish during the day is tracking intermittent leave.'' Second, employers also stated that the current rule does not allow them to adequately staff their businesses, as it is very difficult to find replacement employees to cover absences that are less than one half-day. The Detroit Medical Center commented that, ''Scheduling of sufficient staff is regularly compromised, negatively affecting the quality of service or, in hospital settings, actual patient care because of unscheduled intermittent leave.'' Third, as documented in the Department's 2007 Report on the RFI comments, ''intermittent FMLA leave can have significant impacts on time-sensitive business models. In many situations, the absence of just a few employees can have a significant impact.'' 72 FR at 35632; *see generally* 72 FR 35632–35638 (discussing impacts of unscheduled intermittent leave on certain time-sensitive industries). For example, the City of New York stated that when its 911 operators do not show up for work due to a chronic FMLA condition, the remaining employees must work longer to maintain appropriate staffing and response levels: ''The number of overtime hours being worked leads to overtired people making critical life and death decisions in an emergency driven environment.'' As a result of all these factors, many employers suggested the Department allow employers to require that intermittent leave be taken in greater increments (*e.g.*, two or four hour blocks or one day or one week blocks).

Conversely, a number of commenters defended the current rule on minimum increments of leave. The Legal Aid Society's Employment Law Center asked the Department to ''please be mindful of the employee who, in an ideal world, would not suffer from such devastating illnesses that wreck havoc on their own lives. Employees, too, struggle with chronic and episodic illnesses. The FMLA was specifically designed to provide leave in these instances.'' The National Partnership for Women & Families noted its strong support for the current regulations and specifically urged the Department to resist making any changes in the minimum increment of leave that an employee could take: ''Intermittent leave was designed to help employers by ensuring that workers are not absent any longer than necessary. While some employers now argue for half-day increments of intermittent leave, enforcing a four-hour leave requirement would mean forcing employees to miss more work than necessary, which is contrary to the statute and harmful to both employees and employers.'' The organization 9to5, National Association of Working Women also stated it ''opposes any regulatory change that would impose additional obstacles or requirements on workers seeking to utilize intermittent FMLA leave. Currently, workers may take just the time needed for treatments, minimizing their own loss of pay and

the strain on employers and co-workers.''

The Department understands the burdens imposed on employers by employees using unscheduled intermittent leave as demonstrated by the comments received in response to the RFI. At the same time, the Department is aware of the importance of such leave to employees with serious health conditions. The Department is not proposing to increase the minimum increment of intermittent leave at this time.

The Department also seeks comment as to whether, in situations in which physical impossibility prevents an employee using intermittent leave or working a reduced leave schedule from commencing work mid-way through a shift, an exception should be made to allow the entire shift to be designated as FMLA leave and counted against the employee's FMLA entitlement. For example, if a railroad conductor is required to conduct a train from one point to another, the employee cannot begin or stop work in the middle of the trip. Similarly, an employee who works in a lab sealed at the start of the day cannot enter the lab later or the work performed would be lost. The Department has addressed this scenario in prior guidance. *See* Wage and Hour Opinion Letter FMLA–42 (Aug. 23, 1994). In that 1994 Opinion Letter, the Department stated that when a flight attendant needed only three hours of intermittent leave to care for her sick mother every Friday, preventing her from working a Friday flight assignment during a two month period, only the three hours of leave needed each week could be charged to FMLA, and the remainder of the time may be charged to some other form of paid or unpaid leave. Upon further review, the Department questions whether such an interpretation is appropriate. While the Department's interpretation allows employees to preserve their FMLA entitlement, it may expose them to disciplinary action based on the additional hours of unprotected leave that they must take. The Department seeks comment on whether it is more appropriate to extend FMLA protection to the entire period of leave taken from the employee's assigned schedule in this situation.

A number of commenters to the record addressed this phenomenon. Southwest Airlines stated, ''When * * * employees are absent, flights do not take off without another employee taking their place.'' Therefore, even a few minutes of FMLA leave can result in the employee missing an entire flight. Similarly, the Air Transport Association of America, Inc. and the Airline Industrial Relations Conference commented,

> In this industry, a six-minute absence can result in a flight attendant avoiding a three-day trip to which she or he was assigned. Most airlines ''bank'' flights or schedule multiple flights to arrive and depart in a concentrated time frame, followed by a relative lull in activity. An employee could use intermittent FMLA leave to miss the heavy flight bank, causing the carrier to either operate short-handed or to call in a replacement worker who likely must be paid a shift premium, then come in to work the rest of the shift during which no flights may arrive or depart, leaving the carrier now over-staffed.

The Regional Transportation District in Denver, Colorado commented that ''due to the particular needs of the industry, [there is] difficulty scheduling intermittent leave for bus and light rail operators, particularly if the operator must be relieved in the middle of the run. [We] would like clear guidance on the limitations it can place on an operator to avoid scheduling intermittent leave during a run.'' This situation is also prevalent in the rail industry. The Association of American Railroads commented,

> Railroads typically establish ''pools'' (and ''extra boards'') comprised of train service employees who report to duty when called by the employer, based on train operations. When called in, the worker leaves on the train and must be gone for the entire trip; given the nature of the work, the worker cannot work a ''reduced schedule leave'' or intermittently for less than the entire trip. If the employee cannot work the entire trip, he or she must miss the entire trip no matter how much FMLA leave the worker needs.

Instead of proposing specific language, the Department seeks comment from the public on this issue and what if any language should be included in the final rule to address these situations within the statutory requirements.

The Department also wishes to clarify the application of FMLA leave to overtime hours. An employee may be limited to working eight hours per day or 40 hours per week due to a serious health condition and, under FMLA, has the right not to work overtime hours without being subject to any discipline. It is a reduced leave schedule. Employers continue to have questions, however, as to whether and how the overtime hours not worked due to the serious health condition may be counted against the employee's FMLA entitlement. The preamble accompanying current § 825.203 stated that whether overtime hours not worked can be counted against the employee's FMLA entitlement is determined by whether the employee would be required to use some form of leave to cover those hours in a non-FMLA situation. (60 FR at 2202) The preamble also distinguished between mandatory overtime, voluntary overtime, and overtime on an ''as needed'' basis. The Department's enforcement experience and responses to the RFI lead us to believe that the distinction between these three types of overtime, and the focus on whether leave would normally need to be used to cover the hours not worked, has caused confusion. *See* Wage and Hour Opinion Letter FMLA–107 (July 19, 1999) (''If overtime hours are on an 'as needed' basis and are not part of the employee's *usual or normal workweek*, or is voluntary, such hours would neither be counted to calculate the amount of the employee's FMLA leave entitlement nor charged to the employee's FMLA leave entitlement.'') (emphasis in original). The confusion has been compounded by language in the preamble discussing § 825.205 of the current rule, which states ''[a]n employee's FMLA leave entitlement may only be reduced for time which the employee would otherwise be required to report for duty, *but for the taking of the leave*.'' (60 FR at 2203)

The Department recognizes that overtime by its nature is generally assigned on an as needed basis, and the fact that it is assigned as needed has no bearing on whether the employee has volunteered to work or is being required to work the additional hours. The Department believes the correct focus should be not on whether the employee would normally be required to use leave to cover the overtime hours, but on whether the employee would otherwise be required to report for duty but for the taking of FMLA leave. If the employee would be required to work the overtime hours were it not for being entitled to FMLA leave, then the hours the employee would have been required to (but did not) work may be counted against the employee's FMLA entitlement. Where, in such a case, the employee works a part-time or reduced leave schedule, the employee's leave usage in any given week is proportionate to the employee's scheduled hours in the week in which the leave is used. For example, if an employee has a certified serious health condition limiting the employee's work hours to 40 per week and that employee is scheduled for 48 hours in a week, the employee would take 8 hours of FMLA protected leave that week. This translates into 8/48ths or 1/6th of a week of FMLA leave. For ease of tracking, an employer may convert these

fractions to their hourly equivalent so long as the conversion equitably reflects the employee's total normally scheduled hours.

Where the employee's schedule so varies from week to week such that no ''normal'' schedule or pattern can be discerned, a weekly average of the hours worked for the 12 weeks prior to the start of the FMLA leave is used to calculate the employee's normal workweek as in proposed § 825.205(b)(3) (current § 825.205(d)). In all instances, the employer must select employees for mandatory overtime in a manner that does not discriminate against workers who need to use FMLA leave (*see* § 825.220). The Department is not proposing any regulatory changes related to the overtime issue, which is not addressed in the text of the current regulations and is discussed only in the 1995 preamble to the current rule (*see* 60 FR at 2202).

Section 825.207 (Substitution of Paid Leave)

Current § 825.207 addresses the interaction between unpaid FMLA leave and employer provided paid leave. Current paragraph (a) repeats the statutory language that paid leave may be substituted for unpaid FMLA leave. Current paragraph (b) addresses substitution of accrued paid vacation, personal, or family leave for unpaid FMLA family leave for the birth or placement of a child for adoption or foster care or to care for a spouse, child or parent with a serious health condition. Current paragraph (c) addresses when accrued paid vacation, personal, or medical/sick leave can run concurrently with the employee's unpaid FMLA leave for the employee's own serious health condition or when the employee is needed to care for a spouse, child or parent with a serious health condition. Current paragraph (d) addresses the interaction between a disability plan and unpaid FMLA leave, as well as the interaction of unpaid FMLA leave with a workers' compensation absence. Current paragraph (e) addresses the use of paid vacation or personal leave when taking FMLA leave. Current paragraph (f) confirms that if paid leave is not substituted at the option of the employer or the employee, the employee remains entitled to all accrued paid leave. Current paragraph (g) explains that paid leave used for purposes not covered by the FMLA cannot count against the employee's FMLA entitlement. Current paragraph (h) states that an employer cannot apply the FMLA requirements if paid leave is substituted and the employer's paid leave program applies less stringent procedural standards for taking leave than the FMLA. Current paragraph (i) addresses the interaction between the use of compensatory time off in the public sector and the use of FMLA leave.

The Department's enforcement experience and responses to the RFI lead us to believe that current § 825.207 may be confusing to employees and employers. For example, the differing treatment of ''medical leave,'' ''family leave,'' ''sick leave,'' and ''vacation leave'' makes it difficult both for employers to administer these provisions and for employees to know what their rights and obligations are in substituting paid leave for unpaid FMLA leave. Additionally, both employees and employers have expressed confusion as to the application of the employer's normal leave rules when paid leave is substituted for unpaid FMLA leave.

In response to the RFI, many employees and employee advocacy groups commented that the ability to substitute paid leave for any portion of an otherwise unpaid FMLA leave in many cases was essential to the employee's ability to take leave at all. Several employers and employer groups, however, commented that the substitution provisions of the regulations require that employees seeking to use accrued paid leave concurrently with FMLA leave be treated more favorably than those who use paid leave for other reasons. Still other employers stated that the various rules for substituting different types of paid leave have added to the costs of administering FMLA leave and discouraged the employers from adopting or retaining leave policies that are more generous than required by the FMLA.

Section 102(d)(2) of the FMLA governs the substitution of paid leave for unpaid FMLA leave. 29 U.S.C. 2612(d)(2). Paragraph (A) of that section of the statute addresses substitution of ''accrued paid vacation leave, personal leave, or family leave'' for unpaid FMLA leave for the birth or placement of a child, or to care for a covered family member. Paragraph (B) of that section addresses substitution of ''accrued paid vacation leave, personal leave, or medical or sick leave'' for unpaid FMLA leave to care for a covered family member or for the employee's own serious health condition. Language in paragraph (B) clarifies that the FMLA does not require employers to provide paid sick or medical leave in any situation in which they would not normally do so.

In the current regulations, the Department interpreted the clarifying clause regarding paid sick and medical leave in section 102(d)(2)(B) of the Act as indicating congressional intent to allow employers to enforce their normal rules regarding the use of paid medical and sick leave when such leave was substituted for unpaid FMLA leave. The Department further interpreted the lack of a similar clarifying clause in paragraph (A) of that section of the statute to indicate that employers were not permitted to enforce normal rules regarding the use of paid vacation leave or personal leave when such leave was substituted for unpaid FMLA leave. *See* preamble to current FMLA rule, 60 FR at 2205 (''There are no limitations, however, on the employee's right to elect to substitute accrued paid vacation or personal leave for qualifying FMLA leave, and the employer may not limit the timing during the year in which paid vacation may be substituted for FMLA-qualifying absences or impose other limitations.'').

The Department's interpretation of the substitution of paid leave provision has evolved over time, as has been reflected in the Department's opinion letters on the subject. For example, while the preamble to the current regulations specifically stated that employers could not restrict the time during the year in which an employee could substitute paid vacation leave for unpaid FMLA leave, the Department has clarified in Opinion Letter FMLA–75 that where vacation leave was accrued pursuant to a generally applied restriction on when it could be used, an employee did not have the right to substitute vacation leave for unpaid FMLA leave at any other time. Wage and Hour Opinion Letter FMLA–75 (Nov. 14, 1995) (''[W]here an employee may only use leave under the employer's plan during a specified period when the plant is shut down, the employee has not fully vested in the right to substitute that leave for purposes of FMLA.''). In two other opinion letters on the substitution of paid vacation leave, the Department has recognized that both an employee's right to use paid leave and an employer's right to require substitution are subject to the policies pursuant to which the leave was accrued. *See* Wage and Hour Opinion Letter FMLA–81 (June 18, 1996) (''[T]he Department interprets these provisions to mean that the employee has both earned the [vacation] leave and is able to use that leave during the FMLA leave period.''); Wage and Hour Opinion Letter FMLA–61 (May 12, 1995) (''The Department interprets these provisions to mean that

the employee has both earned the leave and is able to use that leave during the FMLA period. * * * [I]n the particular situation that you describe, the employer could not require the employee to substitute [vacation] leave that is not yet available to the employee to use under the terms of the employer's leave plan.'').

On further consideration, the Department now believes that the better interpretation of paragraph (B) of section 102(d)(2) of the Act is that it simply clarifies the limits on the employer's obligation to allow the substitution of paid sick or medical leave. For example, it clarifies that an employer is not obligated to allow an employee to substitute paid sick leave for unpaid FMLA leave when the employee is caring for a child with a serious health condition if the employer's normal sick leave rules allow such paid leave to be used only for the employee's own illness. However, as the language in both sections of the statute makes clear, in all cases the substitution of paid leave pursuant to section 102(d)(2) of the Act is limited to the substitution of accrued paid leave. *See* FMLA's legislative history: ''Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.'' H.R. Rep. No. 103–8, Pt. 1, at 38 (1993); *see also* S. Rep. No. 103–3, at 27–28 (1993).

Additionally, as several commenters to the RFI noted, by prohibiting employers from applying their normal leave policies to employees substituting paid vacation and personal leave for unpaid FMLA leave, the current regulations may have provided an incentive to employers to scale back on their provision of vacation and personal leave because they are unable to control its usage. Moreover, as other commenters pointed out, by allowing employees to substitute such paid leave for unpaid FMLA leave without meeting their employer's normal leave rules, the regulations have placed employees using FMLA leave in a more favored position regarding the use of employer provided paid leave than their coworkers taking vacation or personal leave for non-FMLA reasons.

The Department agrees that an unintended consequence of the current regulations on substitution has been to create tension with the plain language of the FMLA, which states that nothing in the Act or any other amendments made by it shall be construed to discourage employers from adopting or retaining leave policies more generous than any policies that comply with the requirements under the Act or any amendment made by it. *See* 29 U.S.C. 2653. Additionally, while the FMLA prohibits discrimination against FMLA leave users, there is nothing in the Act that requires employers to treat FMLA users more favorably than other employees with regard to the provision of paid leave. Furthermore, while the Act's protections prohibit an employee from losing any accrued benefits as a result of taking FMLA leave, nothing in that section entitles an FMLA leave-taker to any right or benefit other than that to which the employee would have been entitled had the employee not taken the leave. *See* 29 U.S.C. 2614(a)(2) and (3).

To more consistently apply these principles, the Department proposes to combine current paragraphs (a), (b), and (c) of § 825.207 into one paragraph (a), which now clearly states that the terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave—including, for example, paid vacation, personal leave, family leave, ''paid time off'' (PTO), or sick leave. Additionally, the Department proposes to clarify what is meant in § 825.207 by the term ''substitution,'' which normally means replacing one thing with another, but does not comfortably bear that meaning in the context of the FMLA. Thus, the Department proposes to add language clarifying that for FMLA purposes ''substitution'' means that the unpaid FMLA leave and the paid leave provided by an employer run concurrently. This is standard practice under the current regulations and is not a change in enforcement policy.

Just as employees do not have the right to use leave which has not yet accrued, an employee's ability to use accrued leave is also limited by the leave policies pursuant to which the ''applicable'' leave is accrued (*i.e.*, available for use pursuant to the non-discriminatory terms and conditions of the employer's policy). Therefore, for example, if an employer's paid vacation leave policy prohibits the use of vacation leave in less than full day increments, employees would have no right to use less than a full day of vacation leave regardless of whether the vacation leave was being substituted for unpaid FMLA leave. Similarly, if an employer's paid personal leave policy requires two days notice for the use of personal leave, an employee seeking to substitute personal leave for unpaid FMLA leave would need to meet the two-day notice requirement prior to receiving the paid personal leave. Employers, of course, have the right to voluntarily waive the application of such restrictions on an employee's use of paid leave, but they are not required by the FMLA to do so.

The Department believes the proposed language on the substitution of paid leave for unpaid FMLA leave also is more consistent with the trend toward employers providing employees with ''paid time off'' (PTO) policies that do not distinguish the right to leave based on the reason (vacation versus illness) but instead give employees a pool of leave to use for whatever reason they choose. PTO plans generally allow employees to take paid leave for any reason as long as the employer's procedures are satisfied. Under the current FMLA regulations, such PTO policies were treated the same as paid vacation or personal leave and employers were therefore not allowed to apply their normal leave rules to the substitution of such leave for unpaid FMLA leave. As several commenters to the RFI noted, this interpretation prohibited an employer who chose to use a PTO leave plan from applying its existing policies for taking leave when the leave was being used for sick or family leave purposes.

In addition to the language proposed in this section as described above, the Department also believes certain safeguards for employees are necessary. Therefore, the Department also proposes to add language clarifying that, when providing notice of eligibility for FMLA leave to an employee pursuant to proposed § 825.300, an employer must make the employee aware of any additional requirements for the use of paid leave and must inform the employee that he/she remains entitled to unpaid FMLA leave even if he/she chooses not to meet the terms and conditions of the employer's paid leave policies (such as using leave only in full day increments or completing a specific leave request form). The Department invites comment as to whether this proposal appropriately implements Congressional intent regarding substitution of paid leave. *See* 29 U.S.C. 2612(d)(2).

Language from current § 825.207(d)(1), explaining that employers may apply more stringent requirements for receipt of disability payments, has been moved to new proposed § 825.306(c). The remaining language from current § 825.207(d)(1), making clear that substitution of paid leave does not apply where the employee is receiving paid disability leave, is retained in the proposed section. However, the Department also wishes to clarify that while the substitution provisions are not

applicable when an employee receives disability benefits while taking FMLA leave, if the employer and employee agree to have paid leave also run concurrently with FMLA leave to supplement disability benefits, such as in the case where an employee only receives two-thirds of his or her salary from the disability plan, such an agreement is permitted under FMLA to the degree that it is allowable under applicable State law. This is in keeping with the statutory mandate not to discourage more generous leave policies voluntarily provided by employers.

The language from current § 825.207(d)(2), addressing the interaction between workers' compensation, light duty and the FMLA, has been moved to proposed § 825.207(e). Additional discussion of light duty also can be found in § 825.220(c) of the proposed rule as discussed below. Current § 825.207(e), which states that no limitations may be placed by the employer on substitution of paid vacation or personal leave, including leave earned or accrued under PTO plans, has been deleted in light of the discussion of paragraph (a) above. Current § 825.207(h), which states that when an employer's procedural requirements for taking paid leave are less stringent than the requirements of the FMLA, employees cannot be required to comply with higher FMLA standards, has been deleted because it does not properly implement section 103 of the FMLA, which states that employers may require sufficient FMLA certification in support of *any* request for FMLA leave for either the employee's own serious health condition or a covered family member's serious health condition. It also is in conflict with section 102(e) of the FMLA, which requires employees to provide 30 days notice for foreseeable leave whenever possible for the birth or placement of a child or for planned medical treatment. Current § 825.207(f) and (g) remain unchanged but have been redesignated as paragraphs (b) and (c) of this section.

Finally, the Department proposes to revise current § 825.207(i) to allow the use of compensatory time accrued by public agency employees under the Fair Labor Standards Act (FLSA) to run concurrently with unpaid FMLA leave when leave is taken for an FMLA-qualifying reason. Although the Department did not receive many comments dealing specifically with the issue of compensatory time in response to the RFI, those received indicate a general agreement that the substitution of compensatory time for otherwise unpaid FMLA would be beneficial both to the employee, by minimizing the financial impact of unpaid leave, and to the employer, by allowing the two benefits to run concurrently. Furthermore, the Department believes the proposed revision is consistent with the U.S. Supreme Court's decision in *Christensen* v. *Harris County*, 529 U.S. 576 (2000), in which the Court found that public employers always have the right to cash out a public sector employee's compensatory time or require the employee to use the time.

Section 825.208 (Reserved)

Current § 825.208 has been renumbered as proposed § 825.301, to be discussed below. The section is therefore reserved to avoid extensive renumbering of other sections.

Section 825.210 (Employee Payment of Group Health Benefit Premiums)

This section addresses an employee's obligation to pay his or her share of group health plan premiums while on FMLA leave. The Department received few comments regarding this specific section in response to the RFI. Some commenters stated that it was difficult to obtain payment for an employee's share of health benefit premiums during the period the employee is on FMLA leave. Employer representatives also expressed concern about their ability to recoup their portion of health insurance premiums when an employee decides not to return from FMLA leave. Other commenters requested that the Department clarify an employer's responsibility to maintain health insurance coverage when an employee on FMLA leave fails to pay his or her portion of the premiums.

The Department is proposing to revise paragraph (f) of this section by deleting the word ''unpaid.'' As noted in § 825.207(e), an individual who is simultaneously taking FMLA leave and receiving payments as a result of a workers' compensation injury is not on unpaid leave. No further changes are proposed for this section. For further discussion of an employer's responsibility to maintain the health insurance coverage of an employee on FMLA leave, *see* proposed § 825.212 as discussed below.

Section 825.212 (Employee Failure To Make Health Premium Payments)

Current § 825.212 explains that an employer may terminate an employee's health insurance coverage while the employee is on FMLA leave if the employee fails to pay the employee's share of the premiums, the grace period has expired, and the employer provides sufficient notification to the employee.

The Department received a number of comments regarding this section. For example, the Disability Management Employer Coalition requested that the Department better explain how employers should respond to an employee's failure to pay his or her share of health insurance premiums while on FMLA leave. In particular, the Coalition stated that while many employers pay the employee's share of health insurance premiums because of concerns regarding continuation of coverage, employers have concerns about the cost of doing so. Other commenters raised similar concerns, especially when individuals do not return to work after their FMLA leave has expired, and requested clarification regarding the timing of termination of an individual's coverage for failure to make payment.

The Department proposes to add language to current paragraph (c) of this section to make clear that if an employer allows an employee's health insurance to lapse due to the employee's failure to pay his or her share of the premium as set forth in the regulations, the employer still has a duty to reinstate the employee's health insurance when the employee returns to work and can be liable for harm suffered by the employee if it fails to do so. Alternatives exist in most cases to terminating an employee's health insurance when premium payments are not made. For instance, an employer could make payroll deductions to recoup such payments when an employee returns to work without violating the FMLA. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. *See* § 825.213 of the current and proposed regulations.

Section 825.213 (Employer Recovery of Benefit Costs)

This section explains what process an employer must follow to recoup insurance premiums from an employee when the employee does not return from leave in certain circumstances. A few employer representatives responded to the Department's RFI with concerns about this process, with some suggesting that employees on FMLA leave be provided coverage under the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, as amended, 29 U.S.C. 1161–1168 (COBRA). These commenters were particularly concerned that the current

system requires that employers provide health insurance, and pay the majority of the premium, for individuals on FMLA leave who have no intention of returning to work once their leave entitlement expires. The Department understands these concerns, but cannot adopt the suggested change under current law.

The Department proposes to move language from existing § 825.310(h), which deals with certification requirements when an employee fails to return to work due to the continuation, recurrence, or onset of a serious health condition, to this section, as it believes it is more appropriately placed here with other issues involving repayment of health premiums. This language states that the cost of the certification an employee must obtain to avoid the repayment of health insurance premiums when the employee does not return from leave must be borne by the employee, as well as any travel costs.

Section 825.214 (Employee Right to Reinstatement)

Current § 825.214 addresses an employee's reinstatement rights upon returning to work. This section also makes clear that even if an employee is unable to return to work as a result of the serious health condition and would not have FMLA reinstatement rights, the employee may have rights under the ADA.

In response to the Department's RFI, employers expressed concern about the impact on their business operations of reinstating an individual to his or her same position. Many of these commenters were particularly concerned about the interplay between the use of intermittent leave by an employee and that employee's right to reinstatement. These commenters argued that, in many cases, such individuals should not be entitled to job restoration under current § 825.214(b) because they are unable to perform an essential function of their position, such as to work overtime or meet regular and reliable attendance requirements. Commenters in certain industries, such as those where individuals are trained to work with particular consumers, and smaller employers stated that returning an individual to his or her same position can be difficult, even when the individual takes block leave. These employers often have to hire an individual to replace the employee taking FMLA leave, and are uncertain how to manage the employee's return to work and their obligation to provide reinstatement. On the other hand, numerous employees stated that the ability to take FMLA leave, without having to worry whether their job was secure, was critical to their being able to manage their own serious health condition or caregiving responsibilities. The National Partnership for Women & Families stated that the job restoration provisions of FMLA ''promote[ ] greater workforce continuity and stability by helping employees retain their jobs when an emergency strikes.''

The Department believes that this regulatory provision meets the intent of Congress in this area, by providing employees with job protection while allowing employers some flexibility to return the employee to the same or an equivalent position, and that no changes are appropriate under current law.

The Department proposes minor clarifications along with organizational changes to this section. First, the Department proposes to add a heading titled ''[g]eneral rule,'' emphasizing that the section sets forth the general rule on reinstatement obligations under the FMLA. Proposed § 825.214 retains the language from current § 825.214(a) without change. Language from current paragraph (b) on limitations on reinstatement has been moved to proposed § 825.216(c) and combined with language from current § 825.216(d) on concurrent workers' compensation absences during FMLA leave, for organizational and clarification purposes.

Section 825.215 (Equivalent Position)

Current § 825.215 defines what constitutes an ''equivalent position'' for purposes of reinstatement. Current paragraph (a) explains that an equivalent position is one ''virtually identical'' to the employee's former position. Current paragraph (b) instructs employers to give an employee a ''reasonable opportunity'' to fulfill any conditions the employee needs to fulfill, such as attending a course, if the employee is no longer qualified for his or her position as a result of an FMLA absence. Current paragraph (c) defines equivalent pay, including when an employee is entitled to pay increases and certain types of bonuses when taking FMLA leave. Current paragraph (d) defines what constitutes ''equivalent benefits.'' Current paragraph (e) defines what constitutes ''equivalent terms and conditions'' of employment, and current paragraph (f) confirms that the definition of ''equivalency'' does not extend to *de minimis* or intangible, unmeasurable aspects of the job.

The Department received extensive feedback regarding the impact of the requirements of this regulatory section on employer incentive programs, especially perfect attendance awards. This issue has also been the subject of many requests for clarification to the Department over the years. Employers, and their representatives, almost uniformly stated that the current regulatory distinction between an attendance bonus and a production bonus has a ''chilling effect on employer incentive plans.'' These commenters argued that the current regulatory requirements are illogical and unfair, and have caused many companies to modify, or eliminate altogether, perfect attendance reward programs. Other employers stated that they would not consider implementing a perfect attendance program because, by requiring that employers provide awards to individuals with less than perfect attendance, these commenters believe that the Department has placed employees taking FMLA leave in a better position than those who take no leave. Many employees also commented on the perceived unfairness of providing a ''perfect attendance'' award to individuals who had been absent from work for up to 12 weeks of the eligible time period. Several employer representatives suggested that the Department permit employers to administer attendance incentives and reward perfect attendance without regard to the reason for an absence, thus allowing employers to treat all individuals absent for work in the same manner.

Several employee organizations stated that the current regulatory scheme appropriately recognizes that employees should not be penalized for exercising their FMLA rights. These commenters believed that permitting employers to exclude employees on FMLA leave from award programs would discourage employees from taking FMLA leave.

The Department proposes several changes to this section. No substantive changes have been made to proposed paragraph (a), titled ''[e]quivalent position,'' proposed paragraph (b), titled ''[c]onditions to qualify,'' or current paragraph (c)(1). The Department proposes changes to current paragraph (c)(2) regarding bonuses to allow an employer to disqualify an employee from a bonus or award predicated on the achievement of a goal where the employee fails to achieve that goal as a result of an FMLA absence. Of course, an employer could not disqualify only those individuals on FMLA-qualified leave and allow other employees on other forms of non-FMLA leave to receive such an award without violating the FMLA's non-discrimination requirement.

The Department proposes this change because the wording of current

§ 825.215(c)(2) on bonuses is confusing and because of the unfairness perceived by both employees and employers as a result of allowing an employee to obtain a perfect attendance award when the employee has been absent on FMLA leave. The confusion stems from language in the current section, which distinguishes between bonuses for job performance, such as those based on production goals, versus bonuses based on the absence of certain events occurring, and includes as examples both bonuses for perfect attendance and for working safely with no accidents. Moreover, the language of the current regulation incorrectly groups together bonuses for perfect attendance and safety as not requiring performance by the employee but rather the absence of occurrences. This defies the plain meaning of attendance. Employers are uncertain whether their employee incentive plans will be in violation of the current regulation. *See* Wage and Hour Opinion Letter FMLA–110 (Sept. 11, 2000) (Employer inquiry regarding a plan the employer believed to be a ''production incentive'' plan, which the Department found analogous to a perfect attendance program).

Section 825.215(c)(2), containing this confusing distinction between a bonus for perfect attendance or safety versus meeting or exceeding production goals, also seems to conflict with the language in current § 825.215(d)(5), which states that an employee is ''entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example, if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost.'' Current § 825.215(d)(5) is more consistent with 29 U.S.C. 2614(a)(3), which provides that nothing in that section shall be construed to entitle any restored employee to—(A) the accrual of any seniority or employment benefits during any period of leave; or (B) 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.

The Department also is concerned that the regulatory language in current § 825.215(c)(2) provides the wrong incentive to employers to eliminate perfect attendance awards because of the inequity perceived by coworkers of allowing employees who have taken FMLA leave to receive these awards. The Department did not intend, nor does the Act itself intend, that the FMLA regulations result in a reduction of benefits to all employees.

Therefore, the Department proposes to eliminate the existing language of current § 825.215(c)(2) and replace it with the following:

> Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used vacation leave for an FMLA-protected purpose also must receive the payment.

The Department believes this proposed language better reflects the requirements of the statutory scheme.

The Department has re-titled paragraphs (e) and (f) in the proposed rule. The final sentence of the current section, which reminds employers that putting an employee in a job slated for lay-off when the employee's original position would not be eliminated would not meet the definition of an equivalent position, has been moved to proposed § 825.216(a)(1) where related issues are discussed, for organizational and clarification purposes.

Section 825.216 (Limitations on an employee's right to reinstatement)

Current § 825.216 addresses the limitations on an employee's right to reinstatement. Specifically, current paragraph (a)(1) addresses what happens when an employee is laid off or the employee's shift is eliminated while the employee is on FMLA leave. Current paragraph (b) addresses what happens when an employee taking FMLA leave was only hired for a specific term or project. Current paragraph (c) addresses limitations on reinstatement with regard to ''key employees.'' Current paragraph (d) addresses rules governing the interaction between FMLA leave and a workers' compensation absence when the employee is unable to return to work at the end of the 12-week FMLA leave period.

The Department's RFI generated a handful of comments regarding this section. Several of the comments focused on the difficulty in providing job restoration rights to individuals who take intermittent leave for chronic serious health conditions. For example, FNG Human Resources argued that an employer should have the right to replace employees who ''consistently use up to 11+ weeks of FMLA for year after year.'' One commenter requested that the Department more clearly define the employer's obligations should a layoff occur. A law firm asked that the Department clarify the interaction between § 825.216(a), which ''suggests that a seniority provision in a [collective bargaining agreement] would not yield to the FMLA'', and § 825.700, which, the commenter indicated, suggests the opposite result.

The Department is not proposing any changes to this section to address the use of intermittent leave for chronic serious health conditions. Likewise, the Department believes the current regulatory language in this section and current § 825.700 adequately explains the interaction between the job restoration provisions of FMLA and collectively-bargained seniority provisions.

Minor changes have been made to this section for purposes of greater clarity. The only change the Department proposes to current paragraph (a)(1) is to incorporate the last sentence of § 825.215(f) which, as discussed above, states that restoration to a job slated for lay-off would not meet the requirements of an equivalent position. This is proposed for organizational and clarification purposes, but no substantive change is intended. Similarly, the Department proposes to re-order current paragraph (b) as paragraph (a)(3) for purposes of organizational structure and clarity. The Department proposes a new paragraph (c) to address an employer's obligations when an employee cannot return to work after FMLA leave is exhausted because the serious health condition continues. This section combines language from current §§ 825.214(b) and 825.216(d), because both sections address limitations on reinstatement when an employee has exhausted his or her FMLA leave entitlement and is unable to perform the essential functions of his or her job, but no substantive changes are intended. The Department has not made any changes to current paragraph (c) except to re-designate it as paragraph (b). Current § 825.312 (g) and (h), which address the fraudulent use of FMLA leave and outside employment during FMLA leave, respectively, and therefore also address limitations on reinstatement, have been renumbered as proposed § 825.216 (d) and (e) for organizational purposes.

Sections 825.217 through 825.219 (Explanation of key employees and their rights)

Taken together, current §§ 825.217, 825.218 and 825.219 define the term ''key employee''; explain the meaning of the phrase ''substantial and grievous economic injury'' to the employer's operations; and provide an explanation of the rights of a key employee. A handful of comments received in response to the Department's RFI requested that the Department allow employers greater flexibility to designate ''key employees'', particularly in the safety industry. A law firm representing employers also requested that the Department provide guidance regarding the responsibility of a placement agency to provide job restoration rights when the secondary employer refuses to reinstate the individual because the position was ''mission-critical.''

The exemption for highly compensated employees is defined by statute as applying only to a salaried eligible employee who is among the highest paid 10 percent of the employees employed by the employer within 75 miles of the facility at which the employee is employed. *See* 29 U.S.C. 2614(b)(2). While the Department understands that requiring job restoration for some lower-paid positions in public safety and other industries may cause ''substantial and grievous economic injury'' in particular situations or may cause hardship to the employer, the Department believes that any revisions to address such situations would require a change in the statute.

Minor changes to § 825.217(b) have been made to update the reference to the definition of ''salary basis'' as now contained in 29 CFR 541.602 (previously codified in 29 CFR 541.118) and to add ''computer employees'' to the list of employees who may qualify for exemption from the minimum wage and overtime requirements of the FLSA under those regulations if they meet certain duties and salary tests. The Department did not receive any comments specific to §§ 825.218 and 825.219 in response to the RFI and is not proposing any changes to these provisions.

Section 825.220 (Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights)

Current § 825.220 explains what actions taken by employers constitute an interference with an employee's rights under the FMLA. The Department proposes to change two provisions in this section, and to clarify two other provisions.

First, the Department proposes new language to current paragraph (b) that sets forth the remedy for interfering with an employee's rights under the FMLA. While this language also has been included in proposed § 825.300, which deals specifically with employer notice obligations, and proposed § 825.301, which addresses what triggers an employer's designation obligations, the Department believes it is important that the general rule governing an employer's obligations under the Act also provide guidance on the remedy for such violations. First, numerous commenters to the RFI asked the Department to strengthen or clarify the regulatory provisions implementing the Act's prohibitions on interference and discrimination. 29 U.S.C. 2615(a)(1) and (2). For example, the University of California, Hastings College of Law, Center for Worklife Law requested that the Department ''clarify that interference with an employee's right to take FMLA leave includes not only withholding information but also deterring employees from exercising their rights. * * *'' The Center for Worklife Law asserted that ''employees returning from [FMLA] leave have been given poorer quality assignments, been subjected to heightened scrutiny of their work and received undeservedly negative evaluations.'' Similarly, the law firm of Kennedy, Reeve & Knoll and several individual workers asserted that some employers actively discourage the taking of FMLA leave, especially intermittent leave, or penalize those employees who take such leave.

Second, the Department also received comments about the language contained in current § 825.220(d) stating that where an employee has voluntarily accepted a light duty position in lieu of taking FMLA leave, the employee's right to restoration to the same or an equivalent position is available until 12 weeks have passed within the 12-month period, including all FMLA leave taken and the period of ''light duty.'' The Department is aware that at least two courts have interpreted this language to mean that an employee uses up his or her twelve week FMLA leave entitlement while performing work in a light duty assignment. *See Roberts* v. *Owens-Illinois, Inc.,* 2004 WL 1087355 (S.D. Ind. 2004); *Artis* v. *Palos Community Hospital,* 2004 WL 2125414 (N.D. Ill. 2004). These holdings differ from the Department's interpretation of the current regulation, as further expressed in a 1995 DOL opinion letter which states that an employee who voluntarily accepts a light duty position: retains rights under FMLA to job restoration to the same or an equivalent position held prior to the start of the leave for a cumulative period of up to 12 workweeks. This ''cumulative period'' would be measured by the time designated as FMLA leave for the workers' compensation leave of absence and the time employed in a light duty assignment. The period of time employed in a light duty assignment cannot count, however, against the 12 weeks of FMLA leave.

Wage and Hour Opinion Letter FMLA–55 (Mar. 10, 1995).

Numerous employers, and their representatives, urged the Department to apply the current regulatory language to both voluntary and mandatory light duty assignments. The National Association of Convenience Stores, the U.S. Chamber of Commerce, the Society for Human Resource Management, and others asked the Department to require that employees accept light duty assignments, consistent with their medical restrictions, in lieu of taking FMLA leave. The College and University Professional Association for Human Resources stated that ''[i]n many cases, light duty may be a better alternative than placing the employee on leave, as it allows the employer greater flexibility in meeting its staffing needs'' while the Society for Human Resource Management noted that ''[e]xperience has shown that employees with minor injuries generally recover more quickly if they are working, gradually returning to their former capabilities.'' As an alternative, many employers suggested that the Department revise the regulation to make clear that light duty work counts against an employee's 12-week FMLA entitlement. The American Bakers Association, the National Coalition to Protect Family Leave, the National Business Group on Health, the Retail Industry Leaders Association, the National Restaurant Association, several management-side law firms, and individual employers and human resource professionals urged the Department to rescind Opinion Letter FMLA–55 and explicitly provide ''that time spent in light duty away from the employee's usual job counts against the 12 weeks of FMLA entitlement for all purposes.''

Other commenters, including the AFL-CIO, the Coalition of Labor Union Women, Families USA, the Maine Department of Labor, and the University of Michigan Center for the Education of Women, argued that counting light duty work as FMLA leave is not appropriate. Some employers, and organizations representing human resource professionals, also shared this view. For

example, MedStar Health, Inc. stated that ''[w]hen an employee works, even in an alternate light duty capacity, he/she is not absent under the meaning of the FMLA.''

Some commenters, such as the National Partnership for Women & Families, argued that the Department's current position, which counts the time spent in a light duty position for purposes of job restoration rights but not FMLA leave entitlement, struck the appropriate balance. Still others, such as the University of California, Hastings College of Law, Center for Worklife Law, expressed concern that counting light duty work against an employee's FMLA leave entitlement or reinstatement rights could negatively impact pregnant women. The National Retail Federation suggested that light duty not count against FMLA leave, unless the individual's medical restrictions required reduced hours, in which case any reduction in normal work hours would count against the individual's FMLA leave entitlement.

Upon further review, the Department believes that the current regulatory language does not serve the Act's purpose to provide job protection when FMLA leave is taken. Accordingly, the Department proposes deleting the final sentence of current § 825.220(d), which states that job restoration rights are available until 12 weeks have passed within the 12-month period including all FMLA leave taken and the period of light duty. This change will ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light duty position. The Department also is not proposing to require employees to accept light duty work in lieu of taking FMLA leave. If an employee is voluntarily performing a light duty assignment and performing work, the employee is not on FMLA leave and the employee should not be deprived of future FMLA-qualifying leave when performing such work. By deleting this language, the Department in no way intends to discourage employees and employers from engaging in such light duty work arrangements. Rather, the Department simply wishes to make clear that when an employee is performing a light duty assignment, that employee's rights to FMLA leave and to job restoration are not affected by such light duty assignment. The Department invites comment on whether the deletion of this language may negatively impact an employee's ability to return to his or her original position from a voluntary light duty position.

Many RFI commenters asked that the Department clarify the language in subsection (d) that states ''[e]mployees cannot waive, nor may employers induce employees to waive, their rights under FMLA.'' Some courts have disagreed as to whether this language prohibits only the prospective waiver of FMLA rights, such as the right to 12 weeks of leave, or also prohibits the retrospective settlement of FMLA claims based on past employer conduct, such as through a settlement agreement. Compare *Taylor* v. *Progress Energy,* 493 F.3d 454 (4th Cir. 2007), *petition for cert. filed,* 75 U.S.L.W. 3226 (Oct. 22, 2007) (No. 07–539) (Department's regulation prevents employees from independently settling past claims for FMLA violations with employers without the approval of the Department or a court) with *Faris* v. *Williams WPC–I, Inc.,* 332 F.3d 316 (5th Cir. 2003) (plain reading of the Department's regulation is that it prohibits prospective waiver of rights only and not retroactive settlement of claims).

A majority of commenters to the RFI, including the Connecticut Department of Labor, the Ohio Department of Administration, the National Coalition to Protect Family Leave, the National Retail Federation, the Association of Corporate Counsel, the United Parcel Service, American Electric Power, and the University of California, argued that § 825.220(d) should be amended to explicitly allow waivers and releases in connection with the settlement of FMLA claims, that is, claims for past violations. Commenters supporting this view stated that any interpretation preventing the waiver or release of past claims unnecessarily encourages litigation and interferes with the public policy favoring private resolution of disputes, is neither practical nor efficient (particularly in a reduction-in-force), may discourage companies from providing severance or separation packages, and is not required by the statutory language, which contains no indication that Congress intended to prevent such waivers. Many of these commenters, such as the Connecticut Department of Labor, the Indiana Chamber of Commerce, the Detroit Medical Center, Clark Hill PLC, and the Human Resource Management Association of Southeastern Wisconsin, suggested that the Department adopt minimum standards for knowing and voluntary waivers, similar to those provided for under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621, 626(f). Other RFI commenters, such as the National Employment Lawyers Association, urged the Department to prohibit both prospective and retrospective waivers, stating that requiring Departmental or court approval of voluntary settlements in no way jeopardizes the public policy in favor of settlement and protects vulnerable workers who might be induced to waive their FMLA rights rather than forfeit income.

The Department proposes to clarify the language in paragraph (d) in light of the Fourth Circuit's decision in *Taylor* which held that employees cannot voluntarily settle their past FMLA claims. The Department disagrees with that reading of the regulations. As the example in the current regulations reveals, this provision was intended to apply only to the waiver of prospective rights. In the interest of clarity, however, the Department proposes to make explicit in paragraph (d) that employees and employers should be permitted to voluntarily agree to the settlement of past claims without having to first obtain the permission or approval of the Department or a court. The Department does not believe this is a change in the law as it has never been the Department's practice, since the enactment of the FMLA, to supervise such voluntary settlements.

Section 825.300 (Employer Notice Requirements)

The Act imposes notice obligations on both employers and employees. Current §§ 825.300 and 825.301 outline employers' responsibilities to notify employees of their FMLA rights. Several additional notice requirements, such as notifying employees of their FMLA eligibility and designation of their FMLA leave, also appear elsewhere in current §§ 825.110 and 825.208.

Current § 825.300(a) addresses the statutory posting requirement (*see* 29 U.S.C. 2619(a)). Under current § 825.300(b), an employer that willfully violates the posting requirement may be assessed a civil money penalty not to exceed $100 for each separate offense (*see* 29 U.S.C. 2619(b)). Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer is responsible for providing notice in a language in which the employees are literate. *See* § 825.300(c).

Current § 825.301(b) requires the employer to provide the employee with written notice detailing the specific expectations and obligations of the employee and explaining the consequences of a failure to meet these obligations. The written notice must be provided in a language in which the employee is literate and must include, as appropriate:

(i) That the leave will be counted against the employee's annual FMLA leave entitlement (*see* § 825.208);

(ii) Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see* § 825.305);

(iii) The employee's right to substitute paid leave and whether the employer will require the substitution of paid leave, and the conditions related to any substitution;

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.,* the circumstances under which coverage may lapse);

(v) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment (*see* § 825.310);

(vi) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vii) The employee's right to restoration to the same or an equivalent job upon return from leave (*see* §§ 825.214 and 825.604); and

(viii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

29 CFR 825.301(b)(1). The specific notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work, but is not required to do so (§ 825.301(b)(2)). The notice must be given within a reasonable time after notice of the need for leave is given by the employee-within one or two business days if feasible (§ 825.301(c)). The written notification to the employee that the leave has been designated as FMLA leave may be in any form, including a notation on the employee's pay stub (§ 825.208(b)(2)).

The Department noted in its RFI that one consistent concern expressed by the employee representatives during stakeholder meetings was that employees need to be better aware of their rights under the FMLA. The RFI solicited public input on the effectiveness of these various regulatory notice provisions in promoting communications between employees and employers and on what more could be done to improve the general state of awareness of FMLA rights and responsibilities by both employees and employers. The Department sought information in response to several questions concerning the notice provisions and how those provisions relate to employee awareness of their rights and responsibilities.

Increasing employee and employer awareness of FMLA rights and responsibilities continues to be a challenge based on comments submitted to the RFI. International Auto Processing, Inc., suggested that employees may be unaware of their FMLA rights due to the timing of when they receive information about FMLA: ''If employees continue to be unaware of their FMLA rights, it may be because most employers will cover this at orientation. On the first day of the job, new employees are nervous and are overwhelmed with paperwork and work rules. Since FMLA won't affect them until they have in the requisite 12 months with the company, they may shove that information to the back burner.''

Some comments addressed the sufficiency of the information provided. The United Transportation Union stated that the ''posting requirements for employers under FMLA do not go far enough in that they do not actively educate employees on their rights under FMLA. In addition to posting FMLA basic facts as required by the regulation, employers should be required to give the information to employees, in writing, once they become eligible under the regulations with that employer. Contact phone numbers for the employer as well as detailed appeals process afforded to the employee should be provided, as well as recourse information for possible retaliatory practices by the employer.'' The International Association of Machinists and Aerospace Workers recommended that ''employees should be expressly notified of their right to take intermittent leave. * * * This has proven a real problem for some of our members. * * * An employee who suffers from a condition that is still being diagnosed, but doctors believe it is either lupus, a connective tissue disorder or rheumatoid arthritis, arrived late to work due to her condition on a number of occasions [and] was completely unaware that she could take FMLA on an intermittent basis. She thought if she took any FMLA leave, she would have to stop working altogether, something her illness did not necessitate and something she could not afford to do.''

The AFL–CIO urged the Department to consider ''requiring employers to provide an individualized notice provision to employees on an annual basis,'' and referred to another commenter who suggested requiring notice to employees at the point of hiring and annually thereafter. The Communications Workers of America reiterated that employees need to receive guidelines that ''explain their annual leave entitlement and the process for making application for FMLA leave.''

Proposed Revisions

The Department believes that a key component of making the FMLA a success is effective communication between employees and employers. To improve the process, the Department proposes to collect the notice requirements into one comprehensive section that better captures the appropriate communications that need to occur between an employer and employee in the FMLA process. Specifically, the Department proposes to combine components of current §§ 825.300, 825.301, 825.208, and 825.110 into one comprehensive section addressing an employer's notice obligations.

Proposed § 825.300 is divided into separate paragraphs that address the major topics of ''(a): [g]eneral notice''; ''(b): [e]ligibility notice''; ''(c): [d]esignation notice''; and ''(d): [c]onsequences of failing to provide notice''. The ''general notice'' requirement requires an employer to post a notice explaining the Act's provisions and complaint filing procedures, and to provide this same notice in employee handbooks or by distributing a copy annually. The ''eligibility notice'' provides notice to the employee that he or she is an eligible employee under FMLA (as defined in § 825.110), has FMLA leave available, and has certain rights and responsibilities. Within five business days of having obtained sufficient information to determine whether the requested leave is being taken for a qualifying reason, the employer must provide the employee with a notice regarding designation of FMLA leave—referred to as the ''designation notice.'' The designation notice informs the employee whether the particular leave requested will be designated as FMLA leave.

While the current regulations contain the ''provisional designation'' concept, the Department believes that this process may cause confusion over whether leave is protected prior to the actual designation. In some cases, the leave may not eventually qualify for the Act's protections. Thus, the Department's proposal restructures the regulations to recognize that employers may not be able to designate leave as FMLA covered until the employee provides additional information. The Department specifically invites

comment on whether this proposal will effectively communicate the required information to employees about their FMLA rights while relieving some of the administrative burdens for employers under the current process.

General Notice Requirements

Proposed § 825.300(a) is a ''general notice requirement'' that merges the poster/notice requirement contained in current § 825.300 with the written guidance required in current § 825.301(a). Proposed § 825.300(a)(1) maintains the statutory requirement that every covered employer post and keep posted in conspicuous places on its premises a notice providing information about the FMLA. Given the growth of the Internet since the Department issued the 1995 regulations, however, as well as the practical realities that more and more employees do not physically report to a central location, the Department proposes that this posting requirement may be satisfied through an electronic posting of the notice as long as it otherwise meets the requirements of this section. To provide sufficient notice required by the statute (*see* 29 U.S.C. 2619), the employer must make sure that the information is accessible to applicants as well as employees, so simply posting such information on an intranet that is not accessible to applicants will not meet the requirements. Electronic posting could be accomplished, for example, by posting the notice in a conspicuous manner on the employer's Internet web-page inviting applicants to apply if the employer accepts applications only through the Internet. If the employer also accepts applications on-site, however, the notice would have to be physically posted for applicants to view on-site unless the employer had a computer kiosk available for applicants to view the poster on-line. Similarly, in order for electronic-only posting to provide sufficient notice to employees, all employees must have access to company computers that post the information in a conspicuous manner. For example, the company may make computer kiosks available for use in employee lunch rooms. The Department specifically seeks comment on whether this ''posting'' alternative is considered workable and will ensure that employees and applicants obtain the required FMLA information.

Poster Civil Money Penalty

Section 109(b) of the FMLA (29 U.S.C. 2619(b)) provides that any employer who willfully violates the Act's requirement to post the FMLA notice as required by section 109(a) may be assessed a civil money penalty (CMP) not to exceed $100 for each separate offense. This CMP amount was set by the Congress as part of the original FMLA of 1993. The regulations, at § 825.300(b), currently provide for assessment of a $100 penalty for willful violations of the posting requirement.

The Department proposes to increase the civil money penalty for violation of this posting to $110.00 to meet requirements of the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, Title III, § 31001(s)(1), Apr. 26, 1996, 110 Stat. 1321–373). The Debt Collection Improvement Act amended the Federal Civil Penalties Inflation Adjustment Act of 1990 (Public Law 101–410, Oct. 5, 1990, 104 Stat. 890) to require that Federal agencies issue regulations to adjust certain CMPs for inflation. As amended, the law requires each agency to initially adjust for inflation all covered CMPs, and to periodically make further inflationary adjustments thereafter. The adjustment prescribed in the amended Act is based on a cost-of-living formula according to the percentage determined by the Department of Labor's Consumer Price Index (CPI). The statute provides for rounding the penalty increases. Once the percentage change in the CPI is calculated, the amount of the adjustment is rounded according to a table in the Federal Civil Penalties Inflation Adjustment Act, which is scaled based on the dollar amount of the current penalty. For penalties less than or equal to $100, the increase is rounded to the nearest multiple of $10. The statute applies a cap, for the initial adjustment only, which limits the amount of the first penalty increase to 10 percent of the current penalty amount. Any increase under the Act applies prospectively to violations that occur after the date the increase takes effect in amendments to the regulations.

The amount by which the current CPI–U exceeds the CPI–U for June of 1993 is more than the statutory cap of 10 percent. Consequently, due to inflation since this CMP amount was first established in 1993, the adjustment permitted by law is limited to the maximum 10 percent initial cap. It is proposed, therefore, to amend § 825.300(a) to provide for assessment of a penalty of $110 for willful violations of the posting requirement.

Clarification of Covered Employer Responsibilities

For purposes of clarity, the Department proposes to separate out into a new paragraph the language from existing § 825.300(a) that requires a covered employer to post the general notice to individual employees even if no employees are eligible for FMLA leave. For example, an employer may employ 60 employees located in all 50 states, and no employee meets the eligibility requirement of working at a site to which 50 or more employees report within 75 miles. *See* 29 U.S.C. 2611(2)(B)(ii) and 29 CFR 825.110. In such a case, an employer still would have to comply with the posting requirement. This is a statutory posting requirement, *see* 29 U.S.C. 2611(4) and 2619(a), although some confusion exists on this point since it is not obvious that such a notice is required when an employer does not have any eligible employees. The Department aims to minimize such confusion by highlighting this requirement in a separate section.

Proposed § 825.300(a)(3) states that covered employers with eligible employees also must distribute the general notice described in proposed § 825.300(a) either by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic form. This provision incorporates the existing notice distribution requirement found in current § 825.301(a)(1), which requires an employer to place in an employee handbook, if one exists, a notice of FMLA rights and responsibilities and the employer's policies on the FMLA. Current § 825.301(a)(2) states that if an employer does not have a handbook, when an employee gives specific notice of the need for leave, the employer must provide written guidance to an employee concerning all the employee's rights and obligations under the FMLA, and the DOL Fact Sheet can meet this requirement. The information found in the DOL Fact Sheet mirrors, in part, information contained in the poster.

To streamline the notice requirement currently found in § 825.301(a)(1) and the posting requirement, the Department proposes that one document containing identical information be both posted and distributed, thereby satisfying the posting and distribution requirement. The Department intends that this proposed change will more effectively convey consistent, relevant information to employees. Moreover, the Department's proposed prototype notice is revised to provide employees more useful information on their FMLA rights and responsibilities.

To further address the concern that employees are unaware of their rights as explained above, the Department proposes that if the proposed notice is not contained in an employee handbook, it must be distributed annually, regardless of specific

employee requests for leave. This new frequency requirement exceeds that of the current regulations, but the Department is responding to the concern that employees may not be aware of their FMLA rights in many cases, and the Department believes that this requirement will promote increased awareness. In addition, the communication will be more effective if the notice is provided routinely and annually rather than only when an employee is facing a significant family event like the birth or adoption of a child or a serious medical emergency affecting the employee or a family member.

The Department's proposal does not require that a covered employer with no eligible employees distribute the general notice, although the employer would have to comply with this requirement even if it only has one eligible employee. The Department specifically seeks comments on all aspects of these proposed notice provisions.

Prototype General Notice

Proposed § 825.300(a)(4) explains that the Department has included a prototype notice in Appendix C for employers to use and that copies will be available from Wage and Hour offices and from the Department's Internet website. Consistent with current §§ 825.300(c) and 825.301(b)(1), proposed § 825.300(a)(4) requires that an employer provide the poster and general notice to employees in a language in which they are literate when the employer employs a significant portion of employees who are not literate in English. The Department intends to make such notices available in alternative languages in accordance with the requirements of this section on the Internet and through local Wage and Hour district offices. This section also includes language from current § 825.301(e) requiring notice to sensory-impaired individuals as required under applicable Federal and State law.

Eligibility Notice

Proposed § 825.300(b) consolidates the notice provisions contained in existing §§ 825.110(d) and 825.301(b) into a paragraph entitled ''eligibility notice.'' Consistent with current § 825.110, the employer continues to be responsible under proposed paragraph (b)(1) of this section for communicating eligibility status. As under the current regulations, the employer's obligation to notify the employee of his or her eligibility to take FMLA leave (*i.e.*, whether the employee has been employed for 12 months and has worked for 1,250 hours of service in the preceding 12 months) is not triggered until the employee has provided the employer with at least verbal notice sufficient to indicate that the employee needs FMLA-qualifying leave. *See* §§ 825.302 and 825.303. The proposed regulations require that the eligibility notice be conveyed within five business days after the employee either requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason. While this proposal is a change from the current timeframe of two business days, the Department is responding to significant comments noting that the two-day turnaround time is in practice very difficult to meet, and the Department does not believe that extending this time frame to five business days will compromise an employee's FMLA rights. The Department specifically seeks comment on whether this timeframe will both impart sufficient information to employees in a timely manner and whether it is workable for employers.

Proposed paragraph (b)(2) of this section specifies what information an employer must convey when communicating with the employee as to eligibility status. While not required under the current regulations, the proposal requires the employer to notify the employee whether leave is still available in the applicable 12-month period. If the employee is not eligible or has no FMLA leave available, then, pursuant to proposed paragraph (b)(2), the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available. For example, an employer might need to indicate that an employee has not worked long enough to meet the 12-month eligibility requirement.

The Department proposes these new notification requirements to address the concern that employees are not aware of their rights. The Department believes that a better understanding on the part of both employees and employers as to their respective FMLA rights and obligations will better ensure that employees who qualify for FMLA leave obtain such leave. In proposing these new notice requirements, the Department believes that the additional burden will be minimal, since the employer is already required to calculate such information in any case to determine eligibility in order to meet the requirements of the statute.

If the employee is eligible for FMLA leave, then proposed paragraph (b)(3) also requires, consistent with current § 825.301(b), that the employer inform the employee of the employee's rights and responsibilities, such as any requirement to provide sufficient medical certification, pay premiums for continuing benefits, and job restoration rights upon expiration of FMLA leave. The Department proposes to add language to clarify in § 825.300(b)(3)(iii) when an employer notifies an eligible employee of the right to substitute employer-provided paid leave and the conditions related to any such substitution that the employer also inform the employee that he/she may take unpaid FMLA leave if the employee does not comply with the terms and conditions of the employer's paid leave policies (*see* discussion *supra* at § 825.207). The Department also proposes to add language to § 825.300(b)(3)(v) indicating that employers should include a statement of the employee's essential job functions with the eligibility notice if they will require that those functions be addressed in a fitness-for-duty certification.

The remainder of proposed § 825.300(b) relies upon existing language in current § 825.301 with limited modifications. Specifically, proposed § 825.300(b)(4) adopts language from current § 825.301(b)(2), which provides that the eligibility notice may include other information on an employee's rights and responsibilities such as providing periodic reports of the employee's status and intent to return to work. Consistent with language from current § 825.301(c), proposed § 825.300(b)(6) states that the eligibility notice need not be provided more frequently than once every six months unless the specific information in the notice changes. If leave has already begun, the notice should be mailed to the employee's address of record. Proposed § 825.300(b)(7) states that if information changes, the employer should provide notice to the employee of any information that has changed within five business days, a change from the current two-day requirement. The proposal also contains new language stating that the employer should include the medical certification form, if the employer requires such information, along with the eligibility notice.

Consistent with the current regulations, proposed § 825.300(b)(8) provides that if an employer requires medical certification or a fitness-for-duty report, written notice of the requirement shall be given with respect to each employee notice of a need for leave, unless the employer communicates in writing to employees that such information will always be required in connection with certain

absences and then oral notice must still be given.

Proposed paragraph (b)(9) is unchanged from current § 825.301(d) and provides that employers will responsively answer employees' questions on their rights and responsibilities under FMLA.

Proposed paragraph (b)(10) provides that an optional prototype eligibility notice is included in Appendix D. This proposed prototype reflects changes in the proposed regulation. The Department also has attempted to simplify the form for easier use and adaptability.

Designation Notice

Proposed § 825.300(c) outlines the proposed requirements of the designation notice an employer must provide to an employee, currently located in § 825.208(b). This proposed designation notice requires that an employer notify the employee within five business days (a change from the current requirement of two business days) that leave is designated as FMLA leave once the employer has sufficient information to make such a determination.

The RFI sought comments on whether the current two business day time frame was adequate for employers to notify employees that their request for FMLA leave has been approved or denied. The majority of comments on this topic indicated that the current two-day time frame was too restrictive. United Parcel Service commented, ''In most cases, the initial notification of an absence or need for leave is received by front-line management, who conveys the information up the chain of command and to the local HR representative, who notifies the FMLA administrator, who is ultimately responsible for making a determination. It is not unusual for it to take one to two business days just for the right personnel to receive the information, much less make a determination and communicate it back to the employee.'' Courier Corporation noted similarly, ''The two-day timeframe is way too short for notifying employees about their leave request, since as employers we are often chasing information from the employee or physician.'' Spencer Fane Britt & Browne LLP agreed: ''For most employers, this is virtually impossible. Although most employers designate leave within a reasonable time frame, it is usually well outside the two-day time frame, thus creating a risk that the designation will be ineffective.'' Employers suggested varying timeframes to replace the two-day limit. *See, e.g.*, comments by Fisher & Phillips LLP (fifteen days from receipt of a certification form); National Coalition to Protect Family Leave (ten business days); Association of Corporate Counsel (five working days); Courier Corporation (five days); United States Postal Service (same); Northrop Grumman Newport News Shipbuilding and Dry Dock Company (same).

International Auto Processing, Inc., stated that while some decisions can be made in two days, even a week might not be sufficient in other cases, depending upon the amount of information supplied by an employee and whether clarification is needed from the health care provider. Hinshaw & Culbertson LLP commented similarly that the two-day time frame for providing notification to employees that FMLA leave has been approved or denied is inadequate, ''as there are many factors which result in delays in both obtaining information and processing requests.''

In light of the comments received, the proposed rule requires the employer to provide the employee notice of the designation of FMLA leave within five business days of receiving sufficient information from the employee to designate the leave as FMLA leave. The proposed designation notice also contains an additional provision that expressly requires the employer to inform the employee of the number of hours, days or weeks, if possible, that will be designated as FMLA leave. Although current § 825.208(b)(1) requires employers to inform employees that leave ''is designated and will be counted as FMLA leave,'' it does not specifically require employers to provide employees with information detailing the amount of leave so designated. When an employee requests a block of foreseeable leave and provides appropriate notice to the employer, it should be relatively straightforward for the employer to provide the employee with the amount of leave that will be designated as FMLA. However, to the extent that future leave will be needed by the employee for a condition but the exact amount of leave is unknown (as is often the case with unforeseeable intermittent leave for a chronic serious health condition), the employer must inform the employee every 30 days that leave has been designated and protected under the FMLA and advise the employee as to the amount so designated if the employee took leave during the 30-day period. Currently, the regulations do not specifically address designation of unforeseen, intermittent leave, and the Department believes that it is important for employees to be aware when such leave is designated as FMLA leave in a timely fashion. Further, the proposed section contains a new requirement that an employer notify the employee if the leave is *not* designated as FMLA leave due to insufficient information or a non-qualifying reason.

As noted above, the Department proposes to change the timeframe in which an employer must designate leave as FMLA leave from two business days to five business days. As discussed above with respect to the change in timeframe for providing the eligibility notice, the Department believes this will result in more accurate notice given to employees. Moreover, this change is proposed in concert with new notice requirements that would require employers to provide employees with more substantive information than that required under the current regulations. The Department does not believe that these new information requirements should be burdensome for employers since the employer will already need to determine in any event whether or not the leave should be designated and counted against the employee's 12-week FMLA leave entitlement. The proposed requirement merely requires the employer to expressly communicate this information to the employee. The Department specifically seeks comment on whether these proposed revisions both adequately protect employee rights and are workable for employers. Neither the proposed nor current regulations mandate a specific format for the written notice. The proposed paragraph (c)(2), consistent with current § 825.208(b)(2), indicates that this information may be communicated on a pay stub.

Proposed § 825.300(c)(3) improves the notices employers must provide to employees. It explicitly permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave. This is an acknowledgement that in some cases there will be no question that a leave request qualifies as FMLA leave and the proposal encourages an employer to designate the leave as soon as possible.

Section 825.300(c)(4) states that a prototype designation notice is contained in Appendix E. This form is a new optional ''designation notice'' that an employer can use to satisfy its obligation to notify an employee that leave is being designated as FMLA leave because it is being taken for a qualifying reason, as required by proposed § 825.300(c)(1).

Remedy Provision

Proposed paragraph (d) has been added in light of *Ragsdale*, and expands on current § 825.301(f). Consistent with the Department's discussion of proposed § 825.301, the Department believes that the U.S. Supreme Court's *Ragsdale* decision requires a remedy provision for a notice violation that is tailored to individualized harm. Therefore, as noted in the discussion of §§ 825.110, 825.301, and 825.220, the Department has added a provision explaining that failure to comply with the notice requirements set forth in this section could result in the interference with, restraint of, or denial of the use of FMLA leave. If the employee is able to demonstrate harm as a result of the employer's failure to provide notice of eligibility or designation of FMLA leave as required, an employer may be liable for the harm suffered as a result of the violation, such as lost compensation and benefits, other monetary losses, and appropriate equitable or other relief, including employment, reinstatement, or promotion.

Section 825.301 (Employer Designation of FMLA Leave)

The Department proposes to delete current § 825.301, which addresses employer notices to employees, because its requirements have been incorporated into proposed § 825.300 as discussed above. Current § 825.208 addressing designation of FMLA leave has been moved to proposed § 825.301. Current § 825.208 explains under what circumstances an employer can designate leave as FMLA leave. Paragraph (a) of that section explains that it is the employer's obligation to designate leave as FMLA leave. Paragraph (a)(1) of that section explains that the employee has an obligation to provide the employer with enough information to determine if the leave is potentially FMLA-qualifying. Paragraph (a)(2) explains that the employee need not specifically request FMLA leave, although if an employee requests paid leave for an FMLA reason and the employer denies the request, the employee must provide the employer with sufficient information to make the determination that the leave is for an FMLA-qualifying reason. Paragraph (a) also explains that if the employer does not have sufficient information to designate paid leave as FMLA-covered, the employer has an obligation to inquire further in order to ascertain whether the paid leave is potentially covered by the FMLA. Current paragraph (b)(1) of that section states that once an employer has enough information that leave is taken for an FMLA-qualifying reason, the employer must designate the leave as FMLA leave. Paragraph (b)(2) explains that the designation may be oral or in writing and must be confirmed in writing no later than the following payday. Current paragraph (c) of that section provides that paid leave must be designated as FMLA-covered leave within two business days of when the employee gives notice of leave, or when the employer has sufficient information to make such a determination if not available until later. It also requires the employer to advise the employee if substitution of paid leave will be required. The section also explains that if the employer knows that paid leave is for an FMLA reason when the employee advises of the need for leave or when the leave commences and does not at that time designate (and notify the employee) that the leave is being charged to the employee's FMLA leave entitlement, the leave may not be designated as FMLA leave retroactively and may only be designated as FMLA leave prospectively. In such case, none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement, but ''the employee is subject to the full protections of the Act'' during that period of absence.

Current paragraph (d) of that section explains the rules for designating leave after leave has begun. Current paragraph (e) explains that leave may not be retroactively designated except in limited circumstances such as when a non-FMLA leave turns into an FMLA-qualifying leave or when an employee has taken leave for a short duration and only notifies the employer when the employee returns from leave.

The proposed revisions maintain the basic requirement from current § 825.208 that employers designate qualifying leave as FMLA promptly and notify employees of that designation. *See* the Department's 2007 Report on the RFI comments, Chapter V, Section D (72 FR at 35585). The revisions, however, account for the Supreme Court's ruling in *Ragsdale* prohibiting categorical penalties based on an employer's failure to appropriately designate FMLA leave.

The Department also proposes a new paragraph (b) in this section that specifically addresses employee responsibilities. The substance of the language contained in current paragraph (a) of § 825.208 that addresses such responsibilities has been retained and moved to this new section, but the proposal simplifies the language and mirrors changes made to §§ 825.302 and 825.303. The proposed paragraph cross-references §§ 825.302 and 825.303 that address what constitutes sufficient information an employee must communicate to an employer when needing FMLA leave, as further explained below. Proposed § 825.301(b) also incorporates the substance of the provision in current § 825.208(a)(2) that an employee need not invoke the FMLA when asserting rights under the Act. As a matter of clarification, the word ''unpaid'' is deleted, as these employee responsibilities apply whether the leave is paid or unpaid. The proposed section also explains that the consequences for an employee's failure to satisfy these responsibilities may include delay as well as denial of FMLA leave.

The substance of current § 825.208(b) has been moved to proposed § 825.300(c) that addresses the other notice obligations of employers. As noted above, current § 825.208(c) explains an employer's designation obligations with regard to paid leave and the consequences that apply when an employer fails to properly and timely designate leave. In light of *Ragsdale,* the Department cannot prohibit the retroactive designation of FMLA leave absent a showing of individual harm. By the same token, the Department believes that it is important that employers timely designate FMLA leave so that both employees and employers are aware as to what employee rights attach when a specific FMLA leave period is at issue. Indeed, in the preamble accompanying the current regulations, the Department explained that this section was intended to resolve the question of FMLA designation as early as possible in the leave request process, to eliminate protracted ''after the fact'' disputes. (60 FR at 2207) The Department has received comments, however, that in certain cases, the prohibition on retroactive designation actually may harm the employee.

The Department has reevaluated the original rationale for this rule and still believes it is beneficial to both employees and employers to know in advance, or at least as soon as possible, when leave is considered FMLA-protected leave. Therefore, the Department proposes to make clear that an employer has an obligation to timely designate leave (within five business days, absent extenuating circumstances) as proposed in § 825.301(a). However, in light of *Ragsdale* and the comments the Department has received, proposed paragraph (d) of this section acknowledges that retroactive designation may occur, but that if an employer fails to timely designate leave

as specified in § 825.300 and paragraph (a) of this section, and if an employee establishes that he or she has suffered harm as a result of the employer's actions, a remedy may be available. The Department provides examples in paragraph (e) to illustrate the type of circumstance where an employee may or may not be able to show that harm has occurred as a result of the employer's actions. In many cases where an employee's own serious health condition is involved, the Department believes it will be difficult to show harm as a result of the employer's failure to timely designate FMLA leave, as the employee will frequently be unable to delay or forgo the leave. *Cf. Downey* v. *Strain,*—F.3d—, 2007 WL 4328487 (5th Cir. 2007) (finding employee was harmed by employer's failure to designate leave as FMLA leave). On the other hand, if an employee knows he or she would need the FMLA leave later in the year for planned medical treatment, he or she may choose to have another family member provide care for a child with a serious health condition instead of taking leave at a certain point if the employee knew that the time off would count against the employee's FMLA entitlement. In addition, this proposal can benefit employees who did not fulfill their FMLA notice obligations at the time of taking leave, by allowing employers to retroactively designate leave to prevent disciplinary action.

The last sentence in proposed paragraph (d) states that in all cases where a leave is FMLA-qualifying, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

Proposed paragraph (e), titled ''[r]emedies,'' mirrors the statutory scheme and provides that failure to timely designate could constitute an interference with, restraint of, or denial of, the exercise of an employee's FMLA rights. Specifically, if the employee is able to establish prejudice as a result of the employer's failure to designate leave properly, an employer may be liable for compensation and benefits lost by reason of the violation, for other monetary losses sustained as a direct result of the violation, and for appropriate equitable relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered. This language mirrors the statutory remedies set forth in 29 U.S.C. 2617, as well as language in the *Ragsdale* decision.

In light of proposed paragraphs (d) and (e) discussed above, current paragraphs (d) and (e) of § 825.208 discussing when leave can be retroactively designated under the current regulations have been deleted.

Section 825.302 (Employee Notice Requirements for Foreseeable FMLA Leave)

Current § 825.302(a) explains what notice an employee must give an employer when the need for FMLA leave is foreseeable. The requirement, as set forth in the statute, 29 U.S.C. 2612(e), is that an employee must give at least 30 days' notice if the need for FMLA leave is foreseeable. If 30 days' notice is not possible, the employee must give notice ''as soon as practicable.'' The current regulations define ''as soon as practicable'' in § 825.302(b) to mean ''as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case.'' It further states that ''ordinarily'' as soon as practicable would mean ''at least verbal notification to the employer within one or two business days of when the need for leave becomes known to the employee.'' Current paragraph (c) explains the form and content of notice an employee must provide when taking leave and the obligations of employers to obtain follow-up information when needed. Current paragraph (d) explains that an employer can require an employee to comply with its usual and customary notice procedures, but that an employer cannot disallow or delay leave if such procedures are not followed if timely notice is given. Current paragraph (e) explains that an employee has a duty to plan medical treatment so as to not unduly disrupt an employer's operations; current paragraph (f) explains an employee's notification obligations with regard to intermittent leave; and current paragraph (g) explains that while an employer can waive an employee's FMLA notice requirements, an employer cannot require an employee to comply with stricter FMLA requirements if a collective bargaining agreement, State law, or the employer's leave policies allow less notice.

Timing of Notice

Proposed § 825.302(a) retains both the current requirement that an employee must give at least 30 days' notice when the need for FMLA leave is foreseeable at least 30 days in advance, and the requirement that notice be provided ''as soon as practicable'' if leave is foreseeable but 30 days' notice is not practicable. The Department further proposes to add that when an employee gives less than 30 days' advance notice, the employee must respond to a request from the employer and explain why it was not practicable to give 30 days' notice.

The Department proposes to delete the second sentence of current paragraph (b) of this section, which defines ''as soon as practicable'' as ''ordinarily * * * within one or two business days of when the need for leave becomes known to the employee.'' While the ''one to two business days' '' timeframe was intended as an illustrative outer limit, Wage and Hour Opinion Letter FMLA–101 (Jan. 15, 1999), in effect, mistakenly read the regulation as allowing employees two business days from learning of their need for leave to provide notice to their employers, regardless of whether it would have been practicable to provide notice more quickly. In that letter, the Department found that an absence policy that required employees to report their absences within one hour after the start of their shift, unless they were unable to do so due to circumstances beyond their control, was contrary to the FMLA's notice procedures. The Department provided the following example of the employee's notice obligation:

> For example, an employee receives notice on Monday that his/her therapy session for a seriously injured back, which normally is scheduled for Fridays, must be rescheduled for Thursday. If the employee failed to provide the employer notice of this scheduling change by close of business Wednesday (as would be required under FMLA's two-day notification rule), the employer could take an adverse action against the employee for failure to provide timely notice under the company's attendance policy.

Comments received in response to the RFI indicated that the ''two-day rule'' has created significant problems for employers in maintaining appropriate staffing levels. *See, e.g.*, Southwest Airlines Co. (''[T]he DOL's informal two-day notice practice is an arbitrary standard that fails to recognize an employer's legitimate operational need for timely notice and that contradicts with an employee's statutory duty to provide such notice as is practicable.''); National Coalition to Protect Family Leave (''The phrase 'as much notice as is practicable' is not well-defined. The current phrase puts employers in the difficult position of having to approve leaves where questionable notice has been given. The current regulatory definition—within one or two business days—has been applied by the Department to both foreseeable and unforeseeable leaves, and to protect employees who provide notice within two days, even if notice could have been

provided sooner under the particular facts and circumstances.'').

The Department is aware that timely notice of an employee's need for FMLA leave is critical to the balance struck in the Act between the employee's ability ''to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition'' and ''the legitimate interests of employers.'' 29 U.S.C. 2601(b). Absent emergency situations, where an employee becomes aware of a need for FMLA leave less than 30 days in advance, the Department expects that it will be practicable for the employee to provide notice of the need for leave either the same day (if the employee becomes aware of the need for leave during work hours) or the next business day (if the employee becomes aware of the need for leave after work hours). Accordingly, the Department proposes to add examples to proposed paragraph (b) clarifying the employee's obligation to provide notice ''as soon as practicable.''

Content of Notice

Many commenters responding to the RFI identified issues relating to the sufficiency of the information provided by employees when notifying their employers of the need for FMLA leave, which is addressed in current § 825.302(c). For example, the National Coalition To Protect Family Leave stated that ''employees who call in because of their own or a family member's medical condition do not necessarily provide sufficient information for an employer to [determine whether the leave qualifies for FMLA protection]. Since what constitutes 'sufficient' information is not clearly defined anywhere in the regulations, both employees and employers face difficulties in meeting their rights and responsibilities under the FMLA.'' Jackson Lewis LLP similarly noted that employers sometimes have difficulty in identifying FMLA-qualifying absences: ''Employers are not 'mind readers' and they often refrain from asking employees why they are absent for fear that they may invade an employee's medical privacy. It is also näive to think that employers can effectively train front line supervisors on the myriad of health conditions and personal family emergencies that might qualify for FMLA protection.''

A number of commenters offered suggestions for how the Department could clarify what information constitutes sufficient notice. Some commenters suggested that an employee's leave request should have to be in writing, or that the request should have to specifically mention the FMLA. *See, e.g.*, Edison Electric Institute, Miles & Stockbridge, P.C., Pierce County, Washington, Spencer Fane Britt & Browne LLP, and DST Systems, Inc. The South Central Human Resource Management Association suggested:

> It would eliminate many disputes if an employee were required to request leave in writing or to follow up an oral request with a written request within a reasonable time (such as within two work days after returning to work in the case of intermittent leave, or five work days after requesting leave in the event of unforeseen continuous leave). * * * It would help both parties immensely if the employee were required to mention the FMLA when making such a request.

Other stakeholders expressed a desire for more information from employees, but stopped short of suggesting a requirement that the employee must specifically ask for FMLA leave. The Williams Mullen law firm suggested that the Department should implement detailed regulations that provide necessary language or actions that must be taken by employees to put their employers on notice of their intent to take FMLA leave. The U.S. Chamber of Commerce suggested that employees should be required to specify the purpose of any instance of FMLA leave, such as a doctor's appointment, physical treatment, *etc.,* so that employers can assess veracity when employees appear to be abusing the leave policy. The Association of Corporate Counsel proposed that the DOL should revise the regulations to make clear that an employee's notice to the employer must go beyond merely requesting leave and must provide a basis for the employer to conclude that the requested leave is covered by the FMLA.

One reason employees may provide less notice than employers want may be employees' lack of awareness of their rights and obligations. As noted above, numerous commenters to the RFI emphasized that employees remain unaware of their rights under the FMLA. *See* comments by National Partnership for Women & Families, Madison Gas and Electric Company, Legal Aid Society-Employer Law Center. As the AARP commented, even employees who have some general awareness of the law do not know the details of the law or whether it applies to them. These commenters also noted that employers fail to provide employees with effective information about their rights.

In light of these comments, the Department proposes to retain in § 825.302(c) the standard that an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, but at the same time employees must provide sufficient information to make an employer aware that FMLA rights may be at issue. The Department proposes to clarify that sufficient information must indicate that the employee is unable to perform the functions of the job (or that a covered family member is unable to participate in regular daily activities), the anticipated duration of the absence, and whether the employee (or family member) intends to visit a health care provider or is receiving continuing treatment.

The Department believes that this proposal will provide employers with the information necessary to determine whether absences may be covered by the FMLA, without being overly prescriptive in the wording that an employee must use to request leave. The proposal will also facilitate the early identification of potentially FMLA-protected absences. Finally, the increased specificity in the proposed rule will protect employees from losing FMLA rights by inadvertently failing to put the employer on notice of the need for FMLA leave. The Department also proposes to include such information in the general notice that employers are required to post and either to provide in an employee handbook or distribute at least annually, as specified in proposed § 825.300(a), to ensure that employees are aware of the information they must provide.

This proposed section continues to require employers to inquire further if they need additional information in order to obtain the necessary details about the leave. The proposed rule also states that employees must respond to employers' inquiries designed to determine whether leave is FMLA-qualifying or risk losing FMLA protection if the employer is unable to determine whether the leave qualifies.

The Department seeks comment as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed. For example, where an employee has taken two weeks of FMLA leave for surgery and recovery, and then learns that he or she will need to undergo physical therapy once a week for four to six weeks upon returning to work, should the employee be required to specifically notify the

employer that the additional leave is due to the FMLA-covered condition?

Usual and Customary Employer Procedures

A number of commenters responding to the RFI also addressed the provisions in § 825.302(d) regarding compliance with employers' usual and customary notice procedures for requesting leave. Many employers specifically asserted that call-in procedures, which are enforced routinely outside the FMLA context, can serve as a crucial element of an attendance program and are often critical to an employer's ability to ensure appropriate staffing levels. In discussing the effect call-in requirements have on State agencies in particular, the Ohio Department of Administrative Services commented that such procedures are especially critical in institutional agencies that provide direct care and supervision of inmates or patients. A number of commenters urged reforming the regulations to allow employers to enforce attendance policies that require employees to observe reasonable call-in procedures, including policies that require employees to call in to their direct supervisors or to a designated person in human resources, and to allow a penalty for noncompliance. *See, e.g.*, comments by American Electric Power, Ohio Public Employer Relations Association, and National Association of Convenience Stores. The University of Wisconsin-Milwaukee stated that requiring employees to comply with regular attendance policies unless there is a medical emergency would be helpful, because the simple need for FMLA leave does not mean that regular notification is impossible.

In response to these comments, the proposed revision of § 825.302(d) retains the current rule providing that an employer may require an employee to comply with the employer's usual notice and procedural requirements for calling in absences and requesting leave. However, the Department proposes to eliminate the current language stating that an employer cannot delay or deny FMLA leave if an employee fails to follow such procedures. The combination of requiring employees to comply with employer absence policies, yet prohibiting employers from delaying or denying leave if such procedures are not met in the current regulation, has proved confusing. This confusion has been exacerbated by language in the preamble accompanying the current rule stating that while employers may not delay or deny FMLA leave for failure to follow absence policies, they may ''take appropriate disciplinary action.'' 60 FR at 2221. Cases addressing various types of employee call-in procedures, including employer requirements that employees report absences to specific individuals or offices and that they keep employers updated regarding their need for leave, have analyzed the issue differently. *Compare, e.g., Bones* v. *Honeywell Int'l Inc.,* 366 F.3d 869, 878 (10th Cir. 2004) (''[Employee's] request for an FMLA leave does not shelter her from the obligation, which is the same as that of any other Honeywell employee, to comply with Honeywell's employment policies, including its absence policy.''); *Cavin* v. *Honda of America Mfg., Inc.,* 346 F.3d 713, 723 (6th Cir. 2003) (''[E]mployers cannot deny FMLA relief for failure to comply with their internal notice requirements [to call a specified department].''); *Lewis* v. *Holsum of Fort Wayne, Inc.,* 278 F.3d 706, 710 (7th Cir. 2002) (failure to follow three-day no-call rule legitimate basis for termination and did not violate FMLA); *Gilliam* v. *UPS,* 233 F.3d 969 (7th Cir. 2000) (upholding application of three-day no-call rule).

Accordingly, the Department proposes that, absent unusual circumstances, employees may be required to follow established call-in procedures (except one that imposes a more stringent timing requirement than the regulations provide), and failure to properly notify employers of absences may cause a delay or denial of FMLA protections (as explained in § 825.304). Unusual circumstances would include situations such as when an employee is hospitalized and his/her spouse calls the supervisor to report the absence, unaware that the attendance policy requires that the human resources department be called instead of the supervisor. However, FMLA-protected leave cannot be delayed or denied for failure to meet the employer's timing standard where the standard is more stringent than those established in § 825.302(a). This proposed revision of § 825.302(d) recognizes that call-in procedures are necessary for employers to provide proper coverage to run their businesses. The proposal also benefits employees by ensuring early identification and protection of absences covered by the FMLA.

Where FMLA protection is appropriately delayed because the employee did not provide timely notice of the need for leave, and the employee has an absence during the period in which he/she accordingly is not entitled to FMLA protection, that absence is unprotected and can be treated in the same manner the employer would treat any other unexcused absence. This is a clarification of the ramifications of failing to provide timely notice, and not a change in current law. For example, if an employee could have provided two weeks notice of a doctor's appointment for treatment of a serious health condition, but instead provides only one week's notice of the appointment, the employer may delay FMLA-protected leave for one week (*i.e.*, if the employee could have provided notice on the 7th day of the month of an appointment on the 21st day, but instead only provides notice on the 14th day, the employer may delay FMLA leave until the 28th day (two weeks after the notice was provided)). If the employee does not delay the taking of the leave, the absence will be unprotected and the employer can treat the absence in the same manner as any unexcused absence (*i.e.*, if the employee in the example above is absent on the 21st day, instead of delaying the absence until the notice period is met, the employer may treat the absence as an unexcused absence under its normal leave policies). Alternatively, the employer would have the option of accepting the employee's late notice and counting the leave against the employee's FMLA entitlement. *See* § 825.302(g).

Proposed § 825.302(g) retains language stating that employers may waive employees' FMLA notice requirements. The Department proposes to delete language, however, stating that employers cannot enforce FMLA notice requirements if those requirements are stricter than the terms of a collective bargaining agreement, State law or employer leave policy. The example provided in current § 825.302(g) of an employee substituting paid vacation leave and the employer not being able to require notice from the employee under the FMLA because the vacation leave policy does not require advance notice has proved confusing because it is inconsistent with the employer's right to require notice under the FMLA. Accordingly, this language has been deleted. Sections 825.700 and 825.701 address in more detail the interaction between the FMLA and the provisions of collective bargaining agreements, State law, and employer policies.

Section 825.303 (Employee notice requirements for unforeseeable FMLA leave)

Current § 825.303 explains what notice an employee must give in the case of unforeseeable leave. Specifically, current paragraph (a) explains the ''as soon as practicable'' required timing of the notice, and current paragraph (b) sets forth the method by which notice can be given. The Department has heard from numerous employers that the

taking of unforeseeable leave is central to the administrative problems they experience with the FMLA, and the SHRM FMLA Survey revealed that in its members' experiences, 60 percent of all FMLA leave is unforeseeable leave. Indeed, the significant number of cases that have been litigated as to what constitutes sufficient notice from an employee in the case of unforeseeable leave confirms the difficulties both employers and employees experience under the current regulation. *See Spangler* v. *Federal Home Loan Bank,* 278 F.3d 847, 852 (8th Cir. 2002) (employee, who had made employer aware that she had problems with depression, gave sufficient notice when she called in and indicated she was out because of ''depression again''); *Gay* v. *Gilman Paper Co.,* 125 F.3d 1432, 1434–35 (11th Cir. 1997) (husband calling for employee and indicating wife in the hospital having some tests run was not sufficient notice); *Carter* v. *Ford Motor Co.,* 121 F.3d 1146, 1148–49 (8th Cir. 1997) (employee's wife calling and indicating he would be out because of family problems did not provide sufficient notice); *Barr* v. *New York City Transit Auth.,* 2002 WL 257823, at *7–8 (E.D.N.Y. 2002) (employee calling in sick reporting ''swelling and tightness'' in legs and follow-up doctor's note indicating swelling in legs and rapid heart beat provided sufficient notice); *Mora* v. *Chem-Tronics, Inc.,* 16 F. Supp. 2d 1192, 1216–17 (S.D. Cal. 1998) (invalidating call-in rule requiring employees to call in 30 minutes prior to shift in all circumstances); *Hendry* v. *GTE North, Inc.,* 896 F. Supp. 816, 828 (N.D. Ind. 1995) (employee calling in ill with a migraine headache provided sufficient notice).

Employers and their representatives also mentioned the timing of employee notification of the need for unforeseeable intermittent leave as a particular problem in their administration of the FMLA. For example, Spokane County commented that it is often not notified that an employee is out for a serious health condition until after the employee returns to work. The Pennsylvania Turnpike Commission stated:

> The issue of [employees] failing to notify their supervisors promptly that they are taking FMLA leave is very prevalent in our company. Some employees that are approved for intermittent FMLA simply don't show up for work, and then email or call their supervisor when the work day is almost over to inform them that they are taking FMLA. This is extremely frustrating as an employer, and there does not ever seem to be a valid reason that the employee could not notify the supervisor earlier.

Numerous other employer commenters asserted that the ''two day rule'' interpreted in Wage and Hour Opinion Letter FMLA–101 (see discussion in § 825.302) is even more unworkable in the context of unforeseen FMLA leave because the employee is not required to report the absence prior to the start of his/her shift even where it is practicable to do so. *See, e.g.*, Southwest Airlines Co. (the two-day rule allows employees to remain silent when they have the knowledge and ability to give timely notice, and it ''fails to recognize an employer's legitimate operational need for timely notice''); National Association of Manufacturers (employees taking ''unscheduled intermittent leave routinely ignore mandatory shift call-in procedures (even if they are fully able to comply), wait two working days * * * and then report their absence as FMLA-qualifying'').

The National Partnership for Women & Families and other employee advocates agreed that employees should notify their employers about their need for leave as quickly as is reasonably possible, but asserted that it also is important to ensure that employees are not penalized unfairly when confronted with unexpected emergencies. The Center for WorkLife Law similarly noted that for ''working caregivers with a seriously ill child or family member, medical emergencies are a way of life. Intermittent FMLA leave allows these employees to be available to their families when they are needed most without the stress of losing their jobs.'' The Legal Aid Society's Employment Law Center noted that chronic illnesses are devastating and wreak havoc on employees' lives also, and that the FMLA was specifically designed to cover such episodic absences. The AFL-CIO and the Association of Professional Flight Attendants emphasized that employees who experience unforeseeable absences due to chronic conditions are precisely those most in need of the FMLA's protections, because their jobs are more in jeopardy than those of employees who suffer from a longer illness only once every two or three years. In explaining the difficulties for employees who live with unforeseeable health conditions, an employee described her personal experiences with her daughter's chronic serious health condition:

> My daughter had a major asthma attack which caused a bronchial infection, swelling and bacteria in her throat. * * * No one is capable of predicting an[ ] asthma attack or the severity of the attack; I just would like the assurance of knowing that if or when the situation should arise, I have the time off required to handle her needs without the threat of being * * * terminated.

In light of the apparent confusion with regard to timing and sufficiency of the required notice, and the critically important nature of this topic, the Department proposes to further clarify what constitutes timely and sufficient notice when the need for leave is not foreseeable.

Timing of Notice When ''Not Foreseeable''

In the case of unforeseeable leave, the Department proposes to maintain the requirement that an employee provide notice as soon as practicable under the facts and circumstances of the particular case. While this is the same standard as notice for FMLA leave that is foreseeable less than 30 days in advance, the Department is aware that the employer's need for prompt notice of the need for leave is heightened in situations in which the need for leave is not foreseeable. It is critical in such situations that the employer be notified of the employee's absence promptly so that the employer can assure appropriate staffing. Accordingly, the Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave at least prior to the start of their shift.

To emphasize the importance of notice when the need for FMLA leave was unforeseen, the Department proposes to add language to § 825.302(a) to clarify that it is expected employees will provide notice to their employers promptly. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his/her child in order to report the absence while the child is receiving emergency treatment; once the child's medical situation has stabilized, the employee can be expected to report the absence. However, if the child's asthma attack is resolved by the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler. The Department believes that this proposal better balances the needs of employees to take unforeseeable FMLA leave with the interests of employers and other employees.

Content of Notice When ''Not Foreseeable''

In proposed paragraph (b), the Department retains the standard that an employee need not assert his or her rights under the FMLA or even mention

the FMLA to put the employer on notice of the need for FMLA leave. However, consistent with the proposed changes discussed above with respect to § 825.302, the Department proposes to require that the employee provide the employer with sufficient information to put the employer on notice that the absence may be FMLA-protected. *See Sarnowski* v. *Air Brook Limousine, Inc.,* F.3d—, 2007 WL 4323259, at *3 (3rd Cir. 2007) (''In providing notice, the employee need not use any magic words. The critical question is how the information conveyed to the employer is reasonably interpreted.''). Sufficient information is defined in the same manner as proposed § 825.302(c), which is information that indicates that the employee is unable to perform the functions of the job, the anticipated duration of the absence, and whether the employee intends to visit a health care provider. In addition, because issues are frequently raised with employees giving notice of unforeseen absences by simply calling in ''sick,'' proposed § 825.303(b) clarifies that calling in with the simple statement that the employee or the employee's family member is ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act in the case of unforeseeable leave. Of course, many unforeseeable conditions do develop and deteriorate over a period of a few days, and a condition that did not initially appear to be a serious health condition may develop into one. The employee would be expected to provide the employer the additional information needed to determine if the serious health condition standard is met as it became available.

The Department seeks comment as to whether a different notice standard requiring employees to expressly assert their FMLA rights should apply in situations in which an employee has previously provided sufficient notice of a serious health condition necessitating leave and is subsequently providing notice of dates of leave due to the condition that were either previously unknown or changed.

Complying With Employer Policy When ''Not Foreseeable''

Proposed § 825.303(c) clarifies that an employee must comply with the employer's usual procedures for calling in and requesting unforeseeable leave, except when extraordinary circumstances exist (or the procedure imposes a more stringent timing requirement than the regulations provide), such as when the employee or a family member needs emergency medical treatment. For example, an employee who seeks emergency treatment at a hospital may not be able to comply with the employer's absence reporting procedures if the employee does not have the telephone number for reporting absences with him or her and therefore leaves a message on the supervisor's voicemail (the employee may also be unable to comply with the employer's timing requirements due to the emergency treatment). In contrast, an employee who suffers a flare-up of a chronic condition for which rest and self-medication are the appropriate treatment should be able to comply with the employer's normal absence reporting procedure.

If an employee fails to follow the employer's call-in procedures (assuming any required timing is not more stringent than required by § 825.303(a)), except under extraordinary circumstances, then the employee is subject to whatever discipline the employer's rules provide for such a failure and the employer may delay FMLA coverage until the employee complies with the rules. For example, an employer requires that workers needing unscheduled leave call a designated call-in number instead of leaving a message on the supervisor's voicemail. An employee with a medical certification under FMLA for migraines leaves a message on the supervisor's voicemail indicating that the employee will be absent due to a migraine. Unless some extraordinary circumstance prevented the employee from complying with the employer's requirement that the employee call the designated call-in number, the employer may treat the employee's failure to comply with the call-in rule in the same manner it would normally handle such an infraction. The employer may also delay FMLA protected leave until the employee complies with the call-in procedure. Of course, if the employer chooses to delay the employee's FMLA leave until the employee complies with the call-in procedure, any leave that is not FMLA protected may not be counted against the employee's FMLA entitlement.

Proposed § 825.303(c) also contains language from current § 825.303(a) stating that employers may not enforce advance written notice requirements where the leave is due to a medical emergency.

Section 825.304 (Employee failure to provide notice)

Current § 825.304 addresses what employers may do if an employee fails to provide the required notice for FMLA leave. Specifically, current paragraph (a) states that an employer may waive FMLA notice obligations or its own internal rules. Current paragraph (b) explains that if 30 days notice is not provided to the employer for foreseeable leave, an employer may delay the taking of FMLA leave for 30 days after the date notice is given if no reasonable excuse is provided. Current paragraph (c) states that leave cannot be delayed if the employee was not aware of his or her notice requirements or the need for leave and its timing were not clearly foreseeable to the employee 30 days in advance.

The proposal states the rules applicable to leave foreseeable at least 30 days in advance, foreseeable less than 30 days in advance, and unforeseeable in different paragraphs for purposes of clarity. Specifically, the Department proposes language that provides practical examples of what it means to delay FMLA leave in cases of both foreseeable and unforeseeable leave, such as a case where an employee reasonably should have given the employer two weeks notice but instead only provided one week notice. The proposal provides that in such a case, the employer may delay FMLA protected leave for one week. The proposal also provides that an employer can take disciplinary action for the employee's violation of the employer's internal call-in procedures, as long as such procedures and discipline are applied equally to employees taking leave for non-FMLA reasons and the procedures do not require more advance notice than the standard in § 825.303.

Finally, the Department proposes to retain language from current paragraph (c) stating that FMLA leave cannot be delayed due to lack of required notice if the employer has not complied with its notice requirements, which now will also include providing the general notice in an employee handbook or annual distribution, as set forth in proposed § 825.300.

Section 825.305 (Medical certification, general rule)

Current § 825.305(a) sets forth the general rule as to when an employer may request that an employee provide a medical certification form to substantiate the need for FMLA leave in connection with a serious health condition.

Current § 825.305(b) states that when leave is foreseeable and at least 30 (calendar) days notice has been given, ''the employee should provide the medical certification before the leave begins.'' If that is not possible, then the employer must give the employee at least 15 calendar days to provide the certification, unless it is not practicable

to do so despite the employee's diligent, good-faith efforts.

To help ensure that both employees and employers better understand this requirement, the Department proposes that the time-frame in this section for submitting a medical certification be modified to clearly apply the 15-day standard for both foreseeable and unforeseeable leave, consistent with the language in current § 825.311(a) and (b).

The Department solicits comments on whether language should be added to paragraph (b) of this section that would state that an employer must notify the employee if the certification has not been returned in the 15-day time period, and give the employee another seven calendar days to provide the certification unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts. The Department believes that this proposed requirement may be necessary in light of *Urban* v. *Dolgencorp of Texas, Inc.*, 393 F.3d 572 (5th Cir. 2004), a decision which found an employee was not entitled to FMLA leave because a certification was not returned to the employer after a 15-day extension was granted to the employee to submit the certification. In *Urban,* the employee argued that she did not realize that her health care provider had not returned the certification to the employer. She argued that since it was not sent to her employer, she provided an ''incomplete'' certification, and therefore should have had an opportunity to 'cure' the deficiency under § 825.305(d). The court rejected this argument, finding that a certification that was never given to the employer was not ''incomplete,'' and therefore the employee could not avail herself of the provisions in § 825.305(d). The court also observed that, as a policy matter, the stated purpose of the FMLA was to ''balance the demands of the workplace with the needs of families'' and ''to entitle employees to take reasonable leave for medical reasons'' in a ''manner that accommodates the legitimate interests of employers.'' The court reasoned that ''it would seem illogical to require an employer to continually notify an employee who failed to submit medical certification within a specified deadline,'' observing that in the case of Urban, a 15-day extension had already been granted. *Id.* at 577.

Current § 825.305(c) provides that an employer should request medical certification from the employee within two business days of receiving the employee notice. Consistent with the modifications made to proposed § 825.300, the Department proposes a five-business day standard and the requirement has been incorporated into proposed paragraph (b).

The Department proposes to create a new paragraph (c) entitled ''complete and sufficient certification,'' incorporated in part from paragraph (d) of the current regulation. The Department has retained the standard from the current regulations, which advises employers that in the case of an incomplete certification, they must give the employee a reasonable period of time to cure any deficiency. The Department proposes new language that states ''a certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed.'' In response to the RFI, many commenters, including employers, employees, and health care providers, expressed dissatisfaction with the current medical certification process. The Department held a stakeholder meeting with representatives of each of these groups in September 2007. Multiple employers commented to the RFI that a certification should require not just that the form is completed, but that meaningful responses are given to the questions. *See, e.g.*, National Coalition To Protect Family Leave (''If health care providers * * * do not provide direct responses to the questions, the regulations should be modified to specify that the certification is not considered 'complete' for purposes of the employee's certification obligations, thereby not qualifying the employee for FMLA leave.''); South Central Human Resource Management Association (''We recommend the Regulations make clear that a 'complete' certification is required, that meaningful answers have to be furnished for all questions, and that a certification is 'incomplete' if a doctor provides 'unknown' or 'as needed' to any question.''). The Department agrees that an adequate FMLA certification requires responsive answers and therefore also proposes to define an insufficient certification as one where the information provided is ''vague, ambiguous or non-responsive.'' The Department proposes to define these terms because it is aware that employers are unsure in many circumstances what the distinction is between an incomplete versus an insufficient certification, and whether they must give an employee another opportunity to provide sufficient certification when the initial certification does not establish that the employee has a serious health condition or whether they can simply deny FMLA leave. The Department believes that by defining these terms, employers will better understand what triggers their obligations to give employees further opportunity to provide sufficient certification, which will in turn protect employees from having employers immediately deny them FMLA protections based on the initial certification provided or deny their certifications based on technicalities. For example, under the current regulation, an employer could interpret a ''vague'' answer to simply be insufficient and a basis to deny FMLA leave. Under the proposed regulation, an employer must allow an employee an opportunity to provide sufficient certification when the initial certification is either incomplete or insufficient.

The Department also proposes to clarify the process for curing an incomplete or insufficient certification. The Department received many comments in response to the RFI indicating that employers were unsure how many opportunities an employee must be given to cure an insufficient certification. *See, e.g.*, Waste Management, Inc. (''The current regulation is open to interpretation regarding when information is due and how much additional time should be afforded to employees who do not share the FMLA certification forms timely.''); Federal Reserve Bank of Chicago (''There should be an absolute cut off when an employer can require the employee to submit a completed certification form and the consequence of not meeting that deadline is that the absence(s) is not covered by FMLA.''); Society for Human Resource Management (''HR professionals often have difficulty in determining how many times an employer must give an employee an opportunity to 'cure' a deficiency, and how long to allow them to provide such a complete certification.''). Employees and their representatives expressed a related concern that some employers repeatedly indicated that certifications were incomplete but failed to specify what additional information was necessary, oftentimes necessitating that the employee make repeated appointments with the health care provider in an effort to obtain a complete and sufficient certification. *See, e.g.*, An Employee Comment (''[I]nsurmountable hurdle which many employees encounter is, upon application for family leave, the Company returns the forms asking for 'more information'. Even though the employee's Health Care Provider has filled out the application sections

relevant to the illness/injury, the Company is able to delay, and many times deny, for many weeks and months the benefits and protections which the Act affords.''); Association of Professional Flight Attendants (''[I]t is simply unfair to send FMLA leave requests back to the employees and their treating health care providers for more medical facts, without ever indicating what kinds of additional medical facts are required before the employer will make a determination of medical eligibility or medical ineligibility.''); International Association of Machinists and Aerospace Workers (''We have many members who have their doctors fill out the paper work only to be told it is not properly filled out. The employee fixes that problem and the Company tells them there is another problem with the paper work. This occurs over and over until finally the doctor or the employee, or both give up.'') (emphasis in original). To address these concerns, proposed § 825.305(c) requires that when an employer determines that a certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency. Additional time must be allowed where the employee notifies the employer within the seven calendar day period that he or she is unable to obtain the additional information despite diligent good faith efforts. The current regulations provide an employee ''a reasonable opportunity'' but no timeframe for curing an insufficient certification and the Department believes that a clear timeframe will be helpful to employees and employers. If the deficiencies specified by the employer are not corrected in the resubmitted certification, the employer may deny the taking of FMLA leave. Finally, in light of the *Urban* decision discussed above and the confusion that exists on this issue, language also is proposed that specifies that a certification never submitted to the employer does not qualify as an incomplete or insufficient certification but constitutes a failure to provide certification.

Proposed paragraph (d), titled ''[c]onsequences,'' now sets forth the consequences if an employee fails to provide a complete and sufficient medical certification, and reiterates the standard under the existing regulations that an employer may deny leave. It clarifies that it is the employee's responsibility either to provide such a complete and sufficient certification or to furnish the health care provider providing the certification with any necessary authorization from the employee or the employee's family member—such as that required by the Health Insurance Portability and Accountability Act (HIPAA) Privacy Regulations, 45 CFR Part 160 and 164, or any other applicable law—in order for the health care provider to release a sufficient and complete certification to the employer to support the employee's FMLA request. *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005) (''When requested, medical certification is a basic qualification for FMLA-qualifying leave for a serious health condition, and the employee is responsible for providing such certification to his or her employer. If an employee fails to submit a requested certification, the leave is not FMLA-protected leave.'').

Finally, current § 825.305(e) explains the interaction between the employer's sick or medical leave plan and the FMLA when paid leave (of any type) is substituted for unpaid FMLA leave. The current regulation explains that if less stringent medical certification standards apply to the sick leave plan, those standards must be followed when paid leave is substituted. The Department proposes to delete this section. The Department has heard feedback that it is unclear what constitutes less stringent information and how that information would allow an employer to determine if the leave should be designated as FMLA leave. For example, a plan that requires a doctor's note may be considered less stringent or more stringent depending on what type of information is provided on the note, and that information may or may not indicate whether the leave is FMLA-qualified. *See* Wage and Hour Opinion Letter FMLA–108 (Apr. 13, 2000) (finding that certification requirements the employer asserted were ''less stringent'' were, in fact, more stringent than FMLA requirements). Given this confusion, and the fact that Congress clearly provided in 29 U.S.C. 2613 that an employer could request a medical certification to substantiate a ''serious health condition'' as a prerequisite to being required to provide FMLA leave, the Department proposes to eliminate this language. Under the proposed rule, if an employee seeks the protections of FMLA leave for a serious health condition of the employee or qualifying family member, an employer has a right to have the medical information permitted by the statute. Such information will best enable an employer to determine if the leave is in fact FMLA-qualified. In place of the deleted text of current § 825.305(e), the Department proposes to add a provision allowing for annual medical certifications in those cases in which the serious health condition extends beyond a leave year. This proposal incorporates in the regulation the Department's statement in Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005) that a new medical certification may be required once each leave year.

Section 825.306 (Content of medical certification)

The information necessary for a sufficient certification is set forth in section 103 of the Act. *See* 29 U.S.C. 2613(b). The statute states that a medical certification ''shall be sufficient'' if it states the following: the date the condition commenced; the probable duration of the condition; ''appropriate medical facts'' regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his/her position (as applicable); dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave or leave on a reduced leave schedule and expected duration of such leave. *Id.*

Current § 825.306 addresses how much information an employer can obtain in the medical certification to substantiate the fact that a serious health condition exists. This section currently explains that DOL has developed an optional form (Form WH–380) for employees or their family members to use in obtaining medical certifications and second and third opinions from a health care provider to substantiate the existence of a serious health condition for purposes of FMLA.

Passage of HIPAA

Since the current FMLA regulations were issued in 1995, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996. HIPAA addresses in part the privacy of individually identifiable health information. The Department of Health and Human Services (HHS) promulgated regulations in December 2000 found at 45 CFR Parts 160 and 164 that provide for the privacy of individually identifiable medical information.[15] These regulations apply only to ''covered entities,'' defined as a health plan, a health care clearinghouse, or a health care provider who transmits any health information in electronic

[15] *See* 65 FR 82462 (Dec. 28, 2000).

form in connection with a transaction as defined in the privacy regulations. *See* 45 CFR 160.102(a), 160.103. HHS has stated that the statute does not include ''employers per se as covered entities.'' Therefore, the HHS regulations do not regulate an employer, ''even when it is a covered entity acting as an employer.'' *See* 67 FR 53192 (Aug. 14, 2002).

The final regulations issued by HHS may have an impact, either directly or indirectly, on the medical certification process for FMLA purposes. Under the HIPAA Privacy Rule, the health care provider is permitted to disclose protected health information directly to the patient. Therefore, if the employee has the health care provider complete the medical certification form or a document containing the equivalent information and personally requests a copy of that form to take or send to the employer, the HIPAA Privacy Rule does not and should not impede the disclosure of the protected health information. If the employee asks the health care provider to send the completed certification form or medical information directly to the employer or the employer's representative, however, the HIPAA Privacy Rule will require the health care provider to receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer. As employers have a statutory right to require sufficient medical information to support an employee's request for FMLA leave for a serious health condition, if an employee does not fulfill his or her obligation to provide such information upon request, the employee will not qualify for FMLA leave. *See* Wage and Hour Opinion Letter FMLA2005–2–A (Sept. 14, 2005).

Current Certification Requirements

With regard to what constitutes sufficient medical certification, current § 825.306(b)(1) states that the health care provider must identify which part of the definition of ''serious health condition,'' if any, applies to the patient's condition, and the medical facts which support the certification, including a brief statement as to how the medical facts meet the criteria of the definition. Current § 825.306(b)(2)(i) asks for the approximate date the serious health condition commenced, and its probable duration, including the probable duration of the patient's present incapacity (defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) if different.

Paragraph (b)(2)(ii) of this section asks whether it will be necessary for the employee to take leave intermittently or to work on a reduced leave schedule basis (*i.e.*, part-time) as a result of the serious health condition (see current §§ 825.117, 825.203), and if so, the probable duration of such schedule. Current paragraph (b)(2)(iii) asks if the condition is pregnancy or a chronic condition within the meaning of current § 825.114(a)(2)(iii), whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity.

Current paragraph (b)(3)(i)(A) asks if additional treatments will be required for the condition, and an estimate of the probable number of such treatments. Paragraph (b)(3)(i)(B) asks if the patient's incapacity will be intermittent, or will require a reduced leave schedule, an estimate of the probable number of and interval between such treatments, actual or estimated dates of treatment if known, and period required for recovery if any. Paragraph (b)(3)(ii) asks if any of the treatments will be provided by another provider of health services (*e.g.*, physical therapist), and the nature of the treatments. Paragraph (b)(3)(iii) asks if a regimen of continuing treatment by the patient is required under the supervision of the health care provider, and if so, a general description of the regimen (*see* current § 825.114(b)).

Paragraph (b)(4) asks, if medical leave is required for the employee's absence from work because of the employee's own condition (including absences due to pregnancy or a chronic condition), whether the employee: (i) is unable to perform work of any kind; (ii) is unable to perform any one or more of the essential functions of the employee's position, including a statement of the essential functions the employee is unable to perform (*see* current § 825.115), based on either information provided on a statement from the employer of the essential functions of the position or, if not provided, discussion with the employee about the employee's job functions; or (iii) must be absent from work for treatment.

Paragraph (b)(5)(i) asks, if leave is required to care for the employee's family member with a serious health condition, whether the patient requires assistance for basic medical or personal needs or safety, or for transportation; or if not, whether the employee's presence to provide psychological comfort would be beneficial to the patient or assist in the patient's recovery. The employee is required to indicate on the form the care he or she will provide and an estimate of the time period. Paragraph (b)(5)(ii) asks if the employee's family member will need care only intermittently or on a reduced leave schedule basis (*i.e.*, part-time), and the probable duration of the need.

The RFI sought comments on how the current form WH–380 is working and what improvements could be made to it to facilitate the certification process. The Department received significant feedback from the stakeholder community, including health care providers, that the existing form is confusing. *See, e.g.*, American Academy of Family Physicians (''The form WH–380 is overly complicated and confusing in its format.''); United Parcel Service, Inc. (''The current WH–380 form is poorly drafted and confusing.''); Association of Corporate Counsel (''The current form is confusing and often results in incomplete or vague responses by health care providers that are insufficient to assess the employee's eligibility for leave or the timing of the leave.''). Indeed, stakeholders have shared with the Department that in a number of cases, health care providers have refused to complete the certification form. As the employee has the statutory burden of providing sufficient medical information to substantiate the need for FMLA leave, this confusion poses a serious hardship to the employee. Several stakeholders also have criticized the form for asking health care providers to render legal conclusions by certifying whether a serious health condition exists as defined by the FMLA.

Several commenters suggested that the form could be simplified if it was broken into multiple forms, with separate forms either for intermittent and block leave, or for leave for the employee and leave for the employee's family member. *See, e.g.*, Yellow Book USA (suggesting separate forms for block and intermittent leave); National Council of Chain Restaurants (suggesting separate forms for employee and family members); Spencer Fane suggesting forms for: ''(a) continuous leave for employee's own serious health condition; (b) continuous leave for serious health condition of a family member; (c) reduced schedule/intermittent leave for employee's own serious health condition; and (d) reduced schedule/intermittent leave for serious health condition of a family member.''). A physicians group suggested that use of a standard form, as opposed to individual employer variations, would reduce the burden on health care providers. *See* American Academy of Family Physicians; *see also* Kennedy Reeve & Knoll (''The model certification form must be simplified,

and then it must be the required form for employers to use.'').

In reviewing the criticisms of the medical certification form, the Department notes that employers have a statutory right to obtain sufficient medical certification from an employee to substantiate the existence of a serious health condition. *See* 29 U.S.C. 2613(a), (b). However, the Department believes that the form can be simplified to make it easier for health care providers to understand and complete. The Department proposes the following revisions to the medical certification form, to implement the statutory requirements for ''sufficiency'' of the medical certification as set forth in 29 U.S.C. 2613(b). The Department has declined at this time to create multiple forms. However, the Department seeks feedback as to whether multiple forms would be clearer than the revised Form WH–380 proposed in this rulemaking (*see* Appendix B to these proposed regulations).

Proposed Certification Requirements

Before detailing the proposed changes to this section, the Department notes that the medical certification process remains optional for the employer. That is, an employer is always free to designate qualifying leave as FMLA leave without requiring medical certification of the underlying condition. *See* 29 CFR § 825.305(a).

Proposed § 825.306(a)(1) still requires that the name and address of the health care provider and type of medical practice be identified, but also requires that the pertinent specialization and fax number of the health care provider be provided. This addition allows the employer to more efficiently contact the health care provider for purposes of clarification and authentication as appropriate and in accordance with proposed § 825.307 (discussed below). The question of the approximate date on which the serious health condition commenced and the probable duration has been retained in proposed § 825.306(a)(2).

Consistent with the statute, the Department proposes to retain the requirement that a complete certification contain appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. *See* 29 U.S.C. 2613(b)(3). The Department also has added guidance in this regulatory section as to what constitutes sufficient medical facts for purposes of responding to this question. Specifically, the Department proposes that such medical facts may include information on symptoms, hospitalization, doctors visits, whether medication has been prescribed, referrals for evaluation or treatment (physical therapy, for example) or any other regimen of continuing treatment. These examples of what constitutes sufficient medical facts streamline the certification form by eliminating the need to ask several other questions that are contained in the current regulations, specifically those listed in § 825.306(b)(2)(iii), (b)(3)(i)(A), (b)(3)(ii), and (b)(3)(iii), and are intended to simplify the certification process for health care providers.

Proposed § 825.306(a)(3) also states that the health care provider may provide information on the diagnosis of the patient's health condition. The term ''diagnosis'' was specifically not included in the 1995 final regulations due to concerns expressed under the Americans with Disabilities Act. *See* Preamble to Final FMLA Regulations, 60 FR at 2222. As noted, in response to the RFI, several commenters specifically requested that the Department require the employee's health care provider to specify a diagnosis. *See, e.g.*, South Central Human Resource Management Association (''an employer should be permitted to obtain diagnosis and prognosis''); Detroit Medical Center (''It is critical that the regulations and WH–380 form be changed to require actual diagnoses to determine whether an employee's absences correlate with the medical certification.''); MedStar Health, Inc. (''[T]he FMLA's current restriction on obtaining a diagnosis creates an unnecessary and awkward limitation on the employee's health care provider in completing the medical certification form and the employer's health care provider in seeking clarification of information contained in that form. Generally, meaningful communications between the health care providers cannot take place without some discussion about the actual diagnosis, particularly if second and third opinions are involved.''). In practice, in many cases it may be difficult to provide sufficient medical facts without providing the actual diagnosis, and in some cases the employee may prefer that a diagnosis be provided as opposed to more detailed medical facts. The Department is also aware that the diagnosis may often be provided in practice under the current regulation. For example, many health care providers may currently write a diagnosis such as ''asthma'' on the certification form instead of describing symptoms such as ''intermittent difficulty in breathing due to inflamed airways.'' The Department proposes, therefore, that such information be allowed on the FMLA leave certification form. However, the Department does not intend to suggest, by including such language, that a diagnosis is a necessary component of a complete FMLA certification. If the medical facts set forth by the health care provider's medical certification establish the necessity for leave due to a serious health condition without reference to the employee's diagnosis, a diagnosis is not necessary and may not be required. The health care provider determines the appropriate relevant medical facts in any case and the employer determines if the certification is complete and sufficient to meet the regulatory definition of a serious health condition.

Proposed § 825.306(a)(4) requires that the health care provider provide sufficient information to establish that the employee cannot perform the functions of the employee's job and the likely duration of such inability, consistent with current § 825.306(b)(4).

Proposed § 825.306(a)(5) retains the requirement currently found in § 825.306(b)(5)(i) that information be provided sufficient to establish that the employee is needed to care for a family member, if applicable.

Proposed § 825.306(a)(6), (7), and (8) address the need for certification in connection with the need for reduced schedule or intermittent leave for the employee's own serious health condition or that of a family member. These paragraphs incorporate the requirements set forth in current § 825.306(b)(2)(i) and (ii), (b)(3)(i)(B), and (b)(5)(ii). In response to the RFI, several commenters noted that current § 825.306 and the WH–380 model certification form do not require the health care provider to certify the medical necessity for intermittent leave, which is a statutory requirement for the taking of such leave under section 102(b) of the Act. *See, e.g.*, National Coalition to Protect Family Leave (''In the case of intermittent leave, the medical necessity for the intermittent or reduced schedule also should be specified in accordance with 29 C.F.R. § 825.117 (not currently asked on the model form).''); Society for Human Resource Management (same); American Electric Power (''Unfortunately, the statutory requirement that 'medical necessity' be demonstrated by employees seeking intermittent leave has been effectively eliminated by the Department's regulations.''). Consistent with the statutory and the current regulatory requirements, the proposed section would now clarify that the health care provider must certify that intermittent or reduced schedule leave is medically necessary.

Interaction Between FMLA and Employer Policies

Current paragraph (c) of this section provides that an employer cannot request all of the information set forth above to substantiate the existence of a serious health condition if an employer's sick leave plan requires less information. Consistent with the change made to § 825.305(e), the Department proposes to eliminate this language. Instead, the proposal incorporates language from current § 825.307(a)(1), which explains the interaction between workers' compensation and the FMLA with regard to the clarification of medical information. Specifically, the current regulation provides that if a workers' compensation statute provides for an employer to have direct contact with the workers' compensation health care provider, the employer may do so even if the leave also may be designated FMLA leave. The Department proposes to amend this language to state that if the employer is permitted ''to request additional information'' from the workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions. The Department notes that for purposes of HIPAA, ''individuals do not have a right under the Privacy Rule at 56 CFR 164.522(a) to request that a covered entity restrict a disclosure of protected health information about them for workers' compensation purposes when that disclosure is required by law or authorized by, and necessary to comply with, a workers' compensation or similar law.'' *See* Department of Health and Human Services, Office of Civil Rights Publication, ''Disclosures For Workers' Compensation Purposes: Frequently Asked Questions,'' December 3, 2002.

The Department also proposes to add language to this section that clarifies the interaction between paid leave or benefit plans and FMLA leave. Consistent with Wage and Hour Opinion Letter FMLA2004–3–A (Oct. 4, 2004), the proposed language in this section clarifies that if an employee ordinarily is required to provide additional medical information to receive payments under a paid leave plan or benefit plan, an employer may require that the employee provide the additional information to receive those payments, as long as it is made clear to the employee that the additional information is requested only in connection with qualifying for the paid leave benefit and does not affect the employee's unpaid FMLA leave entitlement. This language reiterates what is contained in existing § 825.207(d)(1) with regard to temporary disability benefit plans and proposed § 825.207(a), although the existing regulations do not define what constitutes a disability plan. For consistency and clarity, the Department proposes that all disability and paid leave plans be covered by this provision.

Interaction Between FMLA Certification and ADA Medical Inquiries

The Department received comments in response to the RFI indicating that employers were frustrated and confused by the differing processes for gathering medical information under the FMLA and the ADA. *See generally* RFI Report, Chapter VII, Interplay Between the Family and Medical Leave Act and the Americans With Disabilities Act, 72 FR at 35599. The United Parcel Service, Inc. explained the dilemma faced by employers: ''When an FMLA-qualifying 'serious health condition' is also a potential 'disability' under the ADA, [§ 825.306's] restriction on medical information is in conflict with the ADA interactive process, which allows—and arguably requires—an employer to gather far more medical information regarding an employee so that it can make an informed decision regarding possible accommodations.'' *See also* Temple University (''FMLA restrictions particularly are problematic when employers face a request from an employee that triggers obligations under both the FMLA and ADA, given that the latter requires the employer to engage in interactive processes to accommodate the employee.''). The Department recognizes that an employee's request for leave due to a serious health condition may also trigger the interactive process under the ADA to determine whether the condition is also a disability. The Department therefore proposes to add a new § 825.306(d), which clarifies that where a serious health condition may also be a disability, employers are not prevented from following the procedures under the ADA for requesting medical information.

Finally, the Department received comments from employees and their representatives indicating that employers are incorporating medical releases into their FMLA certification forms and requiring employees to sign the release as a condition of providing FMLA leave. *See* An Employee Comment (''Also, my employer [has] requested me to sign a medical release form for my son's medical records, or I wouldn't be certified for FMLA.''); Legal Aid Society—Employment Law Center (''In some cases, a medical release is attached to the FMLA form requesting leave, with no explanation of its purpose. As a result, many employees unwittingly forego their right to medical privacy and agree to the unlimited disclosure of their entire medical history, believing that they must sign the release in order to qualify for the FMLA.''); United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (''The USW asks the DOL to clarify that employees are not required to provide a release of medical information to the employer as a condition of applying for or receiving FMLA leave.''). In the preamble to the current regulations, the Department specifically rejected suggestions that employees be required to sign a release or waiver as part of the medical certification process. *See* 60 FR 2222 (''The Department has not adopted the suggestion that a waiver by the employee is necessary for FMLA purposes.''). The Department continues to believe that employees should not be required to sign a release as a condition of taking FMLA leave and has added a new § 825.306(e) to clarify this issue. Of course, when certification is requested, the employee is required to provide the employer with a complete and sufficient certification and failure to do so may result in the delay or denial of FMLA leave.

Section 825.307 (Authentication and clarification of medical certification)

Current § 825.307(a) explains that a health care provider working for an employer can contact the employee's health care provider with the employee's permission for purposes of clarification and authentication of the medical certification. Commenters raised two major areas of concern in their response to the RFI regarding the authentication and clarification process: (1) The requirement that employers obtain employee permission to contact the employee's health care provider, and (2) the requirement that a health care provider working for the employer be utilized to contact the employee's health care provider, rather than allowing direct employer contact.

Several commenters asserted that the requirement that an employer obtain the employee's permission prior to seeking authentication of the certification from the employee's health care provider makes it extremely difficult for employers to investigate suspected fraud related to medical certifications. *See, e.g.*, Robert Haynes, HR—Compliance Supervisor, Pemco Aeroplex, Inc. (noting difficulty in

investigating fraud when employee's consent is necessary for the employer to authenticate form with employee's health care provider); United States Postal Service (suggesting that a ''simple and fair way to remedy this problem is to allow an employer to make contact with the provider for the purpose of confirming authenticity''); Taft, Stettinius & Hollister LLP (''Where authenticity is suspect, the employer's inquiry is not medically related but rather, is intended to determine whether the employee's health care provider issued the certificate and that it has not been altered. In such circumstances, the restrictions contained in Section 825.307(a) serve no useful purpose, impose unnecessary expense on employers, and are not justified by any language in the Act.''). The Department notes that authentication involves only verifying that the certification was completed, or authorized, by the employee's health care provider and does not involve disclosure of any additional medical information. Accordingly, proposed § 825.307(a) clarifies the limited nature of the authentication process and removes the requirement of employee consent to authenticate the certification.

Unlike authentication, clarification does involve communication with the employee's health care provider regarding the substance of the medical information contained in the certification. Several commenters noted that the passage of HIPAA (discussed above in § 825.306) has complicated the process of clarification of FMLA certifications. *See, e.g.*, Methodist Hospital, Thomas Jefferson University Hospital (''With [HIPAA] regulations physicians are reluctant to share information with Employers who are trying to accommodate Employee medical conditions to minimize absence.''); American Academy of Family Physicians (''We agree with comments that the Health Insurance Portability and Accountability Act (HIPAA) has created confusion about the disclosure of information on the FMLA form. As employers are not covered entities, disclosure directly to the employer is prohibited without an authorization by the patient.''); AIG Employee Benefit Solutions' Disability Claims Center (''More than one Provider has written 'HIPAA' across the Form and returned it.''); Briggs & Stratton Corporation (''[M]any physicians still insist that they are prohibited by [HIPAA] from responding to questions on the Certification.'').

The Department notes that the HIPAA Privacy Rule provides far more protection for employee medical information than current § 825.307(a). For example, a valid authorization under the HIPAA Privacy Rule requires, in part, a written document containing: (1) A description of the information that may be disclosed; (2) the name or specific identification of the person(s) to whom the requested disclosure may be made; (3) a description of the purpose of the requested disclosure; (4) an expiration date or event for the authorization; and (5) a signature of the individual and date. 45 CFR 164.508(c)(1). In any instance in which the employee's health care provider is disclosing medical information to the employer, the HIPAA Privacy Rule requires that the employee execute a valid authorization prior to the disclosure. The Department agrees with those commenters who suggested that the protections afforded to employee medical information by the HIPAA Privacy Rule have supplanted the requirement in current § 825.307(a) for employee permission to clarify the certification. *See* Ohio Public Employer Labor Relations Association (''With HIPAA laws protecting confidential medical information, the excessive restrictions found in 29 C.F.R. § 825.307 are unnecessary and should be removed.''); Taft, Stettinius & Hollister LLP (''HIPAA and similar laws provide ample protection for personal health data and the employee's health care provider can always refuse to disclose information if he or she considers a request for clarification to implicate privacy issues.''); Hewitt Associates LLC (''[G]iven HIPAA concerns, it's likely that the employee will still have a check over the process as the health care provider would require the employee's permission before he or she would speak with the employer.''). Accordingly, in lieu of the requirement in current § 825.307(a) that the employee provide permission for the employer to clarify the medical certification, the Department proposes language highlighting that contact between the employer and the employee's health care provider for the purpose of clarifying the medical certification must comply with the HIPAA Privacy Rule. Language has also been added to make clear that if such consent is not given, an employee may jeopardize his or her FMLA rights if the information provided is incomplete or insufficient.

The second major area of concern raised in the comments to the RFI regarding § 825.307(a) was the requirement that the employer utilize a health care provider to contact the employee's health care provider. Many employers commented that the requirement that they communicate only through a health care practitioner resulted in significant cost and delay. *See, e.g.*, Milwaukee Transport Services, Inc. (''In 2006 alone, MTS spent $23,000.00 for the services of a designated health care provider because it was not itself permitted under the FMLA regulations to ask questions which that provider was then forced to ask on its behalf.''); City of Portland (''The Act requires employers to use the employee as an intermediary to communicate with doctors or incur substantial costs hiring additional doctors to consult with employee physicians or, in narrow circumstances, to give second and third opinions.''); Hewitt Associates LLC (''The employer's engagement of its own health care provider is expensive, takes additional time and ultimately delays the decision to approve or deny a leave request.''). Other commenters suggested that their human resources professionals could more efficiently clarify the certification with the employee's health care provider because they were both better versed in the FMLA and more familiar with the employee's job duties and the work environment than the employer's health care provider. See, *e.g.*, Association of Corporate Counsel (''[T]he employer's staff members—often its Human Resources employees—are usually more knowledgeable about the specific job requirements and other information that may be relevant or helpful to the employee's health care provider in making his/her assessment.''). Commenters also noted that the ADA does not contain a similar restriction requiring employers to engage medical providers to contact employees' doctors. *See*, *e.g.*, Commonwealth of Pennsylvania; Clark Hill PLC; City of New York; Edison Electric Instituted. The AFL–CIO, however, commented that the use of a health care provider was necessary to preserve employee privacy.

The Department has considered the comments on this issue particularly in light of the HIPAA Privacy Rule, and has determined that employers should be allowed to directly contact the employee's health care provider for the purposes of authenticating and clarifying the medical certification. Accordingly, proposed § 825.307(a) eliminates the requirement that the employer's health care provider, as opposed to the employer itself, make the contact to an employee's health care provider. The Department believes that this change would significantly address the unnecessary administrative burdens

the current requirement creates and, in light of the protections provided by the HIPAA Privacy Rule, will not significantly impact employee privacy. The Department notes again, however, that such contact by the employer may only take place after the employee has been afforded the opportunity to cure any deficiencies with the certification.

Current § 825.307(a)(1), which addresses rules governing access to medical information when a workers' compensation absence also is at issue, has been moved to proposed § 825.306 because that section also addresses what medical information an employer can obtain in connection with an FMLA absence.

Current § 825.307(a)(2) and (b) cover the requirements an employer must meet when obtaining a second opinion. The existing language of current § 825.307(a)(2) and (b) has been incorporated into proposed § 825.307(b), titled ''[s]econd opinion''. Employers expressed significant frustration with the second and third opinion process in responding to the RFI— and questioned its utility. Specifically, several employers commented on the expense involved in the second and third opinion process. *See*, *e.g.*, Honda (''Based upon Honda's experience, second and third opinions average over $700 per second or third opinion, and cost the employees their time.''); Yellow Book USA (asserting that second opinions are so expensive they are not used). Other commenters noted practical concerns regarding finding physicians to perform second opinions. See, *e.g.*, United States Postal Service (''We are experiencing increasing difficulty finding physicians who will perform a second opinion medical exam.''); FNG Human Resources (''Requesting a second opinion is neither economically feasible nor beneficial in our area. We do not find healthcare providers willing to state that another provider is incorrect in his/her diagnosis.''). The Department notes that the statute itself mandates the second and third opinion process, including that the employer cannot use a health care provider it regularly employs to render the second opinion, and that the employer bears the costs of the second and third opinions. 29 U.S.C. 2613(c), (d). Thus, the Department has determined that it is not appropriate to change the current regulation. In order to increase the utility of the second and third opinion process, however, the Department proposes to add language to § 825.307(b)(1) and (c) requiring the employee (or family member) to authorize the release of relevant medical information regarding the condition for which leave is sought from the employee's (or family member's) health care provider to the second or third opinion provider.

The final issue in § 825.307 that garnered significant comments and an issue which the Department is hearing about more is the requirement in current § 825.307(f) that under certain circumstances, the employer shall accept the medical certification and second and third opinions from a foreign health care provider. In response to the RFI, several commenters stated that this requirement has caused numerous problems. See, *e.g.*, Spencer, Fane, Britt & Browne LLP (''First, employers have no idea whether the health care provider has training and credentials equivalent to U.S.-licensed health care providers. Second, it is difficult to verify that the foreign health care provider even completed the form. * * * Third, obtaining a second and third opinion is next to impossible * * * .''); U.S. Chamber of Commerce (''These companies have had to obtain the services of translators and health care providers with foreign language skills to discuss the certification with foreign doctors.''); Fairfax County Public Schools (''Approximately 20% of the FCPS FMLA requests are for leave for immediate family members who live outside the U.S. and have received medical diagnoses from individuals of unclear medical qualifications.''). Commenters suggested that there should be additional requirements for certifications for foreign health care providers. *See*, *e.g.*, Spencer, Fane, Britt & Browne LLP; U.S. Chamber of Commerce; Fry's Electronics, Inc. At the present time, the substance of § 825.307(f) remains unchanged. Nevertheless, the Department seeks further public comment about what specific changes would allow for better authentication in this area.

In order to assist individuals referring to the regulations on second and third opinions, proposed changes have been made to add titles to each paragraph in this section. Paragraph (c) is now titled, ''[t]hird opinion,'' paragraph (d) is titled, ''[c]opies of opinions,'' paragraph (e) is titled ''[t]ravel expenses,'' and paragraph (f) is titled, ''[m]edical certification abroad.'' The timeframe for employers to provide employees with copies of second and third medical opinions upon the employees' request under paragraph (d) is proposed to be extended from two to five business days, to be uniform with other similar timeframes.

Section 825.308 (Recertifications)

Current § 825.308 specifies when an employer may request subsequent recertifications of medical conditions. In cases of pregnancy, chronic, or permanent/long-term conditions, recertifications may be requested no more often than every 30 days (and only in connection with an absence) unless circumstances described in the initial certification have changed significantly, or the employer receives information to cast doubt on the employee's stated reason for the absence. If the time period specified by the health care provider for the duration of the incapacity or its treatment is longer than 30 days, an employer may not request recertification until the minimum duration has passed, unless the employee requests an extension of leave, circumstances have changed significantly, or an employer has received information that casts doubt on the validity of the certification. This same rule applies to intermittent leaves of absence. If no time period is specified and the condition is other than pregnancy, chronic, or long-term or permanent, an employer can request recertification every 30 days or more frequently if the employee requests an extension of leave, circumstances have changed significantly, or an employer has received information that casts doubt on the validity of the certification.

The Department proposes to re-structure § 825.308 for the sake of clarity. Proposed paragraphs (a), (b), and (c) now clearly apply to all medical conditions and work in conjunction with each other. Paragraph (a), titled ''30-day rule,'' merely states a general rule that an employer may request recertification no more often than every 30 days and only in connection with the absence of the employee. This rule is subject to the more specific occurrences described in paragraphs (b) and (c).

Paragraph (b), titled ''[m]ore than 30 days,'' explains, consistent with the existing regulation, that if a minimum duration for the period of incapacity is specified, the employer may not request recertification until that time period has expired, but adds that in all cases, recertifications may be requested every six months. An example has been provided to give further guidance on this issue. This proposal addresses situations where a certification is provided that states an employee may be incapacitated and in need of intermittent leave for an extended period. There is confusion under the existing requirements as to whether an employer would be able to obtain recertification in a given year absent a

significant change in circumstance or a reason that casts doubt on the validity of the absence where the certification indicates that the duration of the condition is ''lifetime.'' Conversely, under current law, where an employee has a chronic condition certified to last an ''indefinite'' period of time, that certification may be treated as having no durational timeframe and the employer may require a recertification every 30 days in connection with an absence. *See* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004).

In response to the RFI, some employers argued that recertification should be permitted every 30 days even where the certification indicates that the condition will last for an extended duration. See, *e.g.*, University of Minnesota (''In all cases, employers should have the right to request recertification from an employee on FMLA leave every thirty days.''); Carolyn Cooper, FMLA Coordinator, City of Los Angeles (''A remedy to this manipulation or gaming of the medical recertification restriction pertaining to *intermittent/reduced work schedule leaves* is to *allow employers to request recertification every 30 days, regardless if the duration indicated in the initial medical certification is greater than 30 days.*'') (emphasis in original); United Parcel Service, Inc. (''As currently drafted, [the] language permits employees to evade the 30-day recertification requirement by having their health care provider specify a longer period of time.''). Employees and their representatives, however, commented that frequent recertifcations are burdensome for employees. *See, e.g.*, International Association of Machinists and Aerospace Workers (''[O]ur members find that the requirement to recertify every 30 days is incredibly burdensome. * * * [I]t is very expensive for employees to get re-certifications. Some employees, particularly in rural areas, have to travel long distances to even see their doctor. It is ironic that often these employees actually have to miss more work time just to get the recertification.''); An Employee Comment (''For an employer to repeatedly request for recertifications every 30 days, for an chronic Asthmatic who has an *unforeseeable mild flare-up* that can be taken care of with prescription medication, seems unreasonable and repetitious.''); Kennedy Reeve & Knoll (''The frequency with which some employers are requiring notes and recertification is both logistically (due to the availability of doctor's appointment times) and financially burdensome on the employee and physician.''). The American Academy of Family Physicians also objected to allowing recertifications every 30 days for conditions that are medically stable: ''This is a burden to physicians who must spend time completing the form to indicate that a chronic condition is still being managed. It would lessen this burden to allow recertification only for those conditions which are not categorized as chronic care or permanent disability.'' *See also* Mark Blick DO, Rene Darveaux MD, Eric Reiner MD, Susan R. Manuel PA-C (''One employer requires us to complete the form every 60 days (ATT/SBC), one employer every 90 days and another every year. Chronic conditions extending a patient's lifetime such as diabetes and hypertension are not going to change and there is no reason the form has to be updated multiple times throughout the year.''); An Employee Comment (''[E]ven though my mother's illness is terminal and my father's condition is considered lifetime, I still am required to fill out forms and have a doctor sign them every 3 months. The physician's office now charges me $20 for each form I have to have them sign. As you can imagine, this takes a lot of time and money.'').

Taking all of the comments into consideration, the Department believes that it would be reasonable for employers to obtain recertifications every six months in circumstances in which the certification indicates that the condition will last for an extended period of time. An extended period of time includes not only specific months or years (*e.g.*, one year) but certified durations of ''indefinite,'' ''unknown,'' or ''lifetime.'' This is a change in the law from the current construction as explained above and expounded in Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004). The Department feels six months is a reasonable timeframe for permitting recertification of such conditions but requests comments on this proposal. This is also consistent with the Department's proposal in § 825.115(c) that ''periodic'' visits to a health care provider for a chronic serious health condition is defined as at least twice per year.

Proposed paragraph (c) of this section explains, with some modifications to the current rule, what circumstances must exist to request medical recertification in less than 30 days and is now titled ''[l]ess than 30 days.'' The proposed paragraph explains that recertification may be requested in less than 30 days if the employee requests an extension of leave, the circumstances have changed significantly based on the duration or frequency of the absence or the nature or severity of the illness, or if the employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. The remaining provisions of the existing regulation have been incorporated without any substantive changes. However, examples have been added to illustrate what constitutes a change in circumstances or information that would ''cast doubt.'' *See also* Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004) (noting that a pattern of Friday/Monday absences would permit an employer to request recertification in less than 30 days provided that there was no evidence of a medical basis for the timing of the absences).

No changes have been proposed to paragraph (d) from the current regulations except it is titled, ''[t]iming.''

A new paragraph (e) has been proposed, titled ''[c]ontent,'' that confirms an employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in current § 825.306. In addition, consistent with Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), the proposed regulation states that as part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

Proposed paragraph (f) sets forth without change the requirements of current § 825.308(e) that the employee is responsible for the costs associated with the recertification and that no second or third opinion may be required. The Department notes that several employers responding to the RFI requested that the Department allow second and third opinions on recertifications. *See, e.g.*, United States Postal Service (''[A] second opinion should be allowed during the lifetime of an employee's condition, so long as there is reason to doubt the validity of the information in the certification.''); Air Transport Association of America, Inc. and Airline Industrial Relations Conference (''Second and third opinions should also be available to employers on a medical recertification.''). The National Partnership for Women & Families, however, argued that the fact that the statute only refers to second and third opinions on initial certifications supports the current regulatory

prohibition on second and third opinions on recertification. However, both Honda and the AFL-CIO noted that employers are already permitted to reinitiate the certification process on an annual basis, which offers the employer the opportunity to seek a second opinion annually. *See supra* discussion of proposed § 825.305(e). The Department believes that allowing employers to request a new medical certification on an annual basis (and a second and third opinion, if appropriate) allows employers sufficient opportunity to verify the serious health condition. Accordingly, the Department has retained the regulatory prohibition on second and third opinions on recertification, but seeks comment about this in light of the restructuring of § 825.308.

Section 825.310 (Fitness-for-duty certification)

Current § 825.310 explains when an employer may require an employee to provide a fitness-for-duty certification. Current paragraph (a) of this section explains that employers may have a uniformly applied policy or practice that requires similarly situated employees who take leave to provide a certification that they are able to resume work. The Department proposes to add a sentence to paragraph (a) clarifying that employees have the same obligation to provide a complete certification or provide sufficient authorization to the health care provider to provide the information directly to the employer at the fitness-for-duty stage as they do in the initial certification stage.

No changes have been proposed to paragraph (b), which explains that if State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions apply, and that the ADA requires that any return-to-work physical be job-related and consistent with business necessity. The court in *Harrell* v. *USPS*, 445 F.3d 913, 926–27 (7th Cir.), *cert. denied*, 127 S. Ct. 845 (2006), deferred to this regulation, holding that it reasonably implements the statute and is consistent with the legislative history by providing that a collective bargaining agreement ''may impose more stringent return-to-work requirements on the employee than those set forth in the statute.''

Current paragraph (c) of this section explains the procedures for obtaining a fitness-for-duty certification and states that an employer may seek certification only with regard to the condition that caused the employee's need for leave. The existing regulation provides that the certification itself need only be a simple statement of ability to return to work. It also provides that a health care provider employed by the employer can contact the employee's health care provider with the employee's permission for purposes of clarifying the employee's fitness to return to work, that no additional information may be acquired, and that the employee's reinstatement may not be delayed while contact with the health provider is made. A number of commenters responding to the RFI addressed the ''simple statement'' rule. Some employers noted that particular safety concerns inherent in their workplaces necessitated that they obtain clear information regarding an employee's ability to safely return from leave. For example, Union Pacific Railroad Company noted that clear information regarding its employees' ability to work is critical as ''those very employees are entrusted with jobs that affect the safety and security of the general public.'' The Association of American Railroads also stated that ''returning an employee to work is not a 'simple' process in cases where the employee performs a safety sensitive job.'' Therefore, it recommended that the Department should ''define a return to work 'certification' in such a way as to allow employers to require a detailed certification similar to what is required when an employee first requests FMLA leave.'' Similarly, the Maine Pulp & Paper Association stated:

> Employees in the paper industry routinely work with hazardous materials in close proximity to heavy machinery. Forcing employers to accept the employee's medical provider's simple statement that the employee ''is able to resume work,'' or worse, in the case of an intermittent leave-taker, accept the employee's word alone with no medical verification whatsoever jeopardizes the safety of co-workers and increases exposure to expensive workers' compensation claims. MPPA's members have strong safety programs which should not be undercut by administrative requirements of the FMLA.

Jackson Lewis LLP stated that the ''simple statement'' provision allows employees to present ''cursory and conclusory notes asserting, without any factual explanation, that they are 'cleared to return to work without restrictions.' Employers must ignore facts suggesting employees are not qualified to perform their jobs or might pose a direct threat of harm to themselves or others.'' The National Coalition To Protect Family Leave also noted that ''the inability of an employer to obtain more than a 'statement' that the employee can return to work, and lack of opportunity to challenge such a statement, creates risk for everyone involved.'' The Coalition and a number of other commenters stated that the return to work process under the FMLA conflicts with the return to work process under the ADA, with the latter providing a better model because it allows both more substantive information and physical examinations.

In contrast, as explained in more detail with regard to paragraph (g) of this section, several commenters representing employees, including the National Partnership for Women & Families, cautioned that altering the fitness for duty certification procedures under the FMLA would place an ''unwarranted burden'' on employees.

The proposed regulation retains the basic fitness-for-duty certification procedures, but states that for purposes of authenticating and clarifying the fitness-for-duty statement, the employer may contact the employee's health care provider consistent with the procedures set forth in § 825.307 above. The proposal also replaces the requirement that the certification must only be a ''simple statement'' with the statutory language that the employee must obtain a certification from his or her health care provider that the employee is able to resume work. The employer may provide the employee with a list of the employee's essential job duties together with the eligibility notice, in which (as provided for in proposed § 825.300(b)(3)(v)) the employer advises the employee of the necessity for a fitness-for-duty certification. If the employer provides such a list of essential functions, it may require the employee's health care provider to certify that the employee can perform them. When providing a fitness-for-duty certification, the health care provider therefore must assess the employee's ability to return to work against these identified essential functions. However, if the employer wants the health care provider to consider a list of essential functions, it must provide them with the eligibility notice; providing the list at a later date could force the employee to make an extra visit to the health care provider or to incur extra expense or delay. The statement in the current regulations that no additional information may be acquired has been deleted, as the process of clarifying the fitness-for-duty certification may result in the employer obtaining additional information not initially provided on the fitness-for-duty certification. But the employer may not request or require additional information in a certification to establish fitness-for-duty than is specified under these regulations.

The Department also requests further input concerning the appropriate level

of information that may be obtained and the process that employers may follow in connection with a fitness-for-duty certification. This includes, but is not limited to, whether additional information or procedures (such as a second and third opinion process) should be permitted where an employer has reason to doubt the validity of the fitness-for-duty certification. Although the Department did not ask specific questions regarding these topics in the RFI, some commenters did address them. For example, the Association of Corporate Counsel suggested that employers should be permitted to require an employee returning from FMLA leave to undergo a return to work physical conducted by the employer's physician, so long as the employer regularly requires such a physical for all employees returning to work. The Ohio Department of Administrative Services and the National Council of Chain Restaurants stated that employers should be allowed to get a second opinion on a return to work certification when they have reason to doubt the validity of the release. Briggs & Stratton Corporation similarly suggested that an employer should be permitted, ''at its expense, to require verification of the treating health care providers' return to work certification,'' arguing that the current prohibition impedes an employer's ability to fulfill its OSHA obligation to provide a safe work place. The National Coalition To Protect Family Leave also stated that the prohibition on second and third opinions on fitness for duty certifications is ''problematic from a safety perspective'' and conflicts with the ADA process. Therefore, it suggested that employers should be able to challenge a certification obtained from an employee's health care provider and ''to delay the employee's return to work pending receipt of a second opinion if the employer has a reasonable basis to believe that the employee may not be able to safely return to work and perform all the essential functions of the job.'' The Department is proposing no changes in this area, but requests further comments on these issues.

The Department proposes no changes to current paragraph (d) of this section, which explains who bears the cost of the fitness-for-duty certification. Under both the current and proposed regulations, the employee is responsible for the cost of obtaining a fitness-for-duty certification.

Current paragraph (e) of this section explains that advance notice of the need to provide a fitness-for-duty certification must be given when an employee goes out on leave. It also requires that if an employer has a handbook, the employer should include its general policy with regard to fitness-for-duty certifications. The current regulations further provide that no second or third opinions on fitness-for-duty certifications may be required. The Department proposes to modify this section by specifying that the notice of the fitness-for-duty certification requirement is to be provided in the eligibility notice set forth in proposed § 825.300(b).

Current paragraph (f) of this section provides that an employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required by paragraph (e). This language has been retained in the proposed regulations. The Department proposes, however, to add language, consistent with current § 825.311(c), to make clear that the employee is not entitled to the reinstatement protections of the Act if he or she does not provide such a requested certification or request additional FMLA leave.

Current § 825.310(g) provides that an employer cannot obtain a fitness-for-duty certification when an employee returns from an intermittent leave absence. Numerous commenters responding to the request for information addressed this provision. The employer comments indicate that the primary purpose of requiring a fitness-for-duty certification is to make sure the employee is able to resume work safely without harming the employee, co-workers, or the public. When leave is taken intermittently, employers state that they may need to determine whether the employee is fit for duty when safety concerns are at issue, the same as when an employee returns from a block of leave. For example, the United States Postal Service stated:

> Exempting chronic conditions from return to work clearance seems to make little sense because those conditions are just as likely as any other to compromise the health or safety of the workforce. Indeed, some chronic conditions are even more likely to give rise to a justifiable need for return to work clearance than the other serious health conditions under the FMLA. For example, an employer may have little concern about the clerical assistant returning to work after giving birth, but far more (and legitimate) concern about allowing a utility worker to return after a series of epileptic seizures on the job.

Honda similarly stated that, ''[i]n manufacturing, many of the jobs include safety-sensitive duties. Therefore, the current regulation prohibiting a fitness-for-duty form for intermittent leaves puts the employee and his/her co-workers at risk and requires the employer to assume a legal risk for liability, if there is an accident caused by the reinstated employee.'' Therefore, Honda suggested that employers should be permitted to require a fitness-for-duty form for employees returning from intermittent leave, but only ''when it is consistent with the employer's 'uniformly-applied policy or practice' applicable to all similarly-situated employees [the general standard for fitness-for-duty certifications in § 825.310(a)].'' The City of New York commented that ''Fitness for Duty Certifications for employees in safety-sensitive positions who are intermittently absent should be an option for employers. For example, if a sanitation worker responsible for driving a two-ton truck on public roadways takes intermittent leave to treat high blood pressure, a fitness for duty certification should be required before the employee is restored to the position which carries an extreme responsibility to the public.'' Dallas Area Rapid Transit similarly stated that allowing employers ''to request a Fitness for Duty certification [for employees returning from intermittent leave] would protect the safety of both the employee and the public, and support the employer's efforts and regulatory requirement to provide a safe workplace, while also providing a safe efficient service to its customers.'' Such employers suggested that the FMLA return to work process undercuts legitimate employer safety programs. Therefore, numerous commenters, including Willcox & Savage, Foley & Lardner LLP, the National Retail Federation, the National Council of Chain Restaurants, and the National Coalition to Protect Family Leave, suggested that the Department should delete or revise this section of the regulations so that employers would have the same right to seek fitness for duty certifications from employees returning to work from intermittent leave as they do for block leave. Hinshaw & Culbertson LLP suggested that fitness-for-duty certifications ''could be regulated to prevent abuse by the employer by limiting such statements to certain time frames, such as once a quarter. It could also be based on the frequency of the intermittent leave; the more frequent the leave, the more frequent the statement.''

However, numerous commenters representing employees vigorously supported the existing regulation. The National Partnership for Women & Families commented that requiring

employees returning from intermittent leave to provide fitness for duty certifications—which are at the employee's expense—would significantly undermine the statutory purpose behind allowing employees to take intermittent leave. It stated that ''[a]ny benefit to the employer of obtaining fitness for duty statements from intermittent leave-takers is far outstripped by the unwarranted burden that such a change in the regulations would impose on employees. * * * The intermittent leave option helps to take some of the financial strain off employees by enabling them to continue earning a paycheck while addressing serious health or family needs, and allows employees to preserve as much of the twelve weeks of leave as possible.'' The American Federation of Teachers, Local 2026, stated that ''[t]here is no reason to disturb the current rule barring employers from requesting fitness for duty statements from workers who take intermittent leave.'' The AFL–CIO noted that ''[r]equiring employees who take intermittent leave to present fitness for duty certifications for potentially every absence is burdensome and unnecessary.'' The Pennsylvania Social Services Union, SEIU 668, concurred, stating that there is no reason to disturb the current rule. Kennedy Reeve & Knoll commented that ''the logistical impossibility and financial burdens of allowing employers to require fitness-for-duty statements for each and every day of absence make such a policy not feasible.'' The National Business Group on Health also stated that ''[i]t would be an administrative headache to require a fitness for duty statement from an employee who is absent intermittently. The added paperwork to cover this would be overly burdensome.'' The Indiana State Personnel Department, Employee Relations Division, also recognized that the burden of providing fitness for duty certifications after every intermittent absence would be significant for employees and health care providers, but beneficial to employers. In an attempt to address the cost concern, the United Parcel Service suggested that employers bear the cost of fitness for duty certifications when the employee is returning from intermittent leave.

The Department believes, as the comments from employee representatives assert, that it would be unduly burdensome on employees to have to provide a fitness-for-duty certificate for each intermittent leave absence. However, the numerous employer comments addressing the significant safety risks that can exist when some employees return from intermittent leave absences indicate that the current regulation does not appropriately address those concerns. Therefore, the Department proposes that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. For example, if an employee is out periodically for high blood pressure, and the employee operates heavy equipment as part of the employee's essential functions, an employer may have reason to get certification that the employee can perform the essential functions of the job. The employer may not terminate the employment of the employee while awaiting such a certification of fitness for duty for an intermittent or reduced schedule leave absence. The Department is cognizant of the potential burdens on employees who may need to provide both a recertification and a fitness-for-duty certificate within a short period of time. The Department specifically seeks comment on ways to minimize this burden and asks whether this proposal strikes the appropriate balance.

Current paragraph (h) of this section would be deleted to avoid redundancy. This paragraph, which provides an explanation as to the repayment of health insurance premiums if the employee is unable to return to work as a result of a continuation of a serious health condition, is duplicative of the provisions set forth in § 825.213. The last sentence of current § 825.310(h), which explains who bears the cost of the certification in such circumstances, is moved to proposed § 825.213(a)(3).

Section 825.311 (Failure to provide medical certification)

Current § 825.311(a) provides that, in the case of foreseeable leave, if an employee fails to provide medical certification in a timely manner, the employer may delay the taking of FMLA leave until it has been provided. In response to the RFI, Foley & Lardner LLP noted that the regulation ''does not explain how long the delay may last or what the consequences of a 'delay' can be.'' The Department agrees and proposes to explain more clearly the implications of an employee's failure to provide the medical certification in a timely manner. Currently, the regulation states that an employer may ''delay the taking of FMLA leave.'' If the employee takes leave without timely providing a sufficient medical certification for foreseeable leave, then any leave during the time period that the certification was ''delayed'' is not FMLA-protected. To make sure both employees and employers understand the intended meaning of this provision, the Department proposes to amend the wording to state that the employer may ''deny FMLA coverage'' for the period at issue. This proposed language ensures that there is no misunderstanding as to the impact of the ultimate failure to provide a medical certification in a timely manner, but substantively this is not a change from the current regulation. *See* current § 825.312(b) (''If the employee never produces the certification, the leave is not FMLA leave.''); *see also* Sherman & Howard LLC (''The regulations should make clear that if an employee does not ultimately qualify for FMLA leave, or fails to provide medical certification to support the requested leave, the employee's absence will be unprotected. This means that the employer may appropriately enforce its attendance policy which may result in disciplinary action being taken against the employee.''). Proposed paragraph (a) is titled ''[f]oreseeable leave.'' Current § 825.311(b) contains similar language to current paragraph (a) with regard to unforeseeable leave. The Department proposes language similar to that proposed in paragraph (a), to be titled ''[u]nforeseeable leave,'' in proposed § 825.311(b). Section 825.311(b) is proposed to be reworded for purposes of clarity, but no other substantive changes have been made. The Department proposes a new paragraph (c), to be titled ''[r]ecertification,'' that addresses the consequences of failing to provide a timely recertification when requested by the employer. The proposed regulations provide that if a recertification is not provided within 15 days of the request, or as soon as practicable, the employer may deny the continuation of the FMLA leave protections until the recertification is provided. Former paragraph (c) is moved to proposed paragraph (d) but no changes have been made in the requirement to provide medical certification that an employee is fit for duty and able to return to work when seeking reinstatement following FMLA leave for a serious health condition.

Section 825.312 (When can an employer refuse reinstatement)

Current § 825.312(a) through (f) address when an employer can delay or deny FMLA leave to an employee, or deny reinstatement after FMLA leave, when an employee fails to timely provide the required notifications and certifications set forth in the regulations. As these sections are duplicative of

other regulatory sections, they have been deleted from the proposed rule. Current paragraphs (g) and (h) of § 825.312, which address the fraudulent use of leave and outside employment, have been renumbered as § 825.216(d) and (e), which also deal with limitations on reinstatement, but no substantive changes have been made.

Sections 825.400 through 825.600

No changes are proposed in §§ 825.400 through 825.600 other than to the titles of the sections and very minor editorial changes (adding a reference to the Department's website in proposed § 825.401(a), updating the reference in proposed § 825.500(c)(4) to the new employer eligibility notice requirement proposed in § 825.300(b), and deleting a cross-reference in proposed section 825.601(b)).

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

Section 825.700 (Interaction with employer's policies)

Current § 825.700(a) provides that an employer may not diminish the rights established by the FMLA through an employment benefit program or plan, but that an employer may provide greater leave rights than the FMLA requires. As noted previously, the U.S. Supreme Court in *Ragsdale* invalidated the last sentence of current § 825.700(a), which states that if an employee takes paid or unpaid leave and the employer does not designate the leave as FMLA leave, the leave taken does not count against an employee's FMLA entitlement.

A number of commenters responding to the RFI addressed the effect of *Ragsdale*. For example, the National Coalition to Protect Family Leave stated that § 825.700(a) should be removed from the regulations. The Air Transport Association of America, Inc. and the Airline Industrial Relations Conference suggested that the regulations should be revised in light of *Ragsdale,* because employers do not know which regulations they must follow and which are no longer valid, and employees who read them also are confused about which regulations their employers must follow. The Association of Corporate Counsel similarly suggested that § 825.700(a) should be deleted to clarify that an employer's failure to timely designate leave does not increase the statutory leave period. Hewitt Associates LLC commented that ''by deleting the 'penalty' provision and simply reinforcing employer notification obligations,'' the Department would appropriately respond to *Ragsdale.* The National Partnership for Women & Families stated that while the Supreme Court struck down the ''categorical penalty'' in the current regulations, it left intact the requirement that employers designate leave, and it ''did not prohibit DOL from imposing *any* penalties on employers for failing to properly designate and notify employee about leave'' (emphasis in original). (Related comments from both employer and employee representatives addressing possible changes to the notice and designation of leave requirements are addressed in the preamble discussing changes to § 825.208.)

In light of these comments, the Department proposes to delete the last sentence from paragraph (a) of this section struck down by *Ragsdale.* Other than this change required by the Court's decision, the Department proposes no changes to current paragraph (a).

The Department proposes no changes to current § 825.700(b), which provides that an employer may amend existing leave programs, so long as they comply with the FMLA, and that nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

The Department proposes to delete § 825.700(c)(1) and (2) from the current regulations, as they discuss the initial applicability of the statute and periods of employment prior to the statute's effective date, which are no longer necessary.

Section 825.702 (Interaction with Federal and State anti-discrimination laws)

Current § 825.702 addresses the interaction between the FMLA and other Federal and State anti-discrimination laws. Current paragraph (a) confirms that the FMLA and other Federal or State laws are wholly distinct and must be complied with independently. Paragraphs (b), (c), (d) and (e) primarily focus on the interaction between the FMLA and the Americans with Disabilities Act (ADA), particularly with regard to leave rights, job modification, light duty, reassignment, and reinstatement. Paragraph (f) focuses on the interaction of the FMLA with Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, and paragraph (g) states that the U.S. Equal Employment Opportunity Commission can provide further information on Title VII and the ADA.

The Department proposes to add a new paragraph (g) in this section. Existing paragraph (g) would become proposed paragraph (h) in this section. Proposed paragraph (g) incorporates a discussion of the interaction between the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA) and the FMLA. The current regulations contain no such reference, and the interaction between these two laws has been confusing to employees and employers alike. On July 22, 2002, the Department issued guidance stating that, based upon the reinstatement rights provided by USERRA, an employee is entitled to credit for FMLA eligibility purposes for the months and hours that the employee would have worked during the 12 months preceding the start of the leave but for his or her qualifying active duty uniformed service. *See http://www.dol.gov/vets/media/fmlarights.pdf.* This guidance has been incorporated into paragraph (g) of the proposed regulations. The only other change the Department is proposing is to conform the cross-reference in paragraph (d)(2) to the proper paragraph in proposed § 825.207.

The Department received numerous comments in response to the RFI that discussed the relationship between the FMLA and the ADA. Many of those comments were discussed in Chapter VII of the Department's 2007 Report on the RFI comments (*see* 72 FR at 35599), and other sections of this preamble address comments that are relevant to those sections (*see, e.g.*, §§ 825.306–.307). The Department also received comments regarding the interaction between the FMLA and the ADA that are relevant to the job modification, light duty, and reassignment issues addressed in this section.

A number of organizations commented on the differences between the FMLA's and ADA's treatment of light duty work. Sections 825.702(d)(2) and 825.220(d) of the FMLA regulations provide that an employee may voluntarily accept a ''light duty'' assignment while recovering from a serious health condition, but cannot be coerced to do so. Under the ADA, an employer does not have to create a light duty position for an individual with a disability but, if a vacant, light duty position already exists, the employer must reassign the individual with a disability to the position if there is no other effective accommodation available and the reassignment would not pose an undue hardship. *See* EEOC, Workers' Compensation Guidance, at Questions 27 and 28. In addition, if the only effective accommodation available is similar or equivalent to a light duty position, an employer must provide that accommodation, absent undue

hardship. *See* EEOC, Workers' Compensation Guidance, at Question 27.

The Department also received comments regarding the differing standards under the FMLA and the ADA for transferring or reassigning employees to alternative positions. The FMLA permits an employer to temporarily transfer an employee who needs foreseeable intermittent or reduced schedule leave for planned medical treatment to an alternative position; however, the position must have equivalent pay and benefits. The position also must be one for which the employee is qualified and which better accommodates recurring periods of leave. Under the ADA, part-time work or occasional time-off may be a reasonable accommodation. As a general matter, reassignment is the accommodation of last resort under the ADA. However, if or when an employee's need for part-time work or reduced hours in his or her current position creates an undue hardship for an employer, the employer must transfer the employee to a vacant, equivalent position for which the employee is qualified, unless doing so would present an undue hardship for the employer. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Further accommodation is not required if a lower level position is also unavailable. *See* EEOC, Fact Sheet: ''The Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964'' (hereafter ''EEOC FMLA and ADA Fact Sheet''), at Question 13. Under the ADA, employers who place employees in lower level positions are not required to maintain the employee's salary at the level of the higher grade, unless the employer does so for other employees. *See* EEOC Technical Assistance Manual § 3.10.5.

Commenters also focused on the differences between the FMLA and the ADA with regard to the use of leave. Under current § 825.115, an eligible employee may use leave ''where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position.'' Other provisions of the FMLA allow an employee to take leave intermittently or on a reduced schedule. *See* 29 U.S.C. 2612(b); 29 CFR 825.203–.205. Under the ADA, an employee is entitled to reasonable accommodation, including medical leave, only if he or she has an impairment that ''substantially limits'' one or more major life activities. Moreover, an employer is not required to provide any accommodation that would pose an ''undue hardship'' on the operation of the employer's business. Neither the FMLA regulations nor the statute limits the availability of FMLA leave to situations where the employee's absence does not impose an ''undue hardship'' on the employer.

Although the Department received many comments seeking greater consistency between the FMLA and the ADA, the Department can do nothing to alter the fact that the two statutes serve distinctly different purposes, provide different rights, and have different eligibility criteria. Moreover, the FMLA legislative history clearly states that the ''purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection,'' and it specifically recognizes that ''the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA].'' S. Rep. No. 103–3, at 38 (1993). Therefore, the Department proposes no changes to this section (other than the addition of a new section addressing USERRA and the changed internal cross-reference, as described previously). However, the Department believes that both employees and employers would benefit from a better understanding of the interaction between the ADA and FMLA, and provides the following additional description of that interaction.

Although the FMLA adopts the ADA definition of ''essential functions,'' an FMLA ''serious health condition'' is not necessarily an ADA ''disability.'' An ADA ''disability'' is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. 42 U.S.C. 12102(2). Some FMLA ''serious health conditions'' may be ADA disabilities, for example, most cancers and serious strokes and some chronic conditions. Other ''serious health conditions'' may not be ADA disabilities, for example, pregnancy or a routine broken leg or hernia. This is because the condition is not an impairment (*e.g.*, normal pregnancy), or because the impairment is not substantially limiting (*e.g.*, a routine broken leg or hernia). *See* EEOC FMLA and ADA Fact Sheet, at Question 9.

Under the ADA, an employer is required to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability if it would not impose an ''undue hardship'' on the operation of the employer's business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation. Reasonable accommodation may include adapting existing facilities, job restructuring, modifying work schedules, acquiring or modifying equipment or devices, or adjusting or modifying policies. Reasonable accommodation can include reassignment to a vacant equivalent position, if available, or to a lesser position if an equivalent one is unavailable or causes undue hardship. An employer must provide an effective reasonable accommodation that does not pose an undue hardship, but need not provide the employee's preferred accommodation.

Generally, an individual with a disability (or his or her representative) must notify the employer of a request for reasonable accommodation. An individual may use ''plain English'' and the request need not be in writing or mention the ADA or the phrase ''reasonable accommodation.'' Instead, an individual must let the employer know that he or she needs an adjustment or change at work for a reason related to a medical condition. After receiving a request for reasonable accommodation, an employer and the individual with a disability should engage in an informal, ''interactive process'' to clarify what the individual needs and identify the appropriate reasonable accommodation. *See* 29 CFR pt. 1630 app. § 1630.9. As part of this ''interactive process,'' the employer may ask the individual relevant questions that will enable it to make an informed decision about the request. This includes asking what type of reasonable accommodation is needed. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his or her disability and functional limitations. *See* ''EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,'' revised Oct. 17, 2002, at Questions 1, 3, 5, and 6. This is similar to the rule under the FMLA (*see* § 825.302), where an employee need not assert his or her rights under the FMLA or even mention the FMLA to put the employer on notice of the need for FMLA leave, but must provide sufficient information to an employer so that the employer is aware that FMLA rights may be at issue. The proposed rule states that sufficient information includes information that indicates that

the employee is unable to perform the functions of the job, the anticipated duration of the absence, and whether the employee intends to visit a health care provider. Once the employer is put on notice of a FMLA leave request, the regulations specify what information must be exchanged between the employee and employer, rather than them engaging in an informal, ''interactive'' process.

Unpaid leave is a potential reasonable accommodation that an employer might need to provide to an otherwise qualified individual with a disability, unless (or until) it imposes an undue hardship on the operation of the employer's business. *See* 29 CFR pt. 1630 app. § 1630.2(o). An otherwise qualified individual with a disability may be entitled to additional unpaid leave as a reasonable accommodation under the ADA, beyond the 12 weeks of unpaid leave available under the FMLA, if the additional leave would not impose an undue hardship on the operation of the employer's business. Generally, unpaid leave is explored as a reasonable accommodation only after examining, through the interactive process, whether reasonable accommodations can be made to the employee's job to keep the employee at work. No set amount of leave is required as a reasonable accommodation under the ADA. The existence of the FMLA does not mean that more than 12 weeks of unpaid leave automatically imposes an undue hardship for purposes of the ADA. To evaluate whether additional leave would impose an undue hardship, the employer may consider the impact on its operations caused by the employee's initial 12-week absence, along with the undue hardship factors specified in the ADA and its regulations found at 29 CFR 1630.2(p). *See* EEOC FMLA and ADA Fact Sheet.

Under the ADA, a qualified individual with a disability may work part-time in his or her current position, or occasionally take time off, as a reasonable accommodation if it would not impose an undue hardship on the employer. If (or when) reduced hours create an undue hardship in the current position, the employer must see if there is another effective accommodation or if there is a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship while working a reduced schedule. If an equivalent position is not available, the employer must look for a vacant position at a lower level for which the employee is qualified. Continued accommodation is not required if a vacant position at a lower level is also unavailable. *See* EEOC FMLA and ADA Fact Sheet, at Question 13.

Under the ADA, an employer must continue health insurance coverage for an employee taking leave or working part-time only if the employer also provides coverage for other employees in the same leave or part-time status. The coverage must be on the same terms normally provided to those in the same leave or part-time status. *See* EEOC FMLA and ADA Fact Sheet, at Question 15. Under the FMLA, an employer must maintain the employee's existing level of coverage (including family or dependent coverage) under a group health plan during the period of FMLA leave, provided the employee pays his or her share of the premiums. 29 CFR 825.209–.210. An employer may not discriminate against an employee using FMLA leave, and therefore must also provide such an employee with the same benefits (*e.g.*, life or disability insurance) normally provided to an employee in the same leave or part-time status. 29 CFR 825.220(c).

Under the ADA, an employer and employee may agree to a transfer, on either a temporary or a permanent basis, if both parties believe that such a transfer is preferable to accommodating the employee in his or her current position. Note that a qualified individual with a disability who is using FMLA leave to work reduced hours, and/or has been temporarily transferred into another job under the FMLA, may also need a reasonable accommodation (*e.g.*, special equipment) to perform an essential function of the job. *See* 29 CFR 825.204(b).

Section 825.800 (Definitions)

Current § 825.800 contains the definitions of significant terms used in the regulations. Changes to definitions that were affected by the Department's proposed changes and clarifications have been made. Specifically, changes and clarifications have been made to the terms ''continuing treatment,'' ''eligible employee,'' ''employee,'' ''health care provider,'' ''serious health condition,'' ''parent,'' and ''son or daughter.''

Family Leave in Connection With Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty

Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008, amends the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation (collectively referred to herein as the military family leave provisions of H.R. 4986). The provisions of H.R. 4986 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of H.R. 4986 providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because a significant number of United States military servicemembers are currently on active duty or call to active duty status, the Department is fully aware of the need to issue regulations under the military family leave provisions of H.R. 4986 as soon as possible. Towards that end, the Department began preliminary consultations with the Departments of Defense and Veterans Affairs and the U.S. Office of Personnel Management (which will administer similar provisions regarding leave to care for a covered servicemember for most Federal employees) prior to the passage of H.R. 4986.

As it did in the initial notice of proposed rulemaking under the FMLA in 1993, 58 FR 13394 (Mar. 10, 1993), and in the interest of ensuring the expedient publication of regulations, the Department is including in this Notice a description of the relevant military family leave statutory provisions, a discussion of issues the Department has identified, and a series of questions seeking comment on subjects and issues that may be considered in the final regulations. 5 U.S.C. 553(b)(3) (notice of proposed rulemaking shall include ''either the terms or substance of the proposed rule or a description of the subjects and issues involved''). Because of the need to issue regulations as soon as possible so that employees and employers are aware of their respective rights and obligations regarding military family leave under the FMLA, the Department anticipates that the next step in the rulemaking process, after full consideration of the comments received in response to this Notice, will be the issuance of final regulations.

The Department strongly encourages the submission of any comments or concerns which should be considered in the course of developing the final regulations. Commenters are encouraged to identify any issues related to military family leave they believe need to be addressed—even if the Department has not identified such issues—and to offer

their views, with supporting rationale, as to how such issues should be addressed by the Department. Commenters also are invited to submit data relating to the economic impact of the FMLA provisions in H.R. 4986. The Department will undertake to implement the new military family leave provisions so as to maximize the benefits and minimize the burdens on both employees and employers consistent with the purposes of the FMLA.

Summary of the Military Family Leave Provisions and Regulatory Issues

The FMLA amendments in Section 585(a) of H.R. 4986 are summarized below. In addition to creating new leave entitlements, the FMLA provisions of H.R. 4986 include conforming amendments to incorporate the new leave entitlements into the current FMLA statutory provisions relating to the use of leave and to add certain new terms to the FMLA's statutory definitions. The FMLA amendments in H.R. 4986 raise a number of issues about which the Department seeks comment. Although specific issues for public comment are listed below after the discussion of each FMLA statutory amendment in H.R. 4986, commenters are encouraged to identify any issues they believe need to be addressed.

Section 101—Definitions

The military family leave provisions of H.R. 4986 add certain new terms to the FMLA's definitions. The Department is considering adding these definitions to proposed FMLA regulatory § 825.800 as follows:

The term ''Active duty'' is defined by H.R. 4986 as duty under a call or order to active duty under a provision of law referred to in 10 U.S.C. 101(a)(13)(B). This definition will be codified in the FMLA at 29 U.S.C. 2611(14). The Department believes that the Department of Defense is in the best position to determine when a servicemember has been called to active duty. Title 10 provides extensive information regarding a servicemember's active duty or call to active duty status, the terms of which, as noted in H.R. 4986, are referenced in Section 101(a)(13)(B) of that Title. Accordingly, the Department believes that the definition of ''active duty'' in the military family leave provisions of H.R. 4986 does not require further clarification and is considering adding it to proposed FMLA regulatory § 825.800 as currently defined in H.R. 4986, and cross-referencing 10 U.S.C. 101(a)(13)(B).

''Contingency operation'' is defined by the military family leave provisions of H.R. 4986 as a military operation designated by the Secretary of Defense as provided under 10 U.S.C. 101(a)(13). This definition will be codified in the FMLA at 29 U.S.C. 2611(15). The Department believes that the Department of Defense's definition of ''contingency operation'' found in Title 10 does not require further clarification; therefore, the Department is considering including a definition of ''contingency operations'' in proposed FMLA regulatory § 825.800 as currently defined in Section 585(a)(1) of H.R. 4986, and cross-referencing 10 U.S.C. 101(a)(13).

''Covered servicemember'' is defined by the military family leave provisions of H.R. 4986 as a member of the Armed Forces (including National Guard or Reserves) ''who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness.'' This definition will be codified in the FMLA at 29 U.S.C. 2611(16). The Department believes that determining whether a member of the Armed Forces is in outpatient status or is otherwise on the temporary disability retired list for a serious illness or injury is likely to be relatively straightforward. There may be issues, however, regarding what it means for a servicemember to be ''undergoing medical treatment, recuperation, or therapy'' for a serious illness or injury. The Department's initial view is that any treatment, recuperation, or therapy provided to a servicemember for a serious injury or illness, and not just that provided by the Armed Forces, should be covered. The Department solicits public comments on this issue. Should there be a temporal proximity requirement between the covered servicemember's injury or illness and the treatment, recuperation, or therapy for which care is required? Should the Department rely on a determination made by the Department of Defense as to whether a servicemember is undergoing medical treatment, recuperation, or therapy for a serious injury or illness?

''Outpatient status'' for a covered servicemember is defined by the military family leave provisions of H.R. 4986 as the status of a member of the Armed Forces assigned to (a) a medical treatment facility as an outpatient or (b) a unit established to provide command and control of members of the Armed Forces receiving medical care as outpatients. This definition will be codified in the FMLA at 29 U.S.C. 2611(17). The Department believes this definition does not require further clarification, and is considering including it in proposed FMLA regulatory § 825.800 as currently drafted in Section 585(a)(1) of H.R. 4986.

''Next of kin'' is defined by the military family leave provisions of H.R. 4986 as the ''nearest blood relative'' of an individual. This definition will be codified in the FMLA at 29 U.S.C. 2611(18). The Department is consulting with the Department of Defense regarding this definition. Preliminary information suggests that, for disposition of remains, personal effects and the release of records, the Department of Defense generally considers the following individuals ''next of kin'' of a servicemember in the following order: (1) Unremarried surviving spouse; (2) natural and adopted children; (3) parents; (4) remarried surviving spouses (except those who obtained a divorce from the servicemember or who remarried before a finding of death by the military); (4) blood or adoptive relatives who have been granted legal custody of the servicemember by court decree or statutory provisions; (5) brothers or sisters; (6) grandparents; (7) other relatives of legal age in order of relationship to the individual according to civil laws; and (8) persons standing in loco parentis to the servicemember. The Department seeks comments on whether it should adopt the above list of next of kin for purposes of the military family leave provisions. The Department also seeks comments on whether a definition of ''next of kin'' that relies on differing State law interpretations is appropriate, and whether a certification of ''next of kin'' status should be required. If such a certification is required, the Department seeks comments on who should issue such a certification, and its contents.

The Department also seeks public comments on the requirement in the military family leave provisions of H.R. 4986 that the next of kin be the ''nearest'' blood relative. Should the Department interpret this provision to mean that each covered servicemember may only have one next of kin who is eligible to take FMLA leave to provide care if the servicemember is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious illness or injury? The Department seeks comments on how to determine if an employee is the nearest blood relative of a covered servicemember when a servicemember has several relatives of close consanguinity still alive, and whether this language could be

interpreted to provide military caregiver leave to any eligible next of kin of a covered servicemember. If the nearest blood relative of a covered servicemember is unable or unwilling to provide care, should the next nearest blood relative of the covered servicemember be eligible to take FMLA leave to care for the wounded servicemember? The Department also seeks comments on whether it would be appropriate to permit a covered servicemember to designate any blood relative, or other individuals such as those recognized by the Department of Defense as the servicemember's Committed And Designated Representative (CADRE), as next of kin for purposes of FMLA leave taken to care for the servicemember.

''Serious injury or illness'' in the case of members of the Armed Forces, National Guard, or Reserves is defined by the military family leave provisions of H.R. 4986 as ''an injury or illness incurred by the member in line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' This definition will be codified in the FMLA at 29 U.S.C. 2611(19). The Department believes that the Departments of Defense or Veterans Affairs are likely in the best position to provide the standard for what constitutes a ''serious illness or injury'' that *may* ''render the member medically unfit to perform the duties of the member's office, grade, rank, or rating.'' Preliminary information suggests that the military branches already regularly provide, when requested, a medical certification to family members of covered servicemembers certifying that the member is seriously injured or ill and is actively receiving medical treatment. The Department seeks comments on whether a certification from the Departments of Defense or Veterans Affairs should be sufficient to establish whether a servicemember has a serious injury or illness that was incurred by the member in the line of duty while on active duty status in the Armed Forces, as well as on other approaches to determining whether a servicemember has an injury or illness that may render a servicemember medically unfit. The Department also seeks comments on whether H.R. 4986 permits eligible employees to take military caregiver leave under FMLA to care for a servicemember whose serious injury or illness was incurred in the line of duty but does not manifest itself until after the servicemember has left military service. In such circumstances, how would one determine whether the injury or illness renders, or may render, the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating, when the servicemember is no longer serving in the military?

The military family leave provisions of H.R. 4986 appear to rely on certain of the FMLA's existing definitions (*e.g.*, ''parent'', ''son or daughter'', and ''spouse''). Although H.R. 4986 does not change these definitions, the legislative history includes statements by members of Congress that suggest that the term ''son or daughter'' should be given a broader meaning under the military family leave provisions to include adult children. As discussed in greater detail below, the Department seeks comment on whether it would be appropriate to define some of these terms differently for purposes of leave taken because of a qualifying exigency or to care for a covered servicemember under the military family leave provisions of H.R. 4986.

Section 102(a)—Leave Entitlement

The military family leave provisions of H.R. 4986 add a new qualifying reason to take FMLA leave: ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(1)(E) and, by its terms, is not operative until the Secretary of Labor determines, by regulation, the qualifying exigencies that will entitle an eligible employee to take FMLA leave.

Representative Jason Altmire, who introduced this provision, made the following three statements on the House Floor regarding leave taken for a qualifying exigency:

> This amendment allows the immediate family of military personnel to use Family Medical Leave Act time for issues directly arising from deployment and extended deployments. The wife of a recently deployed military servicemember could use the Family and Medical Leave Act to arrange for childcare. The husband of a servicemember could use the Family Medical Leave Act to attend predeployment briefings and family support sessions. The parents of a deployed servicemember could take Family Medical Leave Act time to see their raised child off or welcome them back home. This amendment does not expand eligibility to employees not already covered by the Family Medical Leave Act * * *
>
> [W]hat this legislation does is allow family members of our brave men and women serving in the Guard and Reserve to use Family and Medical Leave Act time to see off, to see the deployment, or to see the members return when they come back, and to use that, importantly, to deal with economic issues, and get the household economics in order * * *
>
> It will allow military families to use family and medical leave time to manage issues such as childcare and financial planning that arise as a result of the deployment of an immediate family member.

153 Cong. Rec. H5258 (daily ed. May 16, 2007); 153 Cong. Rec. H15325 (daily ed. Dec. 12, 2007); 153 Cong. Rec. H15349 (daily ed. Dec. 12, 2007) (statements of Representative Altmire).

In addition to Representative Altmire's statements, in remarks on the Floor, Representative Tom Udall stated:

> For every soldier who is deployed overseas, there is a family back home faced with new and challenging hardships. The toll extends beyond emotional stress. From raising a child to managing household finances to day-to-day events, families have to find the time and resources to deal with the absence of a loved one. * * * The Altmire-Udall amendment would allow spouses, parents or children of military personnel to use Family and Medical Leave Act benefits for issues related directly to the deployment of a soldier. Current FMLA benefits allow individuals to take time off for the birth of a child or to care for a family member with a serious illness. The deployment of a soldier is no less of a crisis and certainly puts new demands on families. We should ensure that the FMLA benefits given in other circumstances are provided to our fighting families during their time of need.

153 Cong. Rec. E1076 (daily ed. May 17, 2007) (statement of Representative Udall).

Finally, Representative George Miller stated that:

> Under the amendment * * * a worker can take family and medical leave to deal with the issues that arise as a result of a spouse, parent, or child's deployment to a combat zone like Iraq or Afghanistan. Under this amendment family members can use the leave to take care of issues like making legal and financial arrangements and making child care arrangements or other family obligations that arise and double when family members are on active duty deployments * * * These deployments and extended tours are not easy on families, and two-parent households can suddenly become a single-parent household and one parent is left alone to deal with paying the bills, going to the bank, picking up the kids from school, watching the kids, providing emotional support to the rest of the family. You have got to deal with these predeployment preparations.

153 Cong. Rec. H5336 (daily ed. May 17, 2007) (statement of Representative Miller).

Given the statements above and Webster's Dictionary definition of ''exigency'' as ''the quality or state of requiring immediate aid or action, or a state of affairs that makes urgent demands,'' how should the Department define qualifying exigencies for purposes of the military family leave provisions of H.R. 4986? Should qualifying exigencies be limited to those items of an urgent or one-time nature arising from deployment as opposed to routine, everyday life occurrences? The military family leave provisions of H.R. 4986 would allow leave for any ''qualifying'' exigency arising out of the fact that the spouse, son, daughter, or parent of an eligible employee is on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation. Because the statute uses the word ''qualifying'', it is the Department's initial view that not every exigency necessarily will entitle a military family member to leave. It also is the Department's initial view that there must be some nexus between the eligible employee's need for leave and the servicemember's active duty status. The Department solicits comments on the degree of nexus required to demonstrate that the exigency arises out of the servicemember's active duty status. In light of the fact that this new entitlement to leave would be in addition to the existing qualifying reasons for FMLA leave, which already permit an eligible employee to take FMLA leave to care for a son or daughter, parent, or spouse with a serious health condition, the Department's initial view is that leave for qualifying exigencies should be limited to non-medical related exigencies, as suggested by Representative Altmire's statements. The Department seeks comment on these issues and on whether it would be appropriate to develop a list of pre-deployment, deployment, and post-deployment qualifying exigencies. If so, should the following types of exigencies qualify: making arrangements for child care; making financial and legal arrangements to address the servicemember's absence; attending counseling related to the active duty of the servicemember; attending official ceremonies or programs where the participation of the family member is requested by the military; attending to farewell or arrival arrangements for a servicemember; and attending to affairs caused by the missing status or death of a servicemember? Are there other types of exigencies that should qualify? Additionally, should such a list be a *per se* list of qualified exigencies?

Although Representative Altmire's statements suggest that a parent of an adult son or daughter should be permitted to take FMLA leave for a qualifying exigency arising out of the deployment of the son or daughter, the military family leave provisions of H.R. 4986 do not alter the current FMLA definition of ''son or daughter.'' Under this definition, a son or daughter must either be (1) under the age of 18 or (2) 18 years of age or older and incapable of self-care because of a mental or physical disability. 29 U.S.C. 2611(12). The Department recognizes that applying this definition of ''son or daughter'' to leave taken because of a qualifying exigency would mean parents would only be able to take FMLA leave because of a qualifying exigency if their son or daughter is under the age of 18 or older than age 18 and incapable of self-care because of a mental or physical disability. By Federal law, however, the minimum age for enlistment in the United States Military is 17 (with parental consent). 10 U.S.C. 505. Moreover, children over the age of 18 who are incapable of self-care are unlikely to be found medically qualified to perform military duties. Therefore, the Department seeks comments on whether it would be appropriate, given the language of H.R. 4986, to define the term ''son or daughter'' differently for purposes of FMLA leave taken because of a qualifying exigency.

The military family leave provisions of H.R. 4986 also establish an additional leave entitlement that permits an ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember'' to ''a total of 26 workweeks of leave during a 12-month period to care for the servicemember.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(3). A number of issues regarding the application of this new FMLA leave entitlement are discussed below. The Department invites comments on these, and any other issues, related to the provision of FMLA leave to care for a covered servicemember.

First, as with leave taken for a qualifying exigency, the military caregiver provision of H.R. 4986 does not alter the current FMLA definition of ''son or daughter'' for purposes of defining who is eligible to take leave to care for a covered servicemember. Thus, the only sons or daughters who will be eligible to take FMLA leave to care for a seriously injured servicemember will be those who are under the age of 18 or age 18 or older and incapable of self-care because of a mental or physical disability. One alternative would be for the Department to define ''next of kin'' as including children of covered servicemembers. The Department could then define the term ''children'' more expansively than the term ''son or daughter'' is currently defined in the FMLA to allow adult children of covered servicemembers to take FMLA leave to care for a covered servicemember. Alternatively, the Department could define the term ''son or daughter of a covered servicemember'' differently than the term ''son or daughter.'' The Department seeks comments on these approaches, whether these approaches are allowed by the military family leave provisions of H.R. 4986, and whether it is appropriate to define the term ''son or daughter'' differently for purposes of FMLA leave taken to care for a covered servicemember.

Second, the military family leave provisions of H.R. 4986 provide that leave to care for a covered servicemember shall only be available ''during a single 12-month period.'' The amendments do not specify whether that 12-month period should be calculated from the date of the servicemember's injury, the date of the determination that the servicemember has a serious injury or illness, the first date on which an eligible employee is needed to care for a seriously injured servicemember, or on some other basis. Current and proposed § 825.200 of the FMLA regulations permits an employer to choose any of the following methods when determining the 12-month period in which the current 12 weeks of FMLA leave entitlement occurs: (1) The calendar year; (2) any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's anniversary date; (3) the 12-month period measured forward from the date any employee's first FMLA leave begins; or, (4) a ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave. The Department seeks comments on how the ''single 12-month period'' should be measured for purposes of determining entitlement to leave to care for a covered servicemember. For example, should an employer be permitted to choose a method when determining the 12-month period in which the 26 workweeks of leave entitlement to care for a covered servicemember occurs, as is the case for other types of FMLA-qualifying leave? What distinctions should the Department draw between calculating the 12-month period for leave to care for a covered servicemember and the other

qualifying reasons for FMLA leave? The Department also seeks comments on how to reconcile this single 12-month period to the employer's regular FMLA leave year, if different 12-month periods are used.

Third, the military family leave provisions of H.R. 4986 provide that the eligible employee is entitled to a total of 26 workweeks of leave during a single 12-month period to care for a covered servicemember. Is the 26 workweek leave entitlement to care for a covered servicemember a one-time entitlement or may an employee have multiple entitlements? The FMLA currently provides that an eligible employee is entitled to a total of 12 workweeks of leave during the relevant 12-month period. The 12 workweeks of leave may be taken for any qualifying FMLA reason until the leave is exhausted in the relevant 12-month period. Assuming the employee continues to meet the eligibility requirements, the employee may take leave again (up to 12 weeks) for any qualifying FMLA reason in a new leave year. The Department seeks comments on whether a similar approach to leave taken to care for a covered servicemember would be appropriate even though the leave entitlement to care for a covered servicemember is limited to a ''single 12-month period'' under the military family leave provisions of H.R. 4986.

Given the statutory language of H.R. 4986, can the 26 workweek leave entitlement be interpreted to apply per covered servicemember, *i.e.*, each eligible employee may take 26 workweeks of leave to care for each covered servicemember? Under this reading, an eligible employee would be permitted to take 26 workweeks of leave to care for his or her spouse who is a covered servicemember in a 12-month period, and could take another 26 workweeks of leave to care for his or her parent who is a covered servicemember in another 12-month period. Could an employee take leave to care for both a spouse and a child who are covered servicemembers in the same 12-month period? Alternatively, could the 26 workweek leave entitlement be calculated per injury of a covered servicemember, such that an eligible employee may take 26 workweeks of leave during a single 12-month period to provide care to a covered servicemember and then may take another 26 workweeks of leave during a different 12-month period to provide care to the same covered servicemember who is experiencing a second serious injury or illness? The 26 workweek leave entitlement also may be viewed as a one-time entitlement to each eligible employee. This interpretation would permit each eligible employee to take 26 workweeks of leave during any single 12-month period, but would not entitle that employee to any additional periods of military family leave to care for the same or other covered servicemembers while still employed by the same covered employer. In this circumstance, does the 12-month limitation continue to apply to the employee in the event he or she goes to work for a different employer? Under any of these examples, should an employee be permitted to take more than 26 workweeks of leave during a single 12-month period? The Department seeks comments on these and any other options relating to how this provision should be interpreted.

Fourth, because leave to care for a covered servicemember with a serious illness or injury may, in some circumstances, also qualify as leave to care for a spouse, parent, or child with a serious health condition, the Department seeks comments on how such leave should be designated. In particular, the Department seeks comments on whether the employee or employer should be able to select whether the leave is counted as FMLA leave taken to care for a covered servicemember or FMLA leave taken to care for a spouse, parent or child with a serious health condition. The Department also seeks comments on whether an initial designation of this leave as one type of FMLA leave may be changed retroactively in any circumstances.

Finally, the military family leave provisions of H.R. 4986 provide for a combined total of 26 workweeks of FMLA leave for an eligible employee who takes leave to care for a covered servicemember as well as leave for other FMLA-qualifying reasons during the applicable 12-month period. The military family leave provisions of H.R. 4986 do not limit the availability of leave to an eligible employee for other FMLA-qualifying reasons during any other 12-month period. These provisions will be codified in the FMLA at 29 U.S.C. 2612(a)(4). How should these provisions be implemented if different methods are used to calculate the 12-month period for leave taken to care for a covered servicemember versus leave for other FMLA-qualifying reasons?

Section 102(b)—Requirements Relating to Leave Taken Intermittently or on a Reduced Leave Schedule

The military family leave provisions of H.R. 4986 allow eligible employees to take FMLA leave to care for a covered servicemember intermittently or on a reduced leave schedule when medically necessary. Eligible employees also are permitted to take FMLA leave for a qualifying exigency intermittently or on a reduced leave schedule. These provisions will be codified in the FMLA at 29 U.S.C. 2612(b)(1). The military family leave provisions of H.R. 4986 also permit an employer to require an employee taking FMLA leave to care for a covered servicemember who is undergoing planned treatment to temporarily transfer to an available alternative position with equivalent pay and benefits that better accommodates recurring periods of intermittent leave or leave on a reduced leave schedule. This is the case currently for FMLA leave taken for planned medical treatment due to the employee's own serious health condition or the serious health condition of a spouse, son, daughter, or parent. The military family leave provisions of H.R. 4986 do not specifically provide for such temporary transfers when FMLA leave is taken for a qualifying exigency. The Department seeks comment on whether it would be appropriate to permit temporary transfers when FMLA leave is taken on an intermittent or reduced leave schedule basis for a qualifying exigency. The Department also seeks comment on how H.R. 4986's provisions regarding leave taken intermittently or on a reduced leave schedule should be incorporated into proposed FMLA regulatory § 825.202, which generally explains the taking of FMLA leave intermittently or on a reduced leave schedule, and proposed FMLA regulatory § 825.204, which covers temporary transfers.

Section 102(d)—Relationship to Paid Leave

The military family leave provisions of H.R. 4986 amend the statutory provisions for substitution of paid leave to include the new FMLA leave entitlements. These amendments will be codified in the FMLA at 29 U.S.C. 2612(d). Under the military family leave provisions of H.R. 4986, an eligible employee may elect, or an employer may require, that an employee substitute any accrued paid vacation leave, personal leave, or family leave for unpaid FMLA leave taken because of a qualifying exigency. In addition, the military family leave provisions of H.R. 4986 permit an eligible employee to elect, or an employer to require, that an employee substitute any accrued paid vacation leave, personal leave, family leave, or medical or sick leave for unpaid FMLA leave taken to care for a covered servicemember. The Department is considering how to

incorporate the military family leave provisions into proposed FMLA regulatory § 825.207, which addresses the substitution of paid leave for unpaid FMLA leave. Because that section as currently proposed in this NPRM refers generally to the substitution of paid leave for unpaid FMLA leave, the Department does not believe that specific reference to the new types of leave entitlement is required. The Department also seeks comments on alternative approaches relating to substitution of paid leave for military family leave provided under H.R. 4986.

Section 102(e)—Employee Notice

The military family leave provisions of H.R. 4986 extend to the new leave provision related to care for a servicemember the FMLA's existing requirements for employees to provide advance notice when the need for leave is foreseeable based on planned medical treatment, and for making reasonable efforts to schedule planned medical treatment so as not to disrupt unduly the employer's operations. The military family leave provisions of H.R. 4986 also provide for new notice requirements for leave taken due to qualifying exigencies whenever the need for such leave is foreseeable. The military family leave provisions of H.R. 4986 require that eligible employees provide notice to the employer that is ''reasonable and practicable'' in these circumstances. These amendments will be codified in the FMLA at 29 U.S.C. 2612(e)(2) and (e)(3).

Under the proposed FMLA regulations in this NPRM, an employee must generally provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, a medical emergency, or because the leave is unforeseeable, notice must be given as soon as practicable under the particular facts and circumstances. For a further discussion of the employee notice requirements proposed in this NPRM, see the preamble discussion of proposed FMLA regulatory §§ 825.302 and 825.303.

The Department's initial view is that these same notice requirements should be extended to leave taken to care for a covered servicemember. If the same notice requirements were adopted, an employee taking FMLA leave to care for a covered servicemember generally would be expected to provide the employer at least 30 days advance notice before FMLA leave is to begin when the need for the leave is foreseeable based on planned medical treatment for the covered servicemember. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, a medical emergency, or because the leave is unforeseeable, notice must be given as soon as practicable under the particular facts and circumstances. The Department seeks comments on whether it should incorporate leave to care for a covered servicemember into the notice provisions of proposed FMLA regulatory §§ 825.302 and 825.303. The Department also is considering applying the requirements in proposed FMLA regulatory §§ 825.302(c) and 825.303(b), which require that the employee provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave and provide information regarding the anticipated timing and duration of the leave, to the taking of FMLA leave to care for a covered servicemember. Finally, the Department requests comments on whether proposed FMLA regulatory §§ 825.203 and 825.302(e), which address an employee's obligation to make a reasonable effort to schedule foreseeable leave for planned medical treatment so as not to disrupt unduly the employer's operations, should specifically reference the requirement in H.R. 4986 that servicemember family leave that is foreseeable based on planned medical treatment be scheduled in the same manner.

The military family leave provisions of H.R. 4986 provide that an employee taking leave due to a qualifying exigency provide ''such notice to the employer as is reasonable and is practicable.'' The Department's initial view is that the notice requirements in proposed FMLA regulatory §§ 825.302 and 825.303 also should be applied to leave taken due to qualifying exigencies. If different notice requirements should be used, the Department seeks comments on what should be required. For example, should the notice timing requirements for leave taken due to qualifying exigencies distinguish between foreseeable leave and unforeseeable leave, as proposed FMLA regulatory §§ 825.302 and 825.303 do? Additionally, leave taken because of a qualifying exigency may not involve a medical condition; therefore, the Department seeks comments on the type of information an employee should provide to the employer in order for the notice to be sufficient to make the employer aware that the employee's need is FMLA-qualifying.

These changes also will likely require that the Department make conforming changes to proposed FMLA regulatory § 825.301(b), which generally addresses employee responsibilities to provide notice of the need for FMLA leave. The exact nature of the changes will depend on whether the same notice standards are applied to all qualifying reasons for FMLA leave. The Department believes that the general notice principles set forth in proposed FMLA regulatory § 825.301 should apply to all qualifying reasons for FMLA leave. The public is invited, however, to comment on this issue and provide alternative views.

Section 102(f)—Leave Entitlements for Spouses Employed by the Same Employer

Under the military family leave provisions of H.R. 4986, an employer may limit the aggregate amount of leave to which eligible spouses employed by the same employer may be entitled in some circumstances. H.R. 4986 provides that a husband and wife employed by the same employer are limited to a combined total of 26 workweeks of leave during the relevant 12-month period if the leave taken is to care for a covered servicemember or a combination of leave taken to care for a covered servicemember and leave for the birth or placement of a healthy child or to care for a parent with a serious health condition. This provision does not alter the existing 12-week limitation that applies to leave taken by a husband and wife employed by the same employer for leave for the birth or placement of a healthy child or to care for a parent with a serious health condition (*e.g.*, a husband and wife employed by the same employer could take no more than a combined total of 12 weeks of FMLA leave for the birth or placement of a healthy child in a 12-month period, even if the husband and wife combined took fewer than 14 weeks of leave to care for a covered servicemember, in that same period). These provisions will be codified in the FMLA at 29 U.S.C. 2612(f). How should the Department incorporate the same employer limitation of the military family leave provisions of H.R. 4986 into the regulatory scheme proposed in this NPRM? The Department specifically seeks comments on how H.R. 4986's limitation on spouses employed by the same employer would interact with FMLA's existing limitation

on spouses employed by the same employer if different 12-month periods are used to determine eligibility for leave taken to care for a covered servicemember and other FMLA-qualifying leave.

Conforming regulatory changes likely will be required to proposed FMLA regulatory § 825.120(a)(3), which discusses the applicability of the same employer limit to FMLA leave taken for pregnancy or birth; proposed FMLA regulatory § 825.121(a)(3), applying the same employer limit to FMLA leave taken for adoption or foster care; and proposed FMLA regulatory § 825.201(b), which discusses the same employer limit in the context of FMLA leave taken to care for a parent with a serious health condition. The Department requests comments on how these sections should be changed to incorporate the same employer limit in the military family leave provisions of H.R. 4986.

Section 103—Certification

The military family leave provisions of H.R. 4986 allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered servicemember. In addition, the military family leave provisions of H.R. 4986 provide for a new certification related to leave taken because of a qualifying exigency. Under the military family leave provisions of H.R. 4986, an employer may require that leave taken because of a qualifying exigency be ''supported by a certification issued at such time and in such manner as the Secretary may by regulation prescribe.'' These provisions will be codified in the FMLA at 29 U.S.C. 2613.

The military family leave provisions of H.R. 4986 amend FMLA's current certification requirements to permit an employer to request that leave taken to care for a covered servicemember be supported by a medical certification. FMLA's current certification requirements, however, focus on providing information related to a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of H.R. 4986 do not explicitly require that a sufficient certification for purposes of military caregiver leave provide relevant information regarding the covered servicemember's serious injury or illness, such as whether the injury was incurred by the member in the line of duty while on active duty in the Armed Forces, or whether the injury may render the member medically unfit to perform the duties of the member's office, grade, rank, or rating. In light of this, the Department seeks comments on the appropriate certification requirements for military caregiver leave, including whether it would be appropriate to interpret FMLA's statutory certification requirements differently for purposes of leave taken to care for a covered servicemember.

Furthermore, FMLA currently provides that an employer may request a medical certification issued by the health care provider of the employee's son, daughter, spouse, or parent in order to support a request for FMLA leave to care for a spouse, parent, or child with a serious health condition. 29 U.S.C. 2613. Although the leave entitlement provisions of H.R. 4986 permit an eligible employee who is the next of kin of a covered servicemember to take military family leave, H.R. 4986's certification requirements appear to permit an employer to obtain certification issued by the health care provider of the employee's next of kin, rather than the covered servicemember. The Department believes that an employer should only be able to obtain a certification from the health care provider or military branch of the covered servicemember for whom the eligible employee is caring. The Department seeks comment on whether it is appropriate to interpret the military family leave provisions of H.R. 4986 in this manner when a medical certification is sought for leave taken by an eligible employee who is the next of kin of a covered servicemember.

The Department is considering whether a medical certification to support leave taken to care for a covered servicemember issued by the Departments of Defense or Veterans Affairs would, in all cases, eliminate the need to both define a sufficient medical certification for purposes of taking leave to care for a covered servicemember and develop a clarification, authentication, validation, and recertification process for leave taken for this purpose. The Department also seeks comment on whether, and how, to incorporate the new certification requirement for leave taken to care for a covered servicemember into proposed FMLA regulatory § 825.305, which describes the general rule applicable to FMLA medical certifications; and proposed FMLA regulatory § 825.306, which addresses the required content of a FMLA medical certification. In light of the fact that many of the certifications supporting leave taken to care for a covered servicemember may be issued by the Departments of Defense or Veterans Affairs, the Department specifically seeks comment on whether there should be different timing requirements that an employee must follow when providing such certification. Likewise, should the content of a sufficient medical certification be different when it is required to support a leave request to care for a covered servicemember? Should the clarification, authentication, and second and third opinion provisions of proposed FMLA regulatory § 825.307 and the recertification provisions in proposed FMLA regulatory § 825.308 be applied to certifications supporting FMLA leave taken to care for a covered servicemember, and, if so, how?

The military family leave provisions of H.R. 4986 also permit the Secretary of Labor to prescribe a new certification requirement for leave taken because of a qualifying exigency arising out of a servicemember's active duty or call to active duty. The Department is considering how to implement such a requirement and seeks comments on the following specific issues:

(A) What type of information should be provided in a certification related to active duty or call to active duty status in order for it to be considered complete and sufficient? Should the certification merely require confirmation of the covered servicemember's active duty status?

(B) Who may issue a certification related to active duty or call to active duty status? Should anyone other than the Department of Defense provide a certification of the covered servicemember's active duty or call to active duty status?

(C) The Department's initial view is that an employee also must provide certification that an absence(s) is due to a qualifying exigency. Because the military family leave provisions of H.R. 4986 require that the qualifying exigency arise out of the covered servicemember's active duty or call to active duty status in support of a contingency operation, should any required certification specify that the requested leave is a qualifying exigency or that it arises out of the covered servicemember's active duty or call to active duty status in support of a contingency operation?

(D) Should an employee seeking FMLA leave due to a qualifying exigency provide certification of the qualifying exigency by statement or affidavit? Who else might certify that a particular request for FMLA leave is because of a qualifying exigency?

(E) Should the certification requirements for leave taken because of a qualifying exigency vary depending on

the nature of the qualifying exigency for which leave is being taken?

(F) What timing requirements should be applied to certifications related to leave taken because of a qualifying exigency?

(G) Who should bear the cost, if any, of obtaining certifications related to leave taken because of a qualifying exigency?

(H) Should an employer be permitted to clarify, authenticate, or validate an active duty or call to active duty certification? Likewise, should an employer be permitted to clarify, authenticate, or validate a certification that a particular event is a qualifying exigency? If so, what limitations, if any, should be imposed on an employer's ability to seek such clarification, authentication, or validation for both types of certifications?

(I) Should a recertification process be established for certifications related to leave taken because of a qualifying exigency? If so, how would that process compare to the current FMLA recertification process?

Section 104(c)—Maintenance of Health Benefits

Under the FMLA, an employer must maintain group health insurance coverage for an eligible employee on FMLA leave on the same terms as if the employee continued to work. 29 U.S.C. 2614(c). When an eligible employee takes qualifying leave to care for a covered servicemember and fails to return from leave after the period of leave entitlement has expired, under the FMLA amendments in H.R. 4986, the employer may recover the premiums paid for maintaining the employee's group health plan coverage during any period of unpaid leave if the employee fails to return to work for a reason other than the continuation, recurrence, or onset of a serious health condition that entitles the employee to leave or other circumstances beyond the control of the employee. In addition, the military family leave provisions of H.R. 4986 provide that an employer may require an employee to support a claim that he or she did not return to work after taking military caregiver leave because of the continuation, recurrence, or onset of a serious health condition with a certification issued by the health care provider of the servicemember being cared for by the employee. These provisions will be codified in the FMLA at 29 U.S.C. 2614(c)(2)–(3).

These new requirements focus on whether an employee does not return to work because of the continuation, recurrence, or onset of a serious health condition—a term that is not relevant to leave taken to care for a covered servicemember. At the same time, the military family leave provisions of H.R. 4986 do not explicitly address whether an employer may recover premiums paid when an employee fails to return to work because of the continuation, recurrence, or onset of a serious injury or illness of the covered servicemember. Likewise, the military family leave provisions of H.R. 4986 do not specifically provide that an employer may obtain a certification regarding the continuation, recurrence, or onset of the servicemember's serious injury or illness if an employee does not return to work after taking FMLA leave to care for a covered servicemember. In light of this, the Department seeks comments on how to appropriately implement these provisions of H.R. 4986.

The Department is considering revisions to proposed FMLA regulatory § 825.213(a) to incorporate these new requirements. The Department believes that proposed FMLA regulatory § 825.213(a)(1) will need to be changed in order to address an employee's failure to return to work after taking leave to care for a covered servicemember. Proposed FMLA regulatory § 825.213(a)(3) also will need to be changed to provide that an employer may require an employee to provide a certification issued by the health care provider of the covered servicemember being cared for by the employee. The Department requests comments on how the requirements in H.R. 4986 should be incorporated into these proposed FMLA regulatory provisions, and whether any additional guidance may be required on this topic.

Section 107—Enforcement

The military family leave provisions of H.R. 4986 provide for conforming amendments to the FMLA to include the new leave entitlements in the FMLA's statutory enforcement scheme. These provisions will be codified in the FMLA at 29 U.S.C. 2617 and amend FMLA's damages provision to provide for the recovery of damages equal to any actual monetary losses sustained by the employee up to a total of 26 weeks (rather than the current 12 weeks) in a case involving leave to care for a covered servicemember in which wages, salary, employment benefits or other compensation have not been denied or lost to the employee.

The Department believes that a similar revision is required to FMLA regulatory § 825.400(c). That regulatory provision currently and as proposed in this NPRM provides that an employee is entitled to actual monetary losses sustained by an employee as a direct result of an employer's violation of one or more of the provisions of FMLA up to a total of 12 weeks of wages. In order to reflect that the leave provisions relating to care for a covered servicemember provide up to 26 weeks of leave, the Department anticipates changing FMLA regulatory § 825.400(c) to provide that, in a case involving a violation of the military family leave provisions, an employee is entitled to actual monetary losses sustained up to a total of 26 weeks of wages. The Department does not believe that further changes to the FMLA regulatory provisions on enforcement are required in order to implement the military family leave provisions of H.R. 4986. The Department invites the public to comment on this and any other enforcement provisions that they believe may need to be revised.

Section 108—Instructional Employees

The military family leave provisions of H.R. 4986 also extend the entitlement to take FMLA leave to care for a covered servicemember and because of a qualifying exigency to eligible instructional employees of local educational agencies. In order to implement this revision, H.R. 4986 contains three statutory changes to the FMLA, which will be codified in subsections (c)(1), (d)(2), and (d)(3) of 29 U.S.C. 2618, and apply the current FMLA rules regarding the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term, by employees of local educational agencies to certain leave taken to care for a covered servicemember by these same employees. The Department believes that three related regulatory changes are required to incorporate these provisions of H.R. 4986 into the FMLA regulatory scheme proposed in this NPRM, which other than changes to titles and very minor editorial changes is the same as the instructional employee provisions in the current FMLA regulations.

First, the military family leave provisions of H.R. 4986 provide that an employer covered by 29 U.S.C. 2618 could require that, in the case of an instructional employee who requests FMLA leave intermittently or on a reduced leave schedule for foreseeable planned medical treatment of a covered servicemember and who, as a result, will be on leave for greater than 20 percent of the total number of working days during the period of leave, the employee choose to either (1) take leave for a period or periods of particular duration; or (2) transfer temporarily to an available alternative position with equivalent pay and benefits that better

accommodates recurring periods of leave. In order to incorporate this change, the Department believes a minor technical revision is required to current and proposed FMLA regulatory § 825.601(a)(1) to provide that the provisions of that section apply when an eligible instructional employee needs intermittent leave or leave on a reduced schedule to care for a covered servicemember, in addition to applying to situations where the employee takes such leave to care for a family member or for the employee's own serious health condition. In all three cases, the provision would continue to apply only to intermittent leave or leave on a reduced leave schedule which is foreseeable based on planned medical treatment and requires the employee to be on leave for more than 20 percent of the total number of working days over the period the leave would extend.

Second, the military family leave provisions of H.R. 4986 extend some of the limitations on leave near the end of an academic term to leave requested during this period to care for a covered servicemember. The Department believes that several FMLA regulatory sections will need to be changed in order to apply the limitations on leave near the end of an academic term to military family leave. Current and proposed FMLA regulatory § 825.602(a)(2) provides that, where an instructional employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of the term, the employer may require the employee to continue taking leave until the end of the term if the leave will last more than two weeks and the employee would return to work during the two-week period before the end of the term. Because the military family leave provisions of H.R. 4986 only extend this limitation on leave near the end of an academic term to leave taken to care for a covered servicemember, and not leave taken because of a qualifying exigency, the Department believes that this FMLA regulatory section may need to be changed in order to specifically reference the types of leave that are subject to the limitation: (1) Leave because of the birth of a son or daughter, (2) leave because of the placement of a son or daughter for adoption or foster care, (3) leave taken to care for a spouse, parent, or child with a serious health condition, and (4) leave taken to care for a covered servicemember. A similar revision also may be required to FMLA regulatory § 825.602(a)(3), which currently and as proposed in this NPRM provides that an employer may require an instructional employee to continue taking leave until the end of the term where the employee begins leave which will last more than five working days for a purpose other than the employee's own serious health condition during the three-week period before the end of the term.

The Department invites comments on whether additional revisions are required to the regulatory provisions governing local educational institutions in light of the military family leave provisions of H.R. 4986.

Incorporation of New FMLA Leave Entitlements Into Proposed FMLA Regulatory Scheme

In addition to the issues discussed above, the Department specifically requests comments on whether the FMLA leave entitlements in H.R. 4986 should generally be incorporated into the FMLA regulatory scheme proposed in this NPRM, or whether stand-alone regulatory sections should be created for one or both of the military family leave provisions of H.R. 4986. The Department seeks comments on which of these approaches would be most beneficial for employees and employers.

Although not specified in the military family leave provisions of H.R. 4986, the Department believes that a number of additional conforming changes may be required to the proposed FMLA regulations in this NPRM in order to fully integrate the military family leave provisions into FMLA's regulatory scheme. For example, proposed FMLA regulatory § 825.100 may need to be changed to incorporate a discussion of the new leave entitlements into the general description of what the FMLA provides. Similarly, proposed FMLA regulatory § 825.112(a), which provides the general rule regarding the circumstances that will qualify for leave, may need to be changed to reference the two qualifying reasons for FMLA leave in H.R. 4986.

The Department also plans on changing the proposed poster and general notice to incorporate the military family leave provisions of H.R. 4986. The Department's initial view is that these new qualifying reasons for FMLA leave should be incorporated into the poster and general notice discussed in proposed FMLA regulatory § 825.300(a). However, the Department seeks comments on whether a separate poster and general notice should be created for military family leave. The proposed eligibility and designation notices in FMLA regulatory § 825.300(b) and (c) also will need to incorporate appropriate references to military family leave. The Department seeks comments on how these notices should be revised in order to incorporate these new FMLA leave entitlements.

The Department seeks public comment on whether there are additional regulatory sections that should be reexamined in light of the military family leave provisions of H.R. 4986. The questions set forth above are not intended to be an exhaustive list of issues that might arise when FMLA leave is taken to care for a covered servicemember or because of a qualifying exigency. The Department encourages the public to identify any other issues which should be considered during the rulemaking process.

Paperwork Reduction Act

In accordance with requirements of the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*, and its attendant regulations, 5 CFR part 1320, the DOL seeks to minimize the paperwork burden for individuals, small businesses, educational and nonprofit institutions, Federal contractors, State, local and tribal governments, and other persons resulting from the collection of information by or for the agency. The PRA typically requires an agency to provide notice and seek public comments on any proposed collection of information contained in a proposed rule. *See* 44 U.S.C. 3506(c)(2)(B); 5 CFR 1320.8. Persons are not required to respond to the information collection requirements as contained in this proposal unless and until they are approved by the OMB under the PRA at the final rule stage.

This ''paperwork burden'' analysis estimates the burdens for the proposed regulations as drafted. In addition and as already discussed, the military family leave provisions of H.R. 4986 amend the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers and because of any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The new statutory provisions will be codified at 29 U.S.C. 2612(e)(2) and (e)(3). The earlier preamble discussion on *Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty* provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments. Because of the need to issue regulations as soon as possible so that employees and employers are aware of the respective rights and obligations

regarding military family leave under the FMLA, the Department anticipates issuing, after full consideration of the comments received in response to this Notice, final regulations that will include necessary revisions to the currently proposed FMLA information collections.

As will be more fully explained later, many of the estimates in the analysis of the ''paperwork'' requirements derive from data developed for the Preliminary Regulatory Impact Analysis (PRIA) under E.O. 12866. However, the specific needs that the PRA analysis and PRIA are intended to meet often require that the data undergo a different analysis to estimate the burdens imposed by the ''paperwork'' requirements from the analysis used in estimating the effect the regulations will have on the economy. Consequently, the differing treatment that must be undertaken in the PRA analysis and the PRIA may result in different results. For example, the PRA analysis measures the total burden of the information collection; however, the PRIA measures the incremental changes expected to result from the proposed regulatory changes. Thus, the PRA analysis will calculate a paperwork burden for an information collection that remains unchanged from the current regulation and the PRIA will not consider that item. Conversely, the regulatory definition for ''collection of information'' for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public. 5 CFR 1320.3(c)(2). The PRIA, however, may need to consider the impact of any regulatory changes in such notifications provided by the government. For example, in the context of the proposed FMLA changes, the general notice that employers currently must develop and provide to their workers is proposed to be replaced with a notice using wording provided by the DOL that employers must periodically provide to their employees. This proposed DOL-provided FMLA notice would not be a ''collection of information'' for PRA purposes; therefore, the proposal reduces burden for PRA purposes. The PRIA, however, must address the economic impact of the frequency with which employers must provide the DOL's FMLA notice under the proposed change to the regulations. Finally, the PRA definition of ''burden'' can exclude the time, effort, and financial resources necessary to comply with a collection of information that would be incurred by persons in the normal course of their activities (*e.g.,* in compiling and maintaining business records). 5 CFR 1320.3(b)(2). The PRIA, however, must consider the economic impact of any changes in the proposed regulation.

Circumstances Necessitating Collection: The FMLA requires private sector employers of 50 or more employees and public agencies to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to ''eligible'' employees for certain family and medical reasons (*i.e.,* for birth of a son or daughter, and to care for the newborn child; for placement with the employee of a son or daughter for adoption or foster care; to care for the employee's spouse, son, daughter, or parent with a serious health condition; and because of a serious health condition that makes the employee unable to perform the functions of the employee's job). FMLA section 404 requires the Secretary of Labor to prescribe such regulations as necessary to enforce this Act. 29 U.S.C. 2654. The proposed regulations provide for the following information collections, many of which are third-party notifications between employers and employees.

A. Employee Notice of Need for FMLA Leave [29 U.S.C. 2612(e); 29 CFR 825.100(d), 825.301(b), 825.302, and 825.303]. An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days' notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable under the facts and circumstances of the particular case. In neither case must an employee expressly assert rights under the FMLA or even mention the FMLA. The employee must, however, provide information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. An employer, generally, may require an employee to comply with its usual and customary notice and procedural requirements for requesting leave.

B. Notice to Employee of FMLA Eligibility [29 CFR 825.219 and 825.300(b)]. When an employee requests FMLA leave or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice must provide information regarding the employee's eligibility for FMLA leave, detail the specific responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. The employer generally must provide the notice the first time in each six-month period that an employee gives notice of the need for FMLA leave; however, if the specific information provided by the notice changes with respect to a subsequent period of FMLA leave, the employer would need to provide an updated notice.

C. Medical Certification and Recertification [29 U.S.C. 2613, 2614(c)(3); 29 CFR 825.100(d) and 825.305 through 825.308]. An employer may require that an employee's leave to care for the employee's seriously-ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more essential functions of the employee's position, be supported by a certification issued by the health care provider of the eligible employee or of the ill family member. The proposal provides that the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies. In addition, an employer must advise an employee whenever it finds a certification incomplete or insufficient and state in writing what additional information is necessary to make the certification complete and sufficient. An employer, at its own expense and subject to certain limitations, also may require an employee to obtain a second and third medical opinion. In addition, an employer may also request recertification under certain conditions. The employer must provide the employee at least 15 calendar days to provide the initial certification and any subsequent recertification. The proposed regulations would provide that the employer must provide seven

calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any deficiency identified by the employer.

D. Notice to Employees of FMLA Designation [29 CFR 825.300(c) and 825.301(a)]. When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

E. Fitness-for-Duty Medical Certification [29 U.S.C. 2614(a)(4); 29 CFR 825.100(d) and 825.310]. As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.,* same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate in providing a complete and sufficient certification to the employer in the fitness-for-duty certification process as in the initial certification process. The DOL is also proposing in § 825.310(g) that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement [29 CFR 825.200(d)(1)]. An employer generally must choose a single uniform method from four options available under the regulations for determining the 12-month period in which the 12-week entitlement occurs for purposes of FMLA leave. An employer wishing to change to another alternative is required to give at least 60 days' notice to all employees.

G. Key Employee Notification [29 U.S.C. 2614(b)(1)(B); 29 CFR 825.219 and 825.300(b)(3)(vi)]. An employer that believes that it may deny reinstatement to a key employee must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations would result if the employer were to reinstate the employee from FMLA leave. If the employer cannot immediately give such notice, because of the need to determine whether the employee is a key employee, the employer must give the notice as soon as practicable after receiving the employee's notice of a need for leave (or the commencement of leave, if earlier). If an employer fails to provide such timely notice it loses its right to deny restoration, even if substantial and grievous economic injury will result from reinstatement.

As soon as an employer makes a good faith determination—based on the facts available—that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer must notify the employee in writing of its determination; that the employer cannot deny FMLA leave; and that the employer intends to deny restoration to employment on completion of the FMLA leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

An employee may still request reinstatement at the end of the leave period, even if the employee did not return to work in response to the employer's notice. The employer must then determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If the employer determines that substantial and grievous economic injury will result from reinstating the employee, the employer must notify the employee in writing (in person or by certified mail) of the denial of restoration.

H. Periodic Employee Status Reports [29 CFR 825.300(b)(4) and 825.309]. An employer may require an employee to provide periodic reports regarding the employee's status and intent to return to work.

I. Notice to Employee of Pending Cancellation of Health Benefits [29 CFR 825.212(a)]. Unless an employer establishes a policy providing a longer grace period, an employer's obligation to maintain health insurance coverage ceases under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease and advise the employee that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date.

J. Documenting Family Relationship [29 CFR 825.122(f)]. An employer may require an employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted or signed tax return, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

K. Recordkeeping [29 U.S.C. 2616; 29 CFR 825.500]. The FMLA provides that employers shall make, keep, and preserve records pertaining to the FMLA in accordance with the recordkeeping requirements of Fair Labor Standards Act section 11(c), 29 U.S.C. 211(c), and regulations issued by the Secretary of Labor. This statutory authority provides that no employer or plan, fund, or program shall be required to submit books or records more than once during any 12-month period unless the DOL has reasonable cause to believe a violation of the FMLA exists or is investigating a complaint.

Employers must maintain basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and

weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid; dates FMLA leave is taken by FMLA eligible employees (available from time records, requests for leave, etc., if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA; if FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave; copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations; any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves; premium payments of employee benefits; records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

Covered employers with no eligible employees must maintain the basic payroll and identifying employee data already discussed. Covered employers that jointly employ workers with other employers must keep all the records required by the regulations with respect to any primary employees, and must keep the basic payroll and identifying employee data with respect to any secondary employees.

If FMLA-eligible employees are not subject to FLSA recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by, or exempt from, FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that: eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record.

Employers must maintain records and documents relating to any medical certification, recertification or medical history of an employee or employee's family member, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements; except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed, when appropriate, if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with the FMLA, or other pertinent law, shall be provided relevant information upon request.

The FLSA recordkeeping requirements, contained in 29 CFR part 516, are currently approved under Office of Management and Budget (OMB) control number 1215–0017; consequently, this information collection does not duplicate their burden, despite the fact that for the administrative ease of the regulated community this information collection restates them.

L. Military Family Leave [29 U.S.C. 2612(e), 2613]: The military family leave provisions of H.R. 4986 extend to the new leave provision related to care for a servicemember the FMLA's existing requirements for employees to provide advance notice when the need for leave is foreseeable based on planned medical treatment, and for making reasonable efforts to schedule planned medical treatment so as not to disrupt unduly the employer's operations. The military family leave provisions of H.R. 4986 also provide for new notice requirements for leave taken due to qualifying exigencies whenever the need for such leave is foreseeable. The military family leave provisions of H.R. 4986 require that eligible employees provide notice to the employer that is ''reasonable and practicable'' in these circumstances.

The military family leave provisions of H.R. 4986 allow employers to apply the FMLA's existing medical certification requirements for serious health conditions to leave taken to care for a covered servicemember. In addition, the military family leave provisions of H.R. 4986 also permit the Secretary of Labor to prescribe a new certification requirement to leave taken because of a qualifying exigency arising out of a servicemember's active duty or call to active duty.

The earlier preamble discussion on Family Leave in Connection with Injured Members of the Armed Forces and Qualifying Exigencies Related to Active Duty provides a fuller explanation of the specific provisions and issues on which the Department seeks public comments.

Purpose and Use: The WHD has created optional use Forms WH–380, WH–381, and the proposed WH–382 to assist employees and employers in meeting their FMLA third-party notification obligations. Form WH–380 allows an employee requesting FMLA leave based on a serious health condition to satisfy the statutory requirement to furnish, upon the employer's request, a medical certification (including a second or third opinion and recertification) from the health care provider. *See* §§ 825.306 and 825.307 and Appendices B, D, and E. Form WH–381 allows an employer to satisfy the regulatory requirement to provide employees taking FMLA leave with written notice detailing specific expectations and obligations of the employee and explaining any consequences of a failure to meet these obligations. *See* § 825.301(b). Form WH–382 allows an employer to meet its obligation to designate an absence as FMLA leave. *See* §§ 825.300(c) and 825 .301(a). While the use of the DOL forms is optional, the regulations require employers and employees to make the third-party disclosures that the forms cover. The FMLA third-party disclosures ensure that both employers and employees are aware of and can exercise their rights and meet their respective obligations under FMLA.

The recordkeeping requirements are necessary in order for the DOL to carry out its statutory obligation under FMLA section 106 to investigate and ensure employer compliance. The WHD uses these records to determine employer compliance.

Information Technology: The proposed regulations continue to prescribe no particular order or form of records. *See* § 825.500(b). The preservation of records in such forms as microfilm or automated word or data processing memory is acceptable, provided the employer maintains the information and provides adequate facilities to the DOL for inspection, copying, and transcription of the records. In addition, photocopies of records are also acceptable under the regulations. *Id.*

Aside from the basic requirement that all third-party notifications be in writing, with a possible exception for the employee's FMLA request that depends on the employer's leave policies, there are no restrictions on the method of transmission. Respondents may meet many of their notification obligations by using DOL-prepared publications available on the WHD Web site. These forms are in a PDF, fillable

format for downloading and printing. The employers may keep recordkeeping requirements covered by this information collection in any form, including electronic.

Minimizing Duplication: The FMLA information collections do not duplicate other existing information collections. In order to provide all relevant FMLA information in one set of requirements, the recordkeeping requirements restate a portion of the records employers must maintain under the FLSA. Employers do not need to duplicate the records when basic records maintained to meet FLSA requirements also document FMLA compliance. The additional records required by the FMLA regulations, with the exception of specifically tracking FMLA leave, are records that employers ordinarily maintain for monitoring employee leave in the usual and ordinary course of business. The regulations do impose, however, a three-year minimum time limit that employers must make the records available for inspection, copying, and transcription by the DOL. The DOL minimizes the FMLA information collection burden by accepting records maintained by employers as a matter of usual or customary business practices. The DOL also accepts records kept due to requirements of other governmental requirements (*e.g.*, records maintained for tax and payroll purposes). The DOL has reviewed the needs of both employers and employees to determine the frequency of the third-party notifications covered by this collection to establish frequencies that provide timely information with the least burden. The DOL has further minimized burden by developing prototype notices for many of the third-party disclosures covered by this information collection.

Agency Need: The DOL is assigned a statutory responsibility to ensure employer compliance with the FMLA. The DOL uses records covered by the FMLA information collection to determine compliance, as required of the agency by FMLA section 107(b)(1). 29 U.S.C. 2617(b)(1). Without the third-party notifications required by the law and/or regulations, employers and employees would have difficulty knowing their FMLA rights and obligations.

Special Circumstances: Because of the unforeseeable and often urgent nature of the need for FMLA leave, notice and response times must be of short duration to ensure that employers and employees are sufficiently informed and can exercise their FMLA rights and obligations. The discussion above outlines the circumstances necessitating the information collection and provides the details of when employees and employers must provide certain notices.

Employers must maintain employee medical information they obtain for FMLA purposes as confidential medical records in separate files/records from the usual personnel files. Employers must also maintain such records in conformance with any applicable ADA confidentiality requirements, except that: supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations; first aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Public Comments: On December 1, 2006, the DOL published a Request for Information (RFI) in the **Federal Register** inviting public comment about the FMLA paperwork requirements and other issues. 71 FR 69504. On June 28, 2007, the DOL published a report that summarized the comments received in response to the RFI. 72 FR 35550. The DOL also engaged various stakeholders representing the interests of employees, employers, and healthcare providers to discuss the FMLA information collection requirements. The proposed FMLA regulations reflect the results of these efforts.

The DOL seeks additional public comments regarding the burdens imposed by information collections contained in this proposed rule. In particular, the DOL seeks comments that: evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; enhance the quality, utility and clarity of the information to be collected; and minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submissions of responses. Commenters may send their views about these information collections to the DOL in the same way as all other comments (*e.g.*, through the regulations.gov Web site). All comments received will be made a matter of public record, and posted without change to *http://www.regulations.gov,* including any personal information provided.

An agency may not conduct an information collection unless it has a currently valid OMB approval, and the DOL has submitted the identified information collections contained in the proposed rule to the OMB for review under the PRA under Control Number 1215–0181. *See* 44 U.S.C. 3507(d); 5 CFR 1320.11. While much of the information provided to the OMB in support of the information collection request appears in this preamble, interested parties may obtain a copy of the full supporting statement by sending a written request to the mail address shown in the **ADDRESSES** section at the beginning of this preamble or by visiting the *http://www.reginfo.gov/public/do/PRAMain* Web site.

In addition to having an opportunity to file comments with the DOL, comments about the paperwork implications of the proposed regulations may be addressed to the OMB. Comments to the OMB should be directed to: Office of Information and Regulatory Affairs, Attention OMB Desk Officer for the Employment Standards Administration (ESA), Office of Management and Budget, Room 10235, Washington, DC 20503, Telephone: 202–395–7316/Fax: 202–395–6974 (these are not toll-free numbers).

Confidentiality: The DOL makes no assurances of confidentiality to respondents. Much of the information covered by this information collection consists of third-party disclosures. Employers generally must maintain records and documents relating to any medical certification, recertification, or medical history of an employee or employee's family members as confidential medical records in separate files/records from usual personnel files. Employers must also generally maintain such records in conformance with any applicable ADA confidentiality requirements. As a practical matter, the DOL would only disclose agency investigation records of materials subject to this collection in accordance with the provisions of the Freedom of Information Act, 5 U.S.C. 552, and the attendant regulations, 29 CFR part 70, and the Privacy Act, 5 U.S.C. 552a, and its attendant regulations, 29 CFR part 71.

Hours Burden Estimates: The DOL bases the following burden estimates on the estimates the PRIA presented elsewhere in this document, except as otherwise noted. The DOL estimates 77.1 million employees were eligible for FMLA leave in 2005. The FMLA applied

to approximately 415,000 private business establishments and State and local governments in 2005. *See County Business Patterns, 2005, U.S. Census Bureau, http://censtats.census.gov/cgi-bin/cbpnaic/cbpsel.pl;* and *Census of Governments, Volume 3, Public Employment, Compendium of Public Employment: 2002* at 248–249, *http://www.census.gov/prod/2004pubs/gc023x2.pdf.* The PRIA data also suggest 7 million employees took FMLA leave in 2005.

A. Employee Notice of Need for FMLA Leave. While employees normally will provide general information regarding their absences, the regulations may impose requirements for workers to provide their employers with more detailed information than might otherwise be the case. The DOL estimates that providing this additional information will take approximately two minutes per employee notice of the need to take FMLA leave. In addition, Westat Report data indicate about 75 percent of FMLA users take leave in a single block, 15 percent take leave in two blocks, and 10 percent take leave in more than two blocks. *See* 2000 Westat Report at 2–3, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL, consequently, estimates FMLA leave takers, on a per capita basis, annually provide 1.5 notices of the need for FMLA leave. In addition, the PRIA estimates some employees who are not eligible for FMLA protections will make some 2,200,000 requests for FMLA leave.

(7,000,000 FMLA covered employee respondents × 1.5 valid responses [*i.e.*, notices to employers]) + 2,200,000 ineligible FMLA requests = 12,700,000 total responses

12,700,000 total responses × 2 minutes/60 minutes per hour = 423,333 hours

B. Notice to Employee of FMLA Eligibility. The DOL estimates that each written notice to an employee of FMLA eligibility, rights, and responsibilities takes approximately ten minutes. Consistent with the estimates for the number of notices employees provide, the DOL estimates that employers will provide 12,700,000 FMLA eligibility notices to employees. Employers may use optional Form WH–381 to satisfy this requirement.

12,700,000 total responses × 10 minutes/60 minutes per hour = 2,116,667 hours

C. Medical Certification and Recertification. The DOL estimates 81.5 percent of employees taking FMLA leave do so because of their own serious health condition or that of a family member. *See* 2000 Westat Report at 2–5, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL also estimates 92 percent of these employees provide medical certifications. *See* 2000 Westat Report at A–2–51. Additionally, the DOL estimates that second or third opinions and/or recertifications add 15 percent to the total number of certifications and that employees spend an average of 20 minutes in obtaining the certifications. Employers may have employees use optional Form WH–380 to satisfy this requirement.

7,000,000 employees taking FMLA leave × 81.5% rate for serious health condition × 92% asked to provide initial medical certifications = 5,248,600 employee respondents

5,248,600 employee respondents × 1.15 responses = 6,035,890 total responses

6,035,890 total responses × 20 minutes/60 minutes per hour = 2,011,963 hours

The DOL associates no paperwork burden with the portion of this information collection employers complete, since—even absent the FMLA—similar information would customarily appear in their internal instructions requesting a medical certification or recertification. The DOL accounts for health care provider burdens to complete these certifications as a ''maintenance and operation'' cost burden, discussed later.

D. Notice to Employees of FMLA Designation. The DOL estimates that each written FMLA designation notice takes approximately ten minutes and that there are 10,500,000 FMLA leaves taken each year. Employers can designate FMLA leave at the same time they provide the eligibility notice about 25 percent of the time, based on the number of instances where employers request a medical certification. According to a 2005 WorldatWork survey, 28.6 percent of absences result from either chronic or permanent/long term conditions. (*See FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, WorldatWork, Figure 9a, p. 8.) Assuming that this applies to FMLA leave takers, the DOL estimates that the notices will have to be sent to about 2,000,000 workers (*i.e.*, 28.6% of 7 million) taking FMLA for either chronic or permanent/long term conditions. For purposes of estimating the paperwork burden, the DOL assumes that for workers with chronic conditions (either temporary or permanent) ten additional notices will have to be provided each year to each of these employees.

7,875,000 initial notices + 20,000,000 additional notices = 27,875,000 total responses

27,875,000 total responses × 10 minutes/60 minutes per hour = 4,645,833 hours

E. Fitness-for-Duty Medical Certification. The DOL estimates that 367,000 employees will each have to provide one fitness for duty certification and 44,000 employees will each have to provide three such certifications, for a total of 499,000 certifications provided by 411,000 employees and that each fitness for duty certification will require ten minutes of the employee's time.

499,000 responses × 10 minutes/60 minutes per hour = 83,167 hours

The DOL accounts for health care provider burdens to complete these certifications as a ''maintenance and operation'' cost burden, discussed later.

F. Notice to Employees of Change of 12-Month Period for Determining FMLA Entitlement. The DOL estimates that annually 10 percent of FMLA covered employers choose to change their 12-month period for determining FMLA eligibility and must notify employees of the change, requiring approximately 10 minutes per change.

415,000 covered employers × 10% response rate = 41,500 respondents

41,500 respondents × 10 minutes/60 minutes = 6917 hours

G. Key Employee Notification. The ''key employee'' status notification to an employee is part of the employee eligibility notice; accordingly, the DOL associates no additional burden for the initial notification. The DOL estimates that annually 10 percent of employers notify one employee of the intent not to restore the employee at the conclusion of FMLA leave. In addition, the DOL estimates half of these cases will require the employer to issue a second notice from the employer to address a key employee's subsequent request for reinstatement. Finally, the DOL estimates each key employee notification takes approximately 5 minutes. The DOL associates no paperwork burden with the employee requests, since these employees would ordinarily ask for reinstatement even if the rule were not to exist.

415,000 covered employers × 10% response rate = 41,500 employer respondents

41,500 employer respondents × 1.5 responses = 62,250 total responses

62,250 total responses × 5 minutes/60 minutes = 5188 hours

H. Periodic Employee Status Reports. The DOL estimates employers require periodic reports from 25 percent of FMLA leave users (based on the percentage of FMLA leave takers with absences lasting more than 30 days). *See*

2000 Westat Report at A–2–29, *http://www.dol.gov/esa/whd/fmla/fmla/appendixa-2.pdf.* The DOL also estimates a typical employee would normally respond to an employer's request for a status report; however, to account for any additional burden the regulations might impose, the DOL estimates a 10 percent response rate and a burden of two minutes per response. The DOL also estimates that each such respondent annually provides two periodic status reports. While the DOL believes most employers would only seek these reports in accordance with customary business practices, the agency has accounted for any potential additional employer burden in the ''Eligibility Notice.''

7,000,000 FMLA leave takers × 25% rate of employer requests × 10% regulatory burden = 175,000 employee respondents

175,000 employee respondents × 2 responses = 350,000 total responses

350,000 total responses × 2 minutes/60 minutes per hour = 11,667 hours

I. Notice to Employee of Pending Cancellation of Health Benefits. The DOL estimates the regulations require employers send notifications of not having received health insurance premiums to 2% of leave takers, based on the number of employees indicating they have lost benefits. For purposes of estimating the paperwork burden associated with this information collection, the DOL expects that unique respondents would send all responses. *See* 2000 Westat Report at 4–4, *http://www.dol.gov/esa/whd/fmla/fmla/chapter4.pdf.* The DOL also estimates each notification will take 5 minutes.

7,000,000 FMLA leave takers × 2% rate notification = 140,000 respondents and responses

140,000 responses × 5 minutes/60 minutes per hour = 11,667 hours

J. Documenting Family Relationships. The DOL estimates 50% of FMLA leave takers do so for ''family'' related reasons, such as caring for a newborn or recently adopted child or a qualifying family member with a serious health condition. *See* 2000 Westat Report at 2–5, *http://www.dol.gov/esa/whd/fmla/fmla/chapter2.pdf.* The DOL also estimates employers require additional documentation to support a family relationship in 5 percent of these cases, and the additional documentation requires 20 minutes.

7,000,000 employees taking FMLA leave × 50% rate for family leave × 5% response rate = 175,000 employee respondents

175,000 × 20 minutes/60 minutes per hour = 58,333 hours

K. General Recordkeeping. The DOL estimates the FMLA imposes an additional general recordkeeping burden on each employer that equals 1.25 minutes for each notation of an employee absence.

10,500,000 total records × 1.25 minutes/60 minutes per hour = 218,750 hours

L. Military Family Leave. This ''paperwork burden'' analysis estimates the burdens for the proposed regulations as drafted. The Department anticipates issuing, after full consideration of the comments received in response to the Proposed Rule, final regulations that will include necessary revisions to the currently proposed FMLA information burden estimates to account for the military family leave provisions of H.R. 4986.

GRAND TOTAL ANNUAL BURDEN HOURS = 9,593,485 HOURS

Persons responding to the various FMLA information collections may be employees of any of a wide variety of businesses. Absent specific wage data regarding respondents, the DOL has used the average hourly rate of non-supervisory workers on non-farm payrolls for September 2007 of $17.62 plus 40 percent for fringe benefits to estimate respondent costs. *See The Employment Situation, November 2007,* at DOL, Bureau of Labor Statistics (BLS) (*http://www.bls.gov/news.release/archives/empsit_12072007.pdf*). The DOL estimates total annual respondent costs for the value of their time to be $236,652,088 ($17.62 × 1.4 × 9,593,485 hours).

Other Respondent Cost Burdens (Maintenance and Operation): Employees seeking FMLA leave for a serious health condition must obtain, upon their employer's request, a certification of the serious health condition from a health care provider. Often the heath care provider's office staff completes the form for the provider's signature. In other cases, the health care provider personally completes it. While most health care providers do not charge for completing these certifications, some do. The DOL estimates completion of Form WH–380 to take about 20 minutes and a fitness-for-duty certification to require 10 minutes; thus, the time would equal the respondent's time in obtaining the certification. The DOL has used the 2005 average hourly wage rate for a physician's assistant of $36.49 plus 40 percent in fringe benefits to compute a $17.03 cost for Form WH–380 ($51.09 × 20 minutes/60 minutes per hour) and $8.52 cost for fitness-for-duty certifications ($51.09 × 10 minutes/60 minutes per hour) *See National Compensation Survey 2005, DOL,* BLS.

The DOL also attributes an average $1.00 cost for each documentation of a family relationship to cover notary costs when an employee does not have other documentation available.

6,035,890 total medical certifications x $17.03 cost per certification =	$102,791,207
499,000 fitness-for-duty certifications x $8.52 cost per certification =	4,251,480
+175,000 documentations of family relationship x $1.00 each =	175,000
Total Maintenance and Operations Cost Burden for Respondents	107,217,687

Federal Costs: The Federal costs that the DOL associates with this information collection relate to printing/duplicating and mailing the subject forms. The DOL also estimates it will annually provide an average of one copy of each form covered by this information collection to each FMLA-covered employer, and that the agency will mail all forms simultaneously to any given requestor. The DOL further estimates information technology costs will offset some of the printing and duplicating costs in an equal amount; therefore, the agency is presenting only the costs of the latter:

415,000 WH–380s (Certification of Health Care Provider) × 4 pages =	1,660,000 pages.
415,000 WH–381s (Notice to Employee of FMLA Eligibility) × 2 pages =	830,000 pages.
415,000 WH–382s (Notice to Employee of FMLA Designation) × 1 page =	415,000 pages.
Total Forms = 1,245,000, Total pages = 2,905,000.	
2,905,000 pages × $0.03 printing costs =	$87,150.
1,245,000 forms × $0.03 envelopes =	$37,350.

1,245,000 forms × $0.41 postage =	$510,450.
Total Estimated Annual Federal Costs =	$634,950.

Displaying OMB Expiration Date: The DOL will display the expiration dates for OMB clearances on the DOL forms cleared under this information collection.

Executive Order 12866, the Small Business Regulatory Enforcement Fairness Act, and the Regulatory Flexibility Act

This rule has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation. The Department has preliminarily determined that this proposed rule is an ''economically significant'' regulatory action under Section 3(f)(1) of Executive Order 12866, based on the analysis presented below. As a result, the Office of Management and Budget has reviewed this proposed rule. The Department also has concluded that this proposed rule is a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*). In addition, the Department has certified that the proposed rule as drafted will not have ''a significant economic impact on a substantial number of small entities'' and, therefore, has not prepared an initial regulatory flexibility analysis under the Regulatory Flexibility Act of 1980 (see the Regulatory Flexibility Act section below). However, the new military family leave provisions of H.R. 4986 will result in an increase in the annual number of FMLA leaves taken. If these additional leaves significantly increase the economic impacts imposed by the FMLA regulation on a substantial number of small businesses, then a regulatory flexibility analysis will be required.

The Department has prepared a Preliminary Regulatory Impact Analysis (PRIA) in connection with this rule, which is presented below in its entirety.

Preliminary Regulatory Impact Analysis of the Proposed Revisions to the Family and Medical Leave Act Regulations

Chapter 1: Industry Profile

Background

The Family and Medical Leave Act established a bipartisan Commission on Family and Medical Leave to study family and medical leave policies and their impact on workers and their employers. The Commission surveyed workers and employers and issued a report in 1995.[16]

In 1999, the Department contracted with Westat to update the employee and establishment surveys conducted in 1995.[17] The two surveys were completed in 2000. A report entitled ''Balancing the Needs of Families and Employers: Family and Medical Leave Surveys, 2000 Update'' (the ''2000 Westat Report'') was published in January 2001.[18]

In 2006, the Department published a Request for Information (RFI) seeking public comment on the Department's administration and implementation of the FMLA regulations.[19] To assist in analyzing the impacts of the FMLA, the Department presented estimates of the coverage and usage of FMLA leave in 2005 in the ''FMLA Coverage and Usage Estimates'' section of the RFI (71 FR 69510). That presentation updated Westat's estimates of the number of workers employed at establishments covered by the FMLA, the number of workers eligible for FMLA leave at covered establishments, and the number of workers who took FMLA leave in 2005 (the latest year for which BLS employment data was available). It also highlighted a number of important findings in the 2000 Westat Report including some of the limitations in using the estimates presented in the report that were noted by Westat and others.

The methodology to calculate the estimates presented in the RFI was to apply coverage, eligibility, and usage rates from the 2000 Westat Report to employment estimates from the 2005 Current Population Survey to produce national estimates of FMLA coverage, eligibility, and usage. The estimates the Department developed using this methodology are reproduced in Table 1 below.

TABLE 1.—ESTIMATES OF NUMBER OF COVERED AND ELIGIBLE EMPLOYEES AND LEAVE TAKEN UNDER THE FAMILY AND MEDICAL LEAVE ACT IN 2005

[Millions of employees]

Employees at FMLA-covered worksites	94.4
Eligible Employees at FMLA-covered worksites	76.1
Non-eligible Employees at FMLA-covered worksites	18.4
Employees taking FMLA-protected leave	6.1
Employees taking intermittent FMLA leave **	1.5

** Note: Many of these 1.5 million workers repeatedly take intermittent leave.
Source: U.S. Department of Labor, Request for Information, (71 FR 69510 and 69511).

As discussed in the Department's report entitled ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information'' (the ''RFI Report''), the Department did not receive any substantive comments on its coverage or eligibility estimates, or the methodology it used to produce those estimates.[20] However, the Department received many comments regarding the FMLA leave usage rates that the Department used.

In the RFI, the Department presented three estimates of the percent (or rate) of covered and eligible workers who took FMLA leave in 2005, and asked for information and data on the estimates. These estimates are reproduced in Table 2 below.

[16] ''A Workable Balance: Report to Congress on Family and Medical Leave Policies.'' The report is available at: *http://www.dol.gov/esa/whd/fmlacoments.htm.*

[17] Westat is a statistical survey research organization serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[18] The report is available at *http://www.dol.gov/esa/whd/fmlacomments.htm.*

[19] The Department received many comments about how the 2000 Westat Report in response to the RFI.

[20] The report is available at: *www.dol.gov/esa/whd/Fmla2007Report.htm* and 72 FR at 35550.

TABLE 2.—PERCENT OF COVERED AND ELIGIBLE EMPLOYEES TAKING FMLA LEAVE IN 2005

	Percent
Upper-bound Estimate *	17.1
Employer Survey Based Estimate **	8.0
Lower-bound Estimate *	3.2

* From the Westat Employee Survey.
** The Department used a rate of 6.5 percent of covered workers in the RFI. The rate presented here is the percentage of covered and eligible workers calculated by dividing 6.1 million by 76.1 million.
Source: U.S. Department of Labor, ''Family and Medical Leave Act Regulations: A Report on the Department of Labor's Request for Information'' (72 FR at 35622).

In response to the RFI the Department received a significant amount of data on FMLA leave usage from a wide variety of sources, including nationally representative survey data and detailed information from specific employers, both large and small, in a wide variety of industries. Although many of the comments concerning FMLA usage rates submitted data higher than the employer survey based estimate presented in Table 2 above, many of the comments included usage rates that were consistent with the range of estimates presented in the RFI and Table 2. Clearly, some employers in some industries will experience higher rates of usage just as other employers in other industries may experience lower rates. Indeed, a few comments to the RFI suggested the Department develop industry specific estimates because the issues related to the FMLA vary by industry.

The RFI was a useful information collection method that yielded a wide variety of objective survey data and research, as well as a considerable amount of company-specific data and information. As explained in the RFI and the RFI Report, despite the criticisms and limitations of the 2000 Westat Report,[21] the Department believes that it provides a great deal of useful information and data on FMLA leave-takers. Moreover, based upon that data, coupled with the information received in response to the RFI, the Department has significantly supplemented and updated its knowledge of the impacts of FMLA leave, particularly intermittent FMLA leave.

Data Sources and Total Estimates by Industry

The estimates presented in this Preliminary Regulatory Impact Analysis (PRIA) are primarily derived from an industry profile developed by CONSAD Research.[22] Just as the Department did for the RFI, CONSAD used data from the 2000 Westat Report as the basis for many of its estimates. However, rather than applying the Westat coverage, eligibility, and usage rates to data from the Current Population Survey (CPS), CONSAD primarily used data from the U.S. Census Bureau, 2005 County Business Patterns (CBP). The CBP data was used because it provides data on the number of employees, establishments, and the size of the payroll in each industry, as well as these data by size of establishment. However, since the CBP only covers most non-agricultural businesses in the private sector, CONSAD supplemented the CBP with data from other sources including the U.S. Department of Agriculture, Census of Agriculture, 2002, the U.S. Census Bureau, Census of Governments, Compendium of Public Employment, 2002, the annual reports of certain Federal agencies (Bonneville Power Authority and Tennessee Valley Authority), the Association of American Railroads, Railroad Service in the United States, 2005, and the U.S. Postal Service, Annual Report, 2006.

CONSAD estimated the number of firms based upon the U.S. Census Bureau, Statistics of U.S. Business, 2004. The Statistics of U.S. Business is based upon the same underlying data as CBP, but presents the data on a firm basis rather than the establishment basis presented in the CBP. This was an important consideration in studying the FMLA regulations, since the 50-employee cutoff above which the FMLA applies refers to the number of employees at a particular firm within a geographic area. The Statistics of U.S. Business contains both the number of firms and the number of establishments in those firms at the 2-digit industry level.

CONSAD based its estimates of revenues at the 2-digit industry level primarily on data from the U.S. Census Bureau, 2002 Economic Census series (2005). Depending upon the particular industry sector, CONSAD used the value of shipments, value of business done, receipts, sales, or revenues, in conjunction with the employment estimates in the Economic Census. In addition, CONSAD obtained some revenue estimates directly from the Census of Agriculture, as well as in the annual reports for the Bonneville Power Authority, the Tennessee Valley Authority, and the U.S. Postal Service.[23]

CONSAD developed estimates of net income before taxes (profits) for each 2-digit industry primarily from the Statistics of Income, 2004, published by the Internal Revenue Service. In addition, CONSAD obtained net income estimates directly from the annual reports for the Bonneville Power Authority, the Tennessee Valley Authority, and the U.S. Postal Service.[24]

Table 3 below presents CONSAD's estimates of the total number of firms, establishments, and employees in the 2-digit industries in which Title I of the FMLA applies. It also presents the annual payroll, revenues, and profits for each 2-digit industry sector. See the CONSAD Report for the complete details on these estimates.[25]

[21] For comments on, and critiques of, the 2000 Westat Report *see* Chapter XI, Section A, of the RFI Report (72 FR at 35550).

[22] CONSAD Research Corporation is an economic and public policy analysis consulting firm serving agencies of the U.S. Government, as well as businesses, foundations, and State and local governments.

[23] Revenue estimates were not available for parts of Forestry, Fishing, and Hunting; Public Utilities; Public Transit and Transportation; Public Educational Services; and Public Administration.

[24] For certain industry sectors net income estimates were not available.

[25] Available at: *http://www.wagehour.dol.gov.*

TABLE 3.—NUMBER OF FIRMS, ESTABLISHMENTS, EMPLOYMENT, PAYROLLS, ANNUAL REVENUE, AND PROFITS, THAT TITLE I OF THE FMLA APPLIES TO, BY INDUSTRY, 2005

NAICS codes	Industry description	Number of firms	Number of establishments	Number of employees	Annual payroll ($million)	Revenues ($million)	Profits ($million)
11	Agriculture, Forestry, Fishing and Hunting	563,692	578,536	3,205,214	$23,664	$200,646	$16,001
21	Mining, Quarrying, and Oil and Gas Extraction.	19,271	24,696	497,272	30,823	190,349	24,598
22	Utilities	6,565	17,328	908,106	57,540	391,226	20,509
23	Construction	778,065	787,672	6,781,327	292,519	1,139,542	71,579
31–33	Manufacturing	288,595	333,460	13,667,337	600,696	3,641,146	257,170
42	Wholesale Trade	337,905	429,823	5,968,929	308,918	4,706,128	181,334
44–45	Retail Trade	737,188	1,123,207	15,338,672	348,047	3,200,607	119,040
48–49	Transportation and Warehousing	168,769	249,211	6,067,022	257,686	556,815	27,340
51	Information	76,138	141,290	3,402,599	203,130	812,244	88,977
52	Finance and Insurance	255,273	476,806	6,431,837	446,740	2,741,213	416,135
53	Real Estate and Rental and Leasing	300,555	370,651	2,144,077	81,790	369,242	58,386
54	Professional, Scientific, and Technical Services.	754,580	826,101	7,689,366	456,456	941,493	87,964
55	Management of Companies and Enterprises	27,353	47,593	2,856,418	243,267	119,588	20,295
56	Administrative and Support and Waste Management and Remediation Services.	320,615	369,507	9,280,282	255,400	459,221	28,777
61	Educational Services	87,807	95,500	13,210,374	405,009	205,433	23,715
62	Health Care and Social Assistance	599,987	746,600	16,025,147	589,654	1,285,333	111,556
71	Arts, Entertainment, and Recreation	114,072	121,777	1,936,484	52,936	148,644	18,926
72	Accommodation and Food Services	462,956	603,435	11,025,909	156,041	489,690	33,202
81	Other Services (except Public Administration).	676,401	740,034	5,390,954	127,481	476,300	31,751
92	Public Administration	74,067	74,067	7,534,000	222,832	.....	.....
All Industry Sectors Covered by Title 1 of the FMLA		6,649,854	8,157,294	139,361,326	$5,160,628	$22,074,860	$1,637,255

Source: CONSAD 2007.
—Data Not Available.
The totals may not sum due to rounding.

Note the total number of employees in Table 3, 139.361 million, is very close to the total number of workers (less Federal employees) in 2005 published by the Bureau of Labor Statistics, 139.773 million. The difference is just 412,000, or 0.3 percent—not enough to significantly affect the estimates presented below.

FMLA Coverage and Eligibility Estimates

Title I of the FMLA covers private-sector employers of 50 or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and the Postal Rate Commission. To be eligible for FMLA benefits, an employee must: (1) Work for a covered employer; (2) have worked for the employer for a total of 12 months; (3) have worked at least 1,250 hours over the previous 12 months; and 4) work at a location where at least 50 employees are employed by the employer within 75 miles.

CONSAD's best estimate of FMLA coverage, by 2-digit industry, was developed by summing the number of establishments with 50 or more employees from the CBP with data from the U.S. Census Bureau, Statistics of U.S. Business for estimates of employment in private firms with 50 or more employees within a 75 mile radius of each other. Some additional data for the operations not covered by the CBP and Statistics of U.S. Business (*i.e.*, the estimates from Census of Agriculture, Census of Governments, U.S. Postal Service, Association of American Railroads, Bonneville Power Authority, and Tennessee Valley Authority) were also used.

All employers in primary and secondary education are covered. Although data for the U.S. Postal Service, classified by the employment size of the post office, are not available, CONSAD assumed that all career postal workers are employed at worksites where 50 or more employees work for the U.S. Postal Service within 75 miles of those locations and that all non-career postal workers, which primarily include casual workers and workers at rural substations, likely do not meet the coverage and eligibility requirements relating to worksite location or to job tenure and working hours (and are not included in these estimates).

For the railroad industry (more specifically, the freight railroad industry), data for 2005 from the Association of American Railroads include Class I railroads, regional line haul railroads, local line haul carriers, and switching and terminal carriers. Based on the average employment in each type of freight railroad, CONSAD assumed that Class I railroads and regional line haul railroads are, in general, covered under the FMLA, while local line haul carriers and switching and terminal carriers are generally not covered because they generally do not employ 50 or more workers.

Data for the agricultural sectors are from the 2002 Census of Agriculture for both crop production and animal production combined. These data identify those farms with 10 or more workers and those workers on these farms who are employed at least 150 days per year. To the extent that these farms have a total of 50 or more employees (and the data suggest that they likely would when the average number of workers employed on these farms working less than 150 days per year is added into the average number of workers employed on these farms working at least 150 days per year), these farms would then be covered under the FMLA. Their employees include those workers employed at least 150 days per year (and likely eligible for FMLA leave), as well as workers employed less than 150 days per year (and not eligible for FMLA leave).

Table 4 below presents CONSAD's estimates for covered establishments. Note the 95.8 million estimate of the total number of workers employed at covered establishments based upon this methodology and data is close to the Department's estimate of 94.4 million (presented in the RFI and the report on the RFI) based upon the 2005 CPS and the methodology in the RFI.

TABLE 4.—NUMBER OF FMLA COVERED FIRMS AND ESTABLISHMENTS, EMPLOYMENT, PAYROLLS, ANNUAL REVENUE, AND PROFITS BY INDUSTRY, 2005

NAICS codes	Industry description	Number of firms	Number of establishments	Number of employees	Annual payroll ($million)	Revenues ($million)	Profits ($million)
11	Agriculture, Forestry, Fishing and Hunting	7,893	16,399	1,008,802	$7,485	$62,902	$5,016
21	Mining, Quarrying, and Oil and Gas Extraction.	881	3,914	336,604	21,389	128,848	16,651
22	Utilities	570	4,773	796,896	50,865	324,319	16,933
23	Construction	16,650	24,291	2,741,450	133,635	460,676	28,937
31–33	Manufacturing	29,765	66,333	11,065,335	501,498	2,947,941	208,210
42	Wholesale Trade	11,926	59,989	3,390,529	184,438	2,673,220	103,003
44–45	Retail Trade	14,512	218,674	9,229,640	206,364	1,925,881	71,629
48–49	Transportation and Warehousing	5,175	80,665	4,922,320	213,610	418,618	19,793
51	Information	3,703	31,089	2,664,028	164,743	635,938	69,663
52	Finance and Insurance	5,335	89,035	4,367,850	325,031	1,861,553	282,597
53	Real Estate and Rental and Leasing	3,726	62,188	1,033,014	39,438	177,900	28,130
54	Professional, Scientific, and Technical Services.	17,492	70,715	4,315,079	269,222	528,342	49,363
55	Management of Companies and Enterprises	2,800	11,322	2,500,373	211,486	104,682	17,765
56	Administrative and Support and Waste Management and Remediation Services.	12,945	52,333	7,428,951	191,044	367,611	23,036
61	Educational Services	18,130	27,610	12,655,139	391,513	165,820	19,142
62	Health Care and Social Assistance	22,161	89,592	11,330,723	400,431	908,806	78,877
71	Arts, Entertainment, and Recreation	3,626	14,661	1,276,356	34,243	97,973	12,475
72	Accommodation and Food Services	19,882	80,376	5,352,996	80,221	237,741	16,119
81	Other Services (except Public Administration).	13,997	56,587	1,843,408	44,489	162,868	10,857
92	Public Administration	74,067	74,067	7,534,000	222,832	.....	.....
All Establishments Covered by Title 1 of the FMLA		285,237	1,134,612	95,793,493	$3,693,976	$14,191,639	$1,078,197

Source: CONSAD 2007.
—Data Not Available.
Note: The totals may not sum due to rounding.

Estimates of Workers Eligible To Take FMLA Leave and FMLA Leave Usage

The estimates of the number of workers eligible to take FMLA leave and FMLA leave usage were developed by applying estimates from the 2000 Westat Report to the coverage estimates. The number of workers eligible to take FMLA leave in each industry was calculated by multiplying Westat's estimate that 80.5 percent of workers employed at covered establishments are eligible to take FMLA leave [26] by the number of workers covered by the FMLA in each industry. Note that CONSAD's estimates of the total number of workers covered by the FMLA is relatively close to the Department's estimates published in the RFI, because both were developed by applying the same Westat estimate to the number of covered employees.

In the RFI, the Department estimated the number of workers who took FMLA leave in 2005 by multiplying the number of workers employed in establishments covered by the FMLA by Westat's estimate that 6.5 percent of workers employed at establishments covered by the FMLA took FMLA leave.[27] However, the Department received many comments in response to RFI that noted this estimate does not represent current conditions because employees today are more aware of their FMLA rights than they were in 1999 when Westat conducted its survey. In the RFI Report, the Department concurred and stated that ''awareness of the FMLA appears to be higher in 2005 than in 1999 when Westat conducted its surveys. So just as FMLA usage increased between the times the two surveys sponsored by the Department were conducted in the 1990s, given the comments received it is likely that FMLA usage increased between 1999 and 2005.'' (72 FR at 35623)

To account for the increase in employee awareness of the FMLA, CONSAD examined the changes in FMLA usage between the 1995 and the 1999 surveys commissioned by the Department. CONSAD then assumed that the extrapolation would look like a typical learning curve and plotted three points corresponding to zero FMLA leave taking in 1993, 3.6 percent in 1995, and 6.5 percent in 2000, and sketched a smooth, monotonically increasing curve through the points and projected it through 2007. On this basis, CONSAD estimated that the curve would have a value of roughly 7.3 in 2007 (*i.e.*, 7.3 percent of workers employed at establishments covered by the FMLA currently take FMLA leave).

Estimates of the number of workers taking FMLA in each industry were then calculated by multiplying the estimated number of workers covered by the FMLA in each industry by 7.3 percent. *See* Table 5 below.

The number of workers who took intermittent FMLA leave in 2005 in each industry was estimated by multiplying Westat's estimate that 23.9 percent of workers who take FMLA leave take some of the leave intermittently (*i.e.*, they repeatedly took leave for a few *hours* or *days* at a time because of ongoing family or medical

[26] DOL estimate developed from 2000 Westat Report, p. A–2–21.

[27] *See* 2000 Westat Report, pp. 3–14—3–15.

reasons)[28] by the estimated number of workers taking FMLA leave in each industry. Table 5 below also presents these estimates.

TABLE 5.—ESTIMATED OF NUMBER OF FMLA ELIGIBLE WORKERS AND FMLA LEAVE USAGE, BY INDUSTRY, 2005

NAICS codes	Industry description	Number of employees		
		Eligible to take FMLA leave	Taking FMLA leave	Taking intermittent FMLA leave
11	Agriculture, Forestry, Fishing and Hunting	812,085	73,643	17,601
21	Mining, Quarrying, and Oil and Gas Extraction	270,966	24,572	5,873
22	Utilities	641,501	58,173	13,903
23	Construction	2,206,867	200,126	47,830
31–33	Manufacturing	8,907,594	807,769	193,057
42	Wholesale Trade	2,729,376	247,509	59,155
44–45	Retail Trade	7,429,860	673,764	161,030
48–49	Transportation and Warehousing	3,962,468	359,329	85,880
51	Information	2,144,543	194,474	46,479
52	Finance and Insurance	3,516,119	318,853	76,206
53	Real Estate and Rental and Leasing	831,576	75,410	18,023
54	Professional, Scientific, and Technical Services	3,473,638	315,001	75,285
55	Management of Companies and Enterprises	2,012,800	182,527	43,624
56	Administrative and Support and Waste Management and Remediation Services	5,980,306	542,313	129,613
61	Educational Services	10,187,387	923,825	220,794
62	Health Care and Social Assistance	9,121,232	827,143	197,687
71	Arts, Entertainment, and Recreation	1,027,467	93,174	22,269
72	Accommodation and Food Services	4,309,162	390,769	93,394
81	Other Services (except Public Administration)	1,483,944	134,569	32,162
92	Public Administration	6,064,870	549,982	131,446
All Establishments Covered by Title 1 of the FMLA		77,113,762	6,992,925	** 1,671,309

** Note: Many of these workers are likely to take multiple FMLA leaves. See Chapter XI, Section E, of the RFI Report (72 FR at 35550).
Source: CONSAD 2007.

Although the Department presented a range for the number of FMLA leave-takers in the RFI Report (*see* Chapter XI, Section D, of the RFI Report (72 FR at 35550)), for this PRIA the Department presents its best estimate—7.0 million workers. The Department departed from presenting a range here because the comments received in response to the RFI strongly suggested that the Department's Employer Survey Based (point) Estimate that it presented in the RFI (6.1 million workers) was reasonable and the Department received very few comments on the approach that it used to develop that estimate.

Estimates of the Number of FMLA Leaves Taken

Because the impacts of some of the proposed revisions are related to the number of FMLA leaves taken rather than the number of workers taking FMLA leave, for this analysis it was necessary to estimate the number of FMLA leaves taken. To do this, CONSAD examined the data collected by the Westat employee survey. From this survey, CONSAD estimated that during 1999, 8.8 million leave-takers working in FMLA covered establishments took 13.3 million leaves. Therefore, on average each leave-taker took 1.5 leaves.[29] Assuming this rate applies to workers taking FMLA leave in 2005, CONSAD estimates that the 7.0 million workers taking FMLA leave took about 10.5 million leaves in 2005.[30] The Department did not develop estimates of the number of FMLA leaves by industry based upon the national average, because comments to the RFI indicate that leave usage can vary greatly by industry.[31]

Chapter 2: Estimated Impacts of the Proposed Revisions Introduction

In this Chapter, the Department presents its estimates of the impacts of the proposed revisions to the FMLA. The approach utilized was to present a summary of the changes most likely to result in behavior changes by covered employers and their employees and to estimate the monetary value of these changes whenever possible. (The preamble to the proposed rule provides a more detailed discussion of each proposed change.) Several findings in the Department's RFI Report, noted below, influenced the methodology used to estimate the impact of the proposed revisions.

[28] Those that answered yes to Question A5B of Westat's employee questionnaire: *See* 2000 Westat Report, Appendix D, p. 10.

[29] It is important to note that the average number of leaves is higher for many leave-takers. For example, as was noted in the CONSAD Report, the covered and eligible leave-takers who reported taking both leave intermittently (*i.e.,* repeatedly at different times) and taking more than one leave, took an average of 4.6 leaves. There also is some uncertainty over how respondents interpreted the term ''leave'' (*i.e.,* whether it means each incident/absence or a group of absences for a single qualifying condition). For example, 1.3 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking *no FMLA* leaves. Another 53.2 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking only *one* FMLA leave. Thus, it would appear that many workers considered a leave to be a single qualified reason (*e.g.,* pregnancy and birth of a child) regardless of the number of incidents/absences (*e.g.,* for pre-natal care, morning sickness, childbirth, recovery from child birth). On the other hand, 8.3 percent of the covered and eligible leave-takers who reported taking leave intermittently reported taking 10 or more FMLA leaves. Presumably, many of these leave-takers were reporting the number of incidents (*e.g.,* absences, late arrivals, *etc.*) rather than the number of leaves based on different qualifying conditions.

[30] Although there is some uncertainty over how respondents interpreted the term ''leave'' in the Westat employee survey (*see* footnote 29), this is the Department's best estimate given available data.

[31] In addition to the difficulty interpreting the term ''leave'' discussed in footnote 29, the Westat surveys were not large enough to develop industry-specific leave usage estimates. Although information provided in response to the RFI suggests that leave usage varies by industry, the data submitted do not permit the development of estimates by industry.

• ''Previous congressional testimony, the 2000 Westat Report, other surveys, and stakeholder meetings suggest that the FMLA has significant benefits and costs.'' (72 FR at 35627)

• ''Further, most surveys of workers and employers show that, while the FMLA has been generally effective in carrying out the congressional intent of the Act, some aspects of the statute and regulations have created challenges for both workers and employers * * * employers report job disruptions and adverse effects on the workforce when employees take frequent, unscheduled, intermittent leave from work with little or no advance notice to the employer.'' (72 FR at 35627)

• ''[S]ome employers are likely to incur higher costs than the 'average' firm responding to Westat's employer survey. If these high costs are clustered in specific industries or types of work, then the FMLA could impose significant costs for those clusters of employers while the average number of employers may have reported relatively lower costs.'' (72 FR at 35630)

• ''The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models * * * In many situations, the absence of just a few employees can have a significant impact * * * Comments received in response to the RFI suggest at least four types of business operations appear to have particular difficulty with unscheduled intermittent FMLA leave: (1) Assembly line manufacturing; (2) operations with peak demand; (3) transportation operations; (4) and operations involving public health and safety.'' (72 FR at 35632)

Based on these findings, the Department used a bifurcated approach to assessing the impacts of the proposed revisions. First, the PRIA assesses the impacts that are generally applicable to most employers and their employees. Second, the PRIA qualitatively discusses the impacts on employers and employees with highly time-sensitive operations.

Although many of the estimates presented below are developed from the same data sources used in the Department's estimates under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* and its attendant regulations, 5 CFR part 1320, there are several differences in the estimates. These differences, however, result from the differing requirements imposed by the E.O. 12866 and the PRA. For example, many of the employer estimates developed for the PRIA are based upon the number of covered establishments while the estimates in the PRA are based upon the number of respondents, which is often the number of employers covered by the FMLA. In addition, the estimates in the PRIA represent the incremental changes of the proposed rule while those in the PRA analysis represent the total burden of the *information collection.* In some cases, this results in the PRA analysis calculating a paperwork burden for an information collection that remains unchanged from the current regulation and is thus not considered an incremental cost of the new regulation in the PRIA. Conversely, the regulatory definition for ''collection of information'' for PRA purposes specifically excludes the public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public (see 5 CFR 1320.3(c)(2)), while the PRIA needs to consider the impact of any regulatory changes in such notifications provided by the government.

Cost of Reviewing and Implementing Revisions

Any change in a regulation will result in costs for the regulated community to review the changes and revise their policies and procedures. The Department estimates that, on average, a human resource professional at each firm with FMLA covered establishments will spend an average of six hours to review the revised FMLA provisions, adjust existing company policies accordingly, and disseminate information to managers and staff. Given that the average hourly wage and benefits rate of a Human Resource compensation and benefits specialist is $36.51,[32] the average one time cost per covered firm is $219.06 (6 hours × $36.51). Multiplying this average cost per firm by the estimated 273,937 firms that have FMLA covered establishments (see the industry profile above) results in an estimated one-time cost of about $60.0 million for firms to review the changes and revise their policies and procedures.

Clarifying the Treatment of Professional Employer Organizations (§ 825.106)

The Department is proposing to clarify how the joint employment rules apply to Professional Employer Organizations (PEOs). Under the proposal, PEOs that contract with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies—are not joint employers with their clients, provided: (1) They do not have the right to exercise control over the activities of the client's employees, and do not have the right to hire, fire or supervise them, or determine their rates of pay, and (2) do not benefit from the work that the employees perform.

Based upon the comments received in response to the RFI, it appears that some commenters were under the erroneous impression that PEOs were treated the same as temporary staffing agencies. Thus, some workers may have been mistakenly treated as if they were covered by the FMLA when they were not. Other comments indicated that some small employers do not use PEOs because of uncertainty over FMLA coverage. Some of these employers may choose to use PEOs after the clarification and provide their employees with some of the benefits offered by the PEOs such as access to group life and health insurance, and retirement plans. Although data limitations inhibit the Department from estimating the impact of this clarification, the Department expects that very few workers or employers will be impacted by this clarification.

Clarifying the Definition of ''Eligible Employee'' (§ 825.110)

Current § 825.110 sets forth the eligibility standards employees must meet in order to take FMLA leave. Specifically, current § 825.110(a) restates the statutory requirement that to be eligible for FMLA leave, an employee must have been employed by an employer for 12 months, been employed for 1,250 hours in the 12 months preceding the leave, and be employed by an employer with 50 or more employees within 75 miles of the worksite. Current § 825.110(b) provides detail on the requirement that the employee must have been employed by the employer for at least 12 months, stating that the 12 months need not be consecutive.

The Department is proposing a new § 825.110(b)(1) to provide that although the 12 months of employment need not be consecutive, employment prior to a continuous break in service of five years or more need not be counted. The Department expects that very few workers will be impacted by this clarification.[33]

[32] Bureau of Labor Statistics, ''National Compensation Survey: Occupational Wages in the United States, June 2006.'' Rate assumes hourly wage plus 40% for benefits.

[33] In order to be impacted by the proposed provision a worker would have to (1) be employed for at least 1,250 hours during the previous 12 months, (2) have a break in employment with that employer for more than 5 years, and (3) need time

Continued

The Determination of Whether 50 Employees Are Employed Within 75 Miles (§ 825.111)

Current § 825.111 sets forth the standards for determining whether an employer employs 50 employees within 75 miles for purposes of employee eligibility. Paragraph (a)(3) of this section provides that when an employee is jointly employed by two or more employers, the employee's worksite is the primary employer's office from which the employee is assigned or reports. The Department is proposing to modify § 825.111(a)(3) to state that after an employee who is jointly employed is stationed at a fixed worksite for a period of at least one year, the employee's worksite for purposes of employee eligibility is the actual physical place where the employee works. No changes are being proposed with respect to employees whose worksite has not been fixed for at least one year.

The Department expects that this clarification will have little net impact. Some employees currently covered by FMLA may not be covered if their official worksite is changed because they have worked more than one year at an establishment which has less than 50 employees within 75 miles, while other employees not currently covered may become covered if their worksite is changed to an establishment which has 50 or more employees within 75 miles.

Clarifying the Definitions of ''Continuing Treatment'' and ''Periodic Visit'' (§ 825.113, § 825.114 and § 825.115)

The current regulations (§ 825.114(a)(2)(i)(A)) define ''continuing treatment'' for purposes of establishing a serious health condition as a period of incapacity of more than three consecutive calendar days and treatment two or more times by a health care provider. However, the current ''two visit'' requirement for serious health conditions is open-ended. One of the proposed clarifications specifies that the two visits to a health care provider must take place within a 30 calendar-day period to meet the definition.

Similarly, a chronic serious health condition is currently defined in § 825.114(a)(2)(iii) as one that requires periodic visits for treatment, but the regulations do not define the term ''periodic visit.'' In the proposal, ''periodic visit'' is defined as visiting a physician twice or more per year for the same condition. This is based on an expectation that employees with chronic serious health conditions will generally visit their health care providers with a minimum frequency of semi-annually.

Although the proposed clarification will reduce uncertainty in the workplace, it is unlikely to have any identifiable impact on FMLA leave-takers for several reasons. First, of the five different definitions of continuing treatment contained in current § 825.114(a)(2)(i) through (v), the Department is proposing to update only two. Those workers who meet the other tests will not be affected (*i.e.*, the clarifications do not impact workers who take FMLA leave for a pregnancy or prenatal care; workers who use leave for a condition that is permanent or long-term for which treatment may not be effective; or workers who use leave for multiple treatments, such as for a condition that would likely result in more than three consecutive days of incapacity in the absence of treatment. The proposed changes also do not affect employees who take FMLA leave for serious health conditions that required an overnight hospital stay or workers who will qualify on the basis of one visit to a health care professional and a continuing regimen of treatment. Second, serious health conditions usually require two visits to a health care provider within 30 days, and workers with chronic serious health conditions typically visit their health care providers twice a year. Finally, the Department has also proposed an ''extenuating circumstances'' exception to the 30-day rule in § 825.115(a)(1), so it is likely that very few workers will be negatively impacted by the proposed changes.

In fact, the Department believes it is providing FMLA protection to more workers by clarifying that the period should be 30 days, instead of adopting the stricter regulatory interpretation offered by the United States Court of Appeals for the Tenth Circuit (see discussion in preamble). Further, to the extent that some employers have chosen to provide their own more stringent definition of the term ''periodic'' for FMLA purposes, clarifying the term ''periodic'' for chronic conditions to mean two or more visits per year will reduce uncertainty in the workplace and decrease the burden for some workers.

The following analysis illustrates how few workers and leaves this may involve. According to both the Westat and WorldatWork surveys, leaves based on multiple visits to a health care provider (as distinct from leaves for self-treatment) represent only a small percentage of FMLA leaves. In fact, the WorldatWork survey states that multiple treatments were the basis of only 5.1 percent of FMLA episodes.[34] However, it is very unlikely that the proposed changes will impact even this small percentage of leaves because: (1) The multiple treatments that most workers currently have will likely meet the revised requirements with no change in the behavior of those workers; and (2) other workers will simply move up the time of their second treatments to meet the revised requirements (*e.g.*, the 30 day period), or provide an explanation of the ''extenuating circumstances.'' Therefore, it is likely that on balance very few workers will be impacted by the proposed changes.[35] The Department specifically requests comment on this conclusion.

Substitution of Paid Leave (§ 825.207)

In the RFI the Department noted ''Some employers commented that the substitution of leave provisions contribute to increased FMLA leave at otherwise popular vacation or personal leave times.'' Moreover, this increased use of FMLA leave resulted in some workers receiving more favorable treatment than others. ''Many employers commented that the regulations force employers to treat employees seeking to use accrued paid leave concurrently with FMLA leave more favorably than those who use their accrued paid leave for other reasons. The Madison Gas and Electric Company, for example, stated that ''during 'peak' or 'high demand' vacation periods, employees may request FMLA leave causing the employer to deny other employees their scheduled leaves due to staffing level concerns based on business needs.'' (72 FR at 35612) The proposed revision will address both of these concerns by combining current paragraphs (a), (b), and (c) of § 825.207 into one paragraph (a), which now clearly states that the

from the earlier period of employment with the same employer to meet the 12 months of employment requirement for FMLA eligibility. Very few workers are likely to meet these three conditions. For example, part-time employees would have to work an average of 25 hours per week for 50 weeks to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few additional weeks of employment from their previous period of employment more than 5 years ago with the same employer. Similarly, returning full-time employees will need more than 7 months of employment at 40 hours per week to meet the 1,250 hours employed requirement. So the only ones impacted are those who want to use FMLA leave and who need a few extra months of employment from their previous period of employment more than 5 years ago with the same employer.

[34] WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 9a, p. 8.

[35] The Department anticipates that at most 27,000 leaves may require an additional visit to a healthcare professional to qualify for FMLA protection.

terms and conditions of an employer's paid leave policies apply and must be followed by the employee in order to substitute any form of accrued paid leave—including, for example, paid vacation, personal leave, family leave, ''paid time off'' (PTO), or sick leave. In addition, the proposed revision will help reduce the impact of unforeseeable intermittent leave and uncertainty in the workplace by providing employers with sufficient notice of their employees' need for leave and thereby allowing for better staffing adjustments.

Proposed § 825.207 requires FMLA leave-takers who are also receiving paid leave to meet their employer's uniformly-applied paid leave policies for accrued paid vacation and personal leave. If an employee does not comply with the requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid vacation and personal leave, but remains entitled to all the protections of unpaid FMLA leave.

According to Westat, 65.8 percent of workers who take FMLA leave received some type of pay during their longest FMLA leave.[36] Further, CONSAD estimated that 55.0 percent of these leave-takers received paid vacation or personal leave.[37] Therefore, about 2.5 million workers (*i.e.*, 7.0 million × 65.8% × 55%) received paid vacation or personal leave during their FMLA leave. However, the proposal will not impact all of these workers because many of them will continue to be eligible to use paid vacation pursuant to their employers' normal vacation leave policies.

Most employers do not have very strict requirements regarding paid leave. According to the 2000 Westat Report, 77.8 percent of leave-takers reported that it was easy to get their employer to let them take time off. This suggests that the vast majority of workers will have no problem complying with their employers' paid leave policies. On the other hand, 14 percent reported that it was difficult to get time off.[38] This suggests that a similarly small percentage of the 2.5 million workers who received paid vacation or personal leave during their FMLA leave may have some difficulty satisfying their employers' paid leave policies.

Some of these FMLA leave-takers will be encouraged to provide their employers with additional notice of a pending absence so they can utilize paid vacation and personal leave in conjunction with their FMLA leave. Other FMLA leave-takers will not be able to satisfy their employer's procedures for taking paid leave (*e.g.*, because the procedures require that leave be taken at specific times of the year or in minimum blocks of time such as a week). However, workers who do not or cannot satisfy their employer's procedures for taking paid leave will still remain entitled to all the protections of unpaid FMLA leave.

The inability to take paid vacation leave concurrently with FMLA leave may have a negative impact on the cash flow of those few who do not satisfy their employer's requirements for taking paid leave, and the Department understands that many commenters responding to the RFI emphasized the importance of the ability to substitute paid leave. However, for the few workers who will no longer be able to substitute paid vacation in all situations, these workers will still be entitled to use their accrued paid leave at some other time.

Perfect Attendance Awards (§ 825.215(c)(2))

The Department is proposing to replace the existing language in § 825.215(c)(2) with language that better reflects the requirements of the statute and reduces uncertainty in the workplace. Specifically, employers are uncertain whether their employee incentive plans are in violation of the current regulation. The confusion stems from language which distinguishes between bonuses for job performance such as those based on production goals, and bonuses that contemplate the absence of occurrences, such as bonuses for working safely with no accidents or for perfect attendance.

Perfect attendance incentives are traditionally offered by employers where the costs of absent employees (*i.e.*, the cost of the production delay itself or the cost of overstaffing or overtime to avoid the delay) are high. Employers would offer the bonuses to motivate workers not to be absent, thereby avoiding costs that are far in excess of the bonus.[39] In such situations, both employers and employees gain from the bonus. Employers reduce their costs. Employees increase their income.

Comments made in response to the RFI indicate that the current FMLA regulations interfere with the effectiveness of perfect attendance bonuses because employees could still qualify for the bonus while absent on FMLA leave. As a result, the benefits of the bonuses to employers are diminished because employers still incur the costs related to absenteeism in addition to the cost of the bonuses, which means that fewer employers may offer these awards, ultimately hurting employees as well.

The Department believes that this revision will restore perfect attendance awards to their intended purpose. By reducing the uncertainty surrounding employee incentive plans, this revision may encourage more employers to provide larger bonuses as incentives to reduce absenteeism among all workers. Based upon the comments to the RFI, the Department expects that some reduction in unnecessary absenteeism will reduce overall employer costs. However, data limitations inhibit the Department from quantifying the impact of this revision.

The Treatment of Light Duty (§ 825.220(d))

The Department is proposing to delete the final sentence of current § 825.220(d) to ensure that employees retain their right to reinstatement for a full 12 weeks of leave instead of having the right diminished by the amount of time spent in a light duty position.

Under FMLA employees have no right to a light duty position. Therefore, employers will only offer such duty to employees when it is advantageous for them to do so. This will continue to be the case under the revised provision. Although the Department believes that this change will have a negligible impact on employers, a few workers whose employers are counting their light duty hours towards their 12 weeks of FMLA leave will now have more hours of leave available. The only impact that the Department anticipates is that some workers may not be offered light duty because their employers will not consider such duty cost-effective if the time is not counted against the worker's FMLA allotment, either for purposes of restoration rights or length of leave.

Changes to the Employer Notification Requirements (§ 825.300)

Proposed § 825.300(a)(3) requires covered employers with eligible employees to distribute a general notice of information about the FMLA to employees either by including it in an employee handbook or by distributing a copy to each employee at least once a year, either in paper or electronic

[36] *See* the 2000 Westat Report, Table 4.2, p. 4–5.

[37] The 2000 Westat Report indicated that of leave-takers who received paid leave during their longest FMLA leave, 39.4% received paid vacation leave and 25.7% received paid personal leave (Table 4.6, p. 4–6). Using probabilities, 55.0% = 39.4% + 25.7%—(39.4% × 25.7%).

[38] *See* 2000 Westat Report, Table 4.2, p. 4–3.

[39] A rational employer would balance the perfect attendance award cost with the cost of employee absence, and not offer such bonuses where the cost of an absence is relatively low.

format, regardless of whether an employee requests leave.

Current § 825.301(a)(1) requires an employer to place in an employee handbook, if one exists, a notice of FMLA rights and responsibilities and the employer's policies on FMLA. Current § 825.301(a)(2) states that an employer without a handbook must provide written guidance to an employee concerning all the employee's rights and obligations under FMLA when the employee gives specific notice of the need for leave.

The difference between the proposed and current provisions, therefore, is that under the proposal all employees working in covered establishments without handbooks must be notified annually rather than just when they ask for leave that could be FMLA leave. The proposed change will likely increase notification costs for some covered employers (*i.e.*, those without handbooks), and will likely increase awareness of the Act and therefore FMLA usage.

CONSAD estimated the number of additional notices that may be required for this provision, based upon data from the 2000 Westat Report. The 2000 Westat Report indicates that 18.9 percent of employees request FMLA leave annually. CONSAD added 1 percent to this estimate to account for the growth in awareness of the FMLA from 1999 to 2005, and then the 19.9 percent was multiplied by ⅔ to account for the fact that the Westat survey covered 18 months instead of 12 months. Thus, CONSAD estimated that about 12.7 million covered employees request leave each year (*i.e.*, 13.3% of the 95.8 million FMLA covered employees).[40] Data from Westat also indicate that 8.1 percent of covered employees did not receive information regarding their FMLA rights in handbooks.[41] Therefore, employers currently send out about 1 million general notices to employees requesting leave (*i.e.*, 12.7 million × 8.1%).

Under the new provision, all FMLA-covered employees must receive an FMLA general notice at least annually, regardless of whether they request leave, if the information is not in an employee handbook. Therefore, employers will have to send annual notices to about 7.8 million workers (*i.e.*, 8.1% of the 95.8 million covered employees), and the net impact of the proposal will be 6.8 million additional general notices sent out each year (*i.e.*, 7.8 million—1 million sent out under the current rule).

The 2000 Westat Report suggests that 32 percent of employees without FMLA information in a handbook will receive an annual notice via e-mail, 62 percent will receive a hand-delivered memo at work, and the remaining 6 percent will receive their annual notice via regular mail.[42] Therefore, among the additional notices needed each year, 2.2 million (*i.e.*, 32% of 6.8 million) will be e-mailed, 4.2 million will be hand-delivered at work, and 0.4 million notices will be sent by regular mail.

Of the 1.135 million FMLA covered establishments, an estimated 92,000 (8.1%) do not include FMLA information in an employee handbook and will be required to send annual notices to employees. For e-mail notices, the Department estimates that it will take on average one hour for a ''benefits and compensation'' specialist to prepare a notice (or find a pre-made one from the Department of Labor's Web site) and e-mail the notice to employees. For hand-delivered notices, the Department assumes that it will take on average 1.5 hours to prepare the notice and hand-deliver it through the interoffice mail. Finally, the Department estimates that it will take a similar specialist an average of two hours to prepare notices to be mailed by regular mail. This time includes preparing the notice, printing mailing labels, and putting the notices in envelopes.

Based on data from the Bureau of Labor Statistics, the average cost for wage and benefits of a ''benefits and compensation specialist'' is $36.51 per hour.[43] So the estimated cost to prepare the 29,000 e-mail notices is about $1.1 million (*i.e.*, 92,000 establishments multiplied by 32%, times the cost of $36.51 per establishment) and the estimated cost for 57,000 firms to hand-deliver notices is about $3.4 million (*i.e.*, 92,000 establishments multiplied by 62%, times the cost of $54.77 per establishment, plus the cost of copying the notice for 4.2 million workers at 8 cents per copy). The estimated cost for 5,500 firms to prepare and deliver the notice through regular mail is about $0.6 million (*i.e.*, 92,000 establishments multiplied by 6%, times the cost of $73.02 per establishment, plus the cost of mailing a notice via regular mail (about 49 cents) times the 0.4 million additional annual notices sent via mail).

Adding all of these costs together yields a total estimated annual additional cost of about $5.1 million for the general notice proposal.[44]

After receiving these general notices on an annual basis some employees who previously did not take FMLA leave, may choose to do so because they acquire additional information from the notice regarding the protections afforded by the FMLA. Data from Westat employee survey reveal that 2.7 percent, or 2.4 million, of covered and eligible employees needed leave for FMLA covered reasons, but did not take it, and that 8.6 percent, or 210,000, of covered and eligible leave-needers reported that they could have afforded to take the leave, but had never heard about the FMLA.[45] The Department also estimates that 17.7 percent of covered and eligible leave-needers who reported they could afford to take leave, but had never heard about the FMLA, did not take the leave for fear of losing their jobs.[46] Assuming these workers would now be more aware of their FMLA protections they would most likely take FMLA leave, the Department estimates that the number of FMLA leave-takers will increase by about 37,000 employees (*i.e.*, 17.7% of 210,000) because of the proposed general notice provision.

The estimated administrative costs associated with these additional workers taking FMLA leave is based upon the estimate of 1.25 hours of a ''compensation and benefits specialist'' to process the paperwork for each worker at a cost of $36.51 per hour. Thus, the administrative burden of 37,000 additional workers taking FMLA leave will cost approximately $1.7 million.

Proposed § 825.300(b) consolidates the notice provisions contained in existing § 825.110(d) and § 825.301(b) into a paragraph entitled ''eligibility notice.'' Consistent with current § 825.110, the employer continues to be responsible under proposed paragraph (b)(1) of this section for communicating eligibility status. The proposed regulations require that this information be conveyed within five business days after the employee requests leave or the employer acquires knowledge that the employee's leave may be for an FMLA-qualifying reason (a change from the

[40] Although 12.7 million workers *requested* leave, only 7.0 million were *eligible* and took leave.

[41] *See* the 2000 Westat Report, Table A2–6.1, p. A–2–50.

[42] *Id.* The Department assumes that the distribution of the means of communication among employees is the same as the distribution of means of communication among establishments.

[43] National Compensation Survey: Occupational Wages in the United States, June 2006. Based on an hourly wage of $26.08 plus 40% for benefits.

[44] To the extent that e-mail or other electronic means of communication may be more common now than in 2000, this may be an overestimate of the impact of this provision.

[45] Department of Labor, Employment Standards Administration, estimates from the Westat Employee Survey data.

[46] *Id.*

current requirement of two business days).

Proposed § 825.300(b)(2) specifies what information an employer must convey when communicating with the employee as to eligibility status. While not required under the current regulations, the proposal requires the employer to notify the employee whether leave is still available in the applicable 12-month period. If the employee is not eligible or has no FMLA leave available, then, pursuant to proposed (b)(2), the notice must indicate the reasons why the employee is not eligible or that the employee has no FMLA leave available. In proposing these new notice requirements, the Department believes there will be very little additional burden, since the employer is already required to calculate such information in order to determine eligibility. Moreover, any additional reporting burden will likely be more than offset by the benefit of changing the notification requirement from two to five days. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.

Similarly, proposed § 825.300(c) outlines the proposed requirements of the designation notice an employer must provide to an employee, currently located in § 825.208(b). This proposed designation notice requires that an employer notify the employee within five business days (a change from the current requirement of two business days) that the leave is designated as FMLA leave once the employer has sufficient information to make such a determination.

Proposed § 825.300(c)(3) explicitly permits an employer to provide an employee with both the eligibility and designation notice at the same time in cases where the employer has adequate information to designate leave as FMLA leave when an employee requests the leave.

The Department estimates that the changes related to increasing the time permitted to provide the notices and the ability to combine the notices will save employers on average about 15 minutes of a ''compensation and benefits specialist'' time in processing each leave. At a cost of $36.51 per hour, saving 0.25 hours on each of the estimated 10.5 million leaves taken results in a savings of about $95.8 million. However, these savings are offset by the cost of the new requirement that an employer notify the employee if the leave is not designated as FMLA leave due to insufficient information or a non-qualifying reason and the cost of providing more information to employees in the designation notices (see below).

Proposed § 825.300(c) requires that an employer notify the employee if the leave is not designated as FMLA leave. As was noted above, CONSAD estimated that 12.7 million covered employees request leave each year. Subtracting the estimated 10.5 million FMLA leaves from the number of requests for FMLA leave yields an estimated 2.2 million FMLA leave requests denied each year. Based upon an estimated 0.5 hours to process each of these requests at a cost of $36.51 per hour, the Department estimates that notifying the 2.2 million workers why their requests for FMLA has been denied will results in a cost to employers of about $40.2 million.

Proposed § 825.300(c)(1) requires employers to inform their employees of the number of hours, days, or weeks, if possible, designated as FMLA leave. To estimate the impact of this change, the Department assumes it would take an additional 10 minutes of a ''compensation and benefits specialist'' time to process each designation because of the new requirement to provide the amount of time that will be designated as FMLA leave.[47] Based upon 10.5 million leaves, this will result in about $65.9 million in additional costs.

Moreover, where the amount of future leave that will be needed by an employee is unknown, such as for workers with chronic conditions, proposed § 825.300(c)(1) requires that the notice of the amount of leave designated and counted be provided every 30 days, to the extent that the employee took leave for the condition in the prior 30-day period. Currently, the regulations do not specifically address the designation of the particular amount of unforeseen, intermittent leave used. Current § 825.208 requires an employer to designate leave as FMLA-qualifying leave, and current § 825.301(c) requires that the notice of an employee's specific obligations must be provided no less often than once every six months, but they do not expressly address the number of days or hours of leave used. To estimate the impact of this change, the Department assumes that for workers with chronic conditions (either temporary or permanent) an additional 10 notices[48] will have to be provided each year and that each notice will take about 10 minutes of a ''compensation and benefits specialist'' time to process.[49] According to the WorldatWork survey, 28.6 percent of absences result from either chronic or permanent/long term conditions.[50] Assuming that this applies to leave takers, the Department estimates that 10 additional designation notices will have to be sent to about 2 million workers (*i.e.*, 28.6% of 7 million) taking FMLA for either chronic or permanent/long term conditions each year at a cost of $121.9 million (*i.e.*, 2 million × 10 notices × 0.167 hour × $36.51 per hour).[51] The Department has not estimated the cost of alternative notification frequencies (*e.g.*, every 60 days, every three months, *etc.*) because the cost of this revision depends solely on the frequency of the designation notices.[52] The Department, however, requests comment on its assumption that 10 additional designation notices would be required each year under the proposed language of § 825.300(c)(1) and whether some alternative frequency for employers to provide the designation notices is more appropriate than the proposed frequency of every 30 days.

The net impact of all of the revisions discussed in this subsection, therefore, will be a net cost of about $139.0 million.

Changes Related to Employees Notifying Their Employers (§§ 825.302, .303 and .304)

The current regulations require an employee to notify his or her employer of the need for leave and generally to schedule leave for planned medical treatments in a way that the absences do not unduly disrupt the employer's business operations. These proposed revisions are intended to reduce the impact of unforeseeable intermittent leave and uncertainty in the workplace without negatively impacting leave-needers.

[47] This estimate is consistent with the data presented in WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 6, p. 7.

[48] Currently up to 2 notices are required each year.

[49] This estimate is consistent with the data presented in WorldatWork, *FMLA Perspectives and Practices: Survey of WorldatWork Members,* April 2005, Figure 6, p. 7.

[50] *Id.*, Figure 9a, p. 8.

[51] This is an upper bound estimate because it is based upon the assumption that the workers will take some FMLA leave each month and that a designation notice will be required every month. Clearly, some workers with FMLA certifications for chronic health conditions do not take FMLA leave every month. Moreover, although the current regulations do not specifically address the designation of unforeseen intermittent leave, the RFI record suggests that many employers are already sending out designation notices for this type of FMLA leave to avoid any potential legal liability.

[52] Additional Annual Cost = (Annual Number of Notices Required—2 Current Notices) × $12.2 million.

Under the Department's proposal, an employee must provide notice as soon as practicable, meaning feasible under the circumstances, and must comply with the employer's usual procedures for calling in and requesting leave, except when extraordinary circumstances exist such as when the employee or covered family member needs emergency medical treatment. The Department expects that in all but the most extraordinary circumstances, employees will be able to provide notice to their employers of the need for leave prior to the start of their shift. The proposed changes should reduce some of the uncertainty and disruptions caused by employees taking unforeseeable FMLA leave with little or no advance notice to their employers.

As was noted in the RFI Report, unscheduled leave is more disruptive to employers than foreseeable leave. By its very definition, foreseeable FMLA leave can be anticipated and planned for as employees are aware of their need in advance and can easily notify their employers prior to taking FMLA leave. Even in cases where the exact timing of the leave is not known 30 days in advance, the Department believes that most employees taking foreseeable FMLA will easily be able to comply with their employers' leave policies (see discussion in preamble). On the other hand, by its very nature, unforeseeable leave presents difficulties for both employees and their employers, particularly as to the requirement that the employee provide notice of the need for leave as soon as practicable.

According to a 2007 survey conducted by the Society for Human Resource Management (SHRM), 34 percent of FMLA leave takers for episodic conditions did not provide notice before the day the leave was taken and 12 percent provided notice more than one day after the leave was taken.[53] Therefore, according to SHRM's survey about 46 percent of employees are not providing notice prior to the start of their workday. This estimate is consistent with the findings of the Employment Policy Foundation, which found that 41 percent of employees are not providing notice prior to the start of their workday or shift.[54] Thus, the Department estimates that no notice is currently being provided prior to the start of the workday for 4.8 million leaves (*i.e.*, 46% of 10.5 million leaves).

It is this late notification that results in greatest uncertainty and disruption to employers' business operations. For example, it creates significant problems if the employer cannot obtain adequate staffing;[55] the production process is often slowed down or brought to a halt;[56] and the situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators.[57] Moreover, workplace uncertainty can impact other employees who may have to pull double-duty to cover for a team member or co-worker.[58]

There are three anticipated behavioral responses that leave-takers will have to the proposed provisions. First, most leave-takers will simply change their notification behavior and notify their employers of leaves prior to the start of their workday. This change will mean that although the leaves are taken, staff uncertainty will be reduced and employers will have more time to obtain a replacement and be in a better position to meet staffing needs despite the unexpected absence. The Department expects that 95 percent or 4.6 million of the 4.8 million leaves where employees are currently not providing notification until the start of the workday will be in this category.

Better control of the unforeseen absences will reduce the disruptions associated with the labor absence. The Westat Survey and comments made in response to the RFI suggest that the most likely response of employers to an unforeseen absence of short duration is to simply assign the absent employee's work to other employees. However, the comments to the RFI also indicate that it may take employers some time to arrange for coverage, especially in cases where the notification of the FMLA comes in after the start of the shift. For this proposed rule, therefore, DOL has used one hour of the average earnings of production and nonsupervisory workers on private nonfarm payrolls ($17.57)[59] plus 40 percent for benefits as a proxy for the cost of an absence without sufficient notification. This savings is not a *productivity* savings in the traditional sense because there is no output and no time involved. Rather, the Department is using one hour of employees' compensation[60] as a rough estimate of the costs related to the uncertainty and disruptions caused by unscheduled intermittent FMLA leave (*e.g.*, work being left undone until the absent employee's work can be shifted to another employee or until another employee can cover for the absent employee). Further, this estimate is limited to the typical impact. If the absence of an employee affects the productivity of other employees besides the one reassigned the task (*i.e.*, in highly time-sensitive production processes such as manufacturing), this may be an underestimate of the effects of this provision.[61] Thus, the Department estimates that more timely notifications by employees will result in a savings of about $113.2 million to employers. The Department specifically request comments on the analysis used to develop this estimate.

The second possible response to this change is that some workers who continue to avoid compliance with their employer's attendance policies may be subject to their employer's disciplinary procedures for being absent. No workers with a legitimate need for FMLA leave will be in this group or decide not to take the leave in response to a last-minute emergency because: (1) The revisions provide for ''extraordinary circumstances'' (see below); and (2) an employee is likely to take leave regardless of the interpretation of ''as soon as practicable'' during a serious health situation.[62]

The Department expects that 4.9 percent or 235,000 of the 4.8 million leaves where employees are currently not providing notification until the start of the workday will be in this category. The Department estimates that each of the leaves not covered by FMLA will save employers' administration and

[53] Society for Human Resource Management, FMLA and Its Impact on Organizations, Figure 7, p. 17, available at: *http://www.shrm.org/hrresources/surveys_published/FMLA%20And%20Its%20Impact%20On%20Organizations%20Survey%20Report.pdf.*

[54] Janemarie Mulvey, PhD, Employment Policy Foundation *Issue Backgrounder,* ''The Cost and Characteristics of Family and Medical Leave,'' April 19, 2005, p. 3. ''With respect to providing notice prior to taking FMLA leave, the survey results show that nearly 50 percent of all FMLA leave takers do not provide notice before the day the leave is taken. According to the survey, in over 30 percent of cases, employees provide notice after the leave has started. In another 11 percent of cases, employees providing notice [sic] at the time the leave begins or immediately after.''

[55] RFI Report, 72 FR at 35631.

[56] *Id.* at 35633.

[57] *Id.* at 35635.

[58] *Id.* at 35633.

[59] According to the October 2007 BLS Employment Report.

[60] The wage plus benefits represents the marginal cost of the absent employee. In a perfectly competitive market, this would be equal to the marginal revenue brought in by that employee. Therefore, one hour of compensation is used as a proxy for the opportunity cost of having the worker missing for an hour.

[61] See the later discussion on the possible impacts on highly time-sensitive industries.

[62] The Department received a number of comments in response to the RFI that suggest some employees may be misusing FMLA leave to avoid their employers' attendance policies (*see* Chapter IV, Section B.2, of the RFI Report, 72 FR at 35571). However, as noted in the RFI Report, the Department cannot assess from the record how much leave taking is actual ''abuse'' and how much is legitimate, and therefore cannot estimate what impact this proposal would have on the alleged misuse of FMLA leave.

reduced operational costs equal to an average of about 1 hour of a ''compensation and benefits specialist's'' time. At a cost of $36.51 per hour, this will result in a savings of about $8.6 million.

The third possible response is that some leave-takers will have ''extraordinary circumstances'' with a serious health condition and take leave without providing advance notice. However, the number of leaves for which advance notice cannot be given will likely be very small, on the order of 0.1 percent of the 4.8 million leaves or 48,000. The uncertainty, disruptions, and costs associated with this type of unscheduled leave for both employers and employees are inevitable, unavoidable, and will likely continue, but the incremental impacts of this continued type of leave, relative to the current rule, is minimal.

The net impact of all of the revisions discussed in this subsection, therefore, will be a net savings of about $121.8 million.

Medical Certifications (§§ 825.305, 825.306 and 825.307)

Current § 825.305(c) provides that an employer should request medical certification from the employee within two business days of receiving the employee notice of the need for leave. The Department is proposing to modify this time-frame to a five-business-day standard. This change is being proposed to maintain consistency with the modifications being proposed to § 825.300. Providing more time will reduce mistakes and provide greater certainty in the workplace, and this typically benefits both workers and employers.

The Department is also proposing in § 825.305(c) that when an employer determines that a medical certification is incomplete or insufficient, the employer must state in writing what additional information is necessary and provide the employee with seven calendar days to cure the deficiency (additional time must be allowed where the employee is unable to obtain the additional information despite diligent good faith efforts). Under the current rule no written statement from the employer is necessary.

In § 825.306 the Department is proposing several revisions to the medical certification form, to implement the statutory requirements for ''sufficiency'' of the medical certification as set forth in 29 U.S.C. 2613(b) and to make it easier for health care providers to understand and complete. The Department has revised its optional form (Form WH–380) for employees or their family members to use in obtaining medical certifications and second and third opinions from a health care provider.

There are three proposed changes to § 825.307. First, the proposed provision clarifies the limited nature of the authentication process and removes the requirement that employees consent to authentication of the certification. Second, the proposal allows employers to contact the employee's health care provider directly, rather than through a third-party health care provider that represents the employer, provided the contact between the provider and the employer comply with the privacy rule under the Health Insurance Portability and Accountability Act (HIPAA). Third, the new provision extends the time allowed for an employer to provide the results of second and third opinions of medical certifications from two business days to five.

According to the 2000 Westat Report, 73.6 percent of leave-takers took leave for a serious health condition (either their own or for a covered family member),[63] and 92 percent of covered establishments required medical documentation for covered leave due to a serious health condition.[64] The Department estimates that these provisions will affect about 7.1 million FMLA leaves taken for serious health conditions (*i.e.*, 7.0 million leave-takers × 73.6% × 1.5 leaves × 92% = 7.1 million). The Department also estimates that these changes, as well as the changes discussed above, will result in a net savings to employers of on average about 15 minutes of a ''compensation and benefits specialist'' time in processing each leave request.[65] At a cost of $36.51 per hour, saving 0.25 hours on each of the estimated 7.1 million leaves taken results in a savings of about $64.8 million for employers.

In response to the RFI, some employee groups stated that it was often very challenging for workers to obtain certifications because the ambiguities on the form made it difficult for their health care providers to address deficiencies noted by their employers. The proposed revisions will make it easier for employees to understand what is required and will reduce uncertainty as to whether the condition qualifies as a serious health condition under the FMLA. In addition, the Department expects that employees will have to make fewer trips and phone calls to their health care providers to obtain ''complete and sufficient'' certifications, although the Department has not quantified this impact.

In response to the RFI, some health care providers expressed their frustration with the current form and the amount of time required to provide their patients with ''complete and sufficient'' certifications. The Department expects that the proposed clarifications will decrease the burden on health care providers and possibly reverse the trend of increasing numbers of health care providers charging their patients for filling out the medical certification forms.

Recertifications (§ 825.308) and Certifications for Fitness-for-Duty (§ 825.310)

Consistent with Wage and Hour Opinion Letter FMLA2004–2–A (May 25, 2004), the proposed change to § 825.308(e) of the FMLA would allow employers to send the absence schedule of an employee to a health care provider and to ask the health care provider whether or not the employee's pattern of intermittent leave use is congruent with the employee's qualifying medical condition. Further, consistent with the existing regulation, proposed § 825.308(b) explains that if a minimum duration for the leave is specified, the employer may not request recertification until that time period has expired but adds that, in all cases, recertifications may be requested every six months. Thus, the Department assumes that this clarification will not impact either employers or employees. The proposed change to § 825.308(e) will, however, provide employers with a tool to determine if the employee's pattern of FMLA leave is consistent with their condition, or possible misuse. However, as noted in the RFI Report, the Department cannot assess from the record how much leave taking is actual ''abuse'' and how much is legitimate, and therefore can not estimate what impact this proposal would have on the alleged misuse of FMLA leave.[66]

[63] The 2000 Westat Report, Table 2.3, p. 2–5.

[64] The 2000 Westat Report, Table A2–6.3, p. A–2–51.

[65] The net savings of 15 minutes includes: 1) the savings associated with extending the time allowed to ''process'' medical certifications from two to five days (providing more time will reduce the number of mistakes involved in the medical certification process and time required to address and correct those mistakes); plus 2) the time saved by allowing employers to contact the employee's health care provider directly; less 3) the additional time and cost that employers will have to take to provide a written explanation of why a medical certification is incomplete or insufficient.

[66] The Department received a number of comments in response to the RFI that suggest some employees may be misusing FMLA leave. For example, a number of commenters stated that some employees appear to be misusing the FMLA rules to secure for themselves a preferred schedule (*see*

Continued

Current § 825.310(c) states that a fitness-for-duty certification need only be a simple statement of the employee's ability to return to work. The proposed provision allows a fitness-for-duty certification similar to that of the initial medical certification of the FMLA leave. The Department is also proposing in § 825.310(g) that an employer be permitted to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist. For example, if a bus driver takes intermittent leave for a serious health condition that may influence his or her ability to drive safely over the road, then a fitness-for-duty certification is permitted. Finally, the Department is proposing in § 825.310(c) that, consistent with the HIPAA Privacy Rule, employers may contact an employee's health care provider directly, rather than through a third-party health care provider which represents the employer, for purposes of clarifying and authenticating the fitness-for-duty certification.

These proposed changes have several important impacts. First, they would better protect the safety and health of workers taking leave, and their coworkers. Second, § 825.310(c) will reduce administrative burdens. Third, the proposed change to § 825.308(e) will reduce uncertainty in the workplace by permitting an employer to determine if an employee's pattern of leave is consistent with the serious health condition.[67]

The additional information needed for a fitness-for-duty certification is likely to result in additional costs. The 2000 Westat Report found that 52.4 percent of workers took leave for their own serious health condition;[68] and the Department assumes that 10 percent of these leave-takers, or 367,000 workers, are required to have a fitness-for-duty certification to return to work (*i.e.*, 7.0 million workers × 52.4% × 10.0% = 367,000). Their health care providers will have to take an additional 10 minutes to provide the additional information on the proposed fitness-for-duty certification, and this additional time will cost an average of $51.06 per hour.[69] Thus, health care providers are likely to incur about $4.7 million in additional costs and these costs are likely to be shifted to employees in the form of higher fees for filling out the certifications.[70]

Although employers will take longer to review these certifications, the Department assumes that these costs will be offset by the ability of employers to directly contact the workers' health care providers.

The proposal in § 825.310(g) to permit an employer to require an employee to furnish a fitness-for-duty certificate every 30 days if an employee has used intermittent leave during that period and reasonable safety concerns exist is likely to impact very few workers. The 2000 Westat Report found that 52.4 percent of workers took leave for their own serious health condition and 23.9 percent of those workers took it intermittently.[71] The Department assumes that 5 percent of these leave-takers, or 44,000 workers, will be required to have a fitness-for-duty certification where reasonable safety concerns exist[72] in order to return to work from intermittent leave (*i.e.*, 7.0 million workers taking FMLA leave × 52.4% × 23.9% × 5.0% = 44,000).[73] On average the Department assumes these 44,000 workers will be required to provide three fitness-for-duty certifications for the intermittent leave they take, and obtaining each of these 132,000 certifications will cost an average of $50.[74] Thus, the revised provision will likely cost workers about $6.6 million per year.[75]

To estimate the impact of these additional certifications on employers, the Department assumed that it would take an additional 30 minutes of a ''compensation and benefits specialist's'' time at a cost of $36.51 per hour to request and process each certification. Based upon 132,000 fitness-for-duty certifications, this will result in about $2.4 million in additional costs for employers.

Although the net impact of the revisions discussed in this subsection will be a net cost of about $2.4 million for employers and $11.3 million for employees, the proposed revisions to § 825.310(g) will increase workplace safety by making sure that workers are healthy enough to return to work and do not pose a safety risk to themselves and others. However, data limitations inhibit the Department from estimating the number of workers who may be impacted by this proposal, or quantifying the resulting safety benefit.

Summary of Impacts

The Department estimates that the proposed revisions will result in a total first year net costs of about $26.1 million, and a net savings of about $33.9 million, each year thereafter (and this does not include the additional savings expected in the time-sensitive high-impact industries that are discussed in the next section).

For employers, the most significant costs will be the first year cost of reviewing and implementing the proposed revisions and the cost of providing employees with additional and more specific notifications. After the first year, however, these costs will be more than offset by the reduction in administrative costs and increased productivity resulting from employees providing better notice of their need for FMLA leave (*see* previous discussion of §§ 825.302, 825.303 and 825.304).

Although the vast majority of FMLA leave-takers will see no difference, the Department estimates that employees will incur $11.3 million in additional expenses related to taking FMLA leave, primarily as the result of the increased number of certifications that they will have to provide their employers. However, since these costs are primarily related to health care, a large portion is likely to be paid by the employee's

Chapter IV, Section B, of the RFI Report, 72 FR at 35575). However, the RFI Report also noted that the increase in the use of unscheduled intermittent FMLA leave seen in the data submitted by some employers could be due to other factors, such as workers suffering from the adverse health effects associated with the stress of staffing shorthanded operations (*see* Chapter XI, Section L, of the RFI Report, *Id.* at 35635).

[67] A number of comments to the RFI questioned employee leave patterns.

[68] The 2000 Westat Report, Table 2.3, p. 2–5. The establishment survey also found that 37.8 percent of FMLA leave-takers took leave for their own serious health condition; Table 3.8, p. 3–16.

[69] Average cost of physicians' assistants from the Bureau of Labor Statistics, National Compensation Survey, 2005. The average hourly wage was multiplied by 1.4 to account for benefits.

[70] Comments to the RFI indicate that many health care providers are now charging fees for FMLA certifications. It should be noted that the Department expects the majority of these fees will be paid by workers' health insurance. According to the Bureau of Labor Statistics, 2007 National Compensation Survey, unpublished data, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage.

[71] The 2000 Westat Report, Table 2.3, p. 2–5; and those that answered yes to Question A5B of Westat's employee Questionnaire.

[72] *See* the preamble for a discussion and examples of the term ''reasonable safety concerns.''

[73] The Department assumed a lower rate here because of the additional ''reasonable safety concern'' requirement on employer's ability to require a fitness-for-duty certification for intermittent leave.

[74] The Department assumes that workers with chronic conditions are under doctors' care so that for most workers the added cost of the certifications will only be the charge for the doctor to fill out the forms, which will probably cost less than $50. Other workers will, of course, require medical examinations, which will probably cost more than $50.

[75] It should be noted that the Department expects the majority of these costs will be paid by workers' health insurance. *See* footnote 70.

health insurance, some of which is financed by employers. According to the Bureau of Labor Statistics, 2007 National Compensation Survey, 90 percent of establishments with 50 or more employees offer health care benefits, and 81 percent of workers in those establishments have access to those health care benefits. Further, employers with 50 or more employees paid for 81 percent of health insurance premiums for single coverage, and 73 percent for family coverage.[76]

Table 6 presents a summary of the impacts discussed above.

TABLE 6.—SUMMARY OF THE MAJOR IMPACTS OF THE PROPOSED REVISIONS

Provision	Cost to employers ($ millions)	Employees or health in ($ millions)
Reviewing and Implementing Revisions *	$60.0	N/A
§ 825.300	139.0	N/A
§ 825.302, § 825.303 and § 825.304	−121.8	N/A
§ 825.305, § 825.306 and § 825.307	−64.8	N/A
§ 825.308 and § 825.310	2.4	$11.3
First Year Impact of Major Revisions	14.8	11.34
Recurring Impact of Major Revisions	−45.2	11.3

* First Year Impact, only.
Source: U.S. Department of Labor.

Although these impacts are substantial, the Department has determined that they do not account for all of the impacts that can be reasonably anticipated from the proposed revisions. The Department expects that the impact that the revisions will have in the highly time-sensitive operations will add to the benefits. Analyses of these impacts are presented below, however, because of data limitations the Department has not attempted to quantify these benefits.

Impact of the Revisions on Highly Time-Sensitive Operations

Comments in response to the RFI indicate that firms in industries with time-sensitive operations incur greater costs than the typical establishments. These vulnerable industries include manufacturing, health care, transportation, public safety, and communications. For example, unexpectedly absent employees in these industries can disrupt assembly lines for manufacturing, delay the take-off of commercial airliners, and jeopardize adequate staffing in public safety positions.[77] This section discusses the impacts the proposed revisions will have on highly time-sensitive operations.

Untimely notification of an absence of a high-impact employee can have a more costly effect in highly time-sensitive industries than others. Examples provided in response to the RFI indicate that if an employer is unable to plan for the absence of a high-impact employee in one of these industries because of late notification, the following disruptive events can occur:

- Manufacturing assembly lines may be interrupted if there is not a stand-by employee to take the absent employee's place.
- Passengers are delayed and productivity losses increase if an airline pilot, flight attendant, bus driver, or train engineer does not show up for work at their expected time.
- Adequate public safety may not be provided when police officers, emergency dispatch workers, fire fighters, and paramedic shifts are not fully covered because of inadequate notice.

The conventional economic assumption is that the wage rate represents the value of the marginal product for the occupation and/or the industry. This was the reason in the previous sections that wage rates were used as a proxy of the cost of the disruption caused by the absence of a worker taking unscheduled FMLA leave. However, this assumption does not hold in highly time-sensitive operations because of the asymmetrical nature of their operations.

Workers' wages are primarily based upon their average output. Yet, in time-sensitive operations the absence of a single worker can sometimes result in disruptions that cost far in excess of the value of the worker's average output or wage. For example, a worker's absence may cause expensive equipment and other workers to be idled. In these situations, the worker's average compensation or productivity cannot be used to estimate the total welfare cost of the absence.

''Data on the productivity impact of FMLA, while potentially probative, cannot by itself be used to estimate welfare effects accurately. While it is broadly true that reductions in productivity reduce economic welfare, the magnitude of the reduction depends on how the effect is distributed across inputs and industries. A regulation that reduces labor productivity, for example, will have a larger impact on economic welfare in industries where production requires ''fixed proportions'' of capital and labor (e.g., air transport, which requires at least one pilot and one co-pilot per airplane) than in industries where capital can easily be substituted for labor. Similarly, a reduction in total factor productivity in an industry producing products for which there are few economic substitutes will have a larger effect on economic welfare than one affecting an industry producing a product with many substitutes. In the latter case, consumers will simply shift their purchases away from the products of the less productive industry, suffering little or no loss in consumer surplus. For these and other reasons, economists do not generally attempt to measure the impact of policies on economic welfare effects by tracking their effects on productivity.'' [78]

This situation is akin to the peak demand situation at an electric utility

[76] Bureau of Labor Statistics, National Compensation Survey, 2007, unpublished data.

[77] For example, New York City noted: ''The situation is particularly ominous when the employee works in a safety-sensitive position, such as 911 operators, or other employees requiring face-to-face relief, because if the person's shift is not able to be covered by a colleague who in some instances is required to work overtime, then the public may receive a slow response to an emergency call.'' Fairfax County Public Schools provided the example of school bus drivers. ''[T]he essence of a school bus driver's job is to deliver children to school on time and safely. A few bus drivers have used chronic conditions such as CFS, depression, or sleep problems as an excuse not to report on time and not to call in when they will be late. They claim that their 'condition' precludes them from providing notice or from being on time. These behaviors mean that children are often left waiting on street corners in all weather for some other bus driver.'' For a complete discussion, *see* Section K of Chapter XI of the Department's Report on the RFI (72 FR at 35632).

[78] Jeffrey A. Eisenach, *Assessing the Costs of the Family and Medical Leave Act,* Criterion Economics, February 16, 2007, p. 6. (Doc. 10172A in response to RFI.)

company. Most customers are charged rates equal to the average cost of power generation. During periods of peak demand (when the marginal high-cost equipment is pressed into service and when the utility is sometimes forced to buy power to meet customer demands), the utility may take a loss on the sale of power. However, this loss is made up when demand drops so that the utility can generate the needed power at a much lower rate. This is why electric utilities offer customers variable rates tied to overall power demand. By charging higher rates during periods when power is more expensive to supply (so-called peak load pricing), this pricing structure motivates customers to cut back on their power use during periods of high or peak demand.

The U.S. labor market is not perfectly competitive. For instance, some labor laws and regulations limit the flexibility of employers and employees to enter into some mutually agreeable arrangements. Moreover, most employers cannot use peak load pricing to vary the wages paid to their employees based upon the demand at that moment.

> [The] FMLA may inhibit the market's ability to allocate labor efficiently among firms (and jobs among workers). Both firms and workers display heterogeneity with respect to values they place on absenteeism. In some industries, employee absenteeism will have a relatively small effect on firms' overall ability to operate, and therefore entail a relatively modest financial impact. In other sectors, absenteeism hinders production substantially by, for example, diminishing the productivity of other workers and equipment. If the effect of worker absence on a company's productivity is relatively modest, economists classify that firm as operating a so called *linear production technology*. Firms whose productivity is more sensitive to absenteeism are said to employ *assembly line technologies.* Companies relying on assembly line production techniques depend to a much greater extent on coordinated efforts of labor and machinery. Therefore, the absence of a single employee has a ripple effect throughout the organization.[79]

The RFI record suggests that intermittent FMLA leave can have significant impacts on time-sensitive business models. For example, the United States Postal Service reported ''[i]n a time-sensitive environment * * * unscheduled leave presents significant operational challenges.'' The United Parcel Service, Inc. stated ''employers typically can arrange coverage for an employee who might require intermittent leave to take his mother to regularly scheduled * * * treatments. However, it is a huge burden for management to cover for an employee who is certified for intermittent leave for chronic * * * [conditions] and who calls in with no advance notice * * * especially in time-sensitive/service-related industries.''[80]

In many situations, the absence of just a few employees can have a significant impact. For example, with respect to unscheduled intermittent leaves, some employers find they have to over staff on a continuing basis just to make sure they have sufficient coverage on any particular day (such as hourly positions in manufacturing, public transportation, customer service, health care, call centers, and other establishments that operate on a 24/7 basis). Some employers require their employees to work overtime to cover the absent employee's work. Both of these options result in additional costs.[81]

Unfortunately, without an accurate production function for each of these industries, it is not possible to quantitatively estimate the impact that the absence of these workers, including unforeseen absences, will have on the time-sensitive operations. However, to the extent the proposed rule reduces the cost of uncertainty in staffing, time-sensitive operations are likely to see larger productivity benefits than other industries.

Appendix A: Potential Impact of Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008

Introduction

As discussed in the preamble above, Section 585(a) of H.R. 4986, the National Defense Authorization Act for FY 2008, amends the FMLA to provide leave to eligible employees of covered employers to care for covered servicemembers, or for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation. The provisions of H.R. 4986 providing FMLA leave to care for a covered servicemember became effective on January 28, 2008, when the law was enacted. The provisions of H.R. 4986 providing for FMLA leave due to a qualifying exigency arising out of a covered family member's active duty (or call to active duty) status are not effective until the Secretary of Labor issues regulations defining ''qualifying exigencies.'' Because a significant number of United States military are currently on active duty or call to active duty status, the Department is fully aware of the need to issue regulations under the military family leave provisions of H.R. 4986 as soon as possible and is seeking public comment on any issues related to military family leave that may need to be addressed in final regulations.

This appendix to the PRIA indentifies the potential number of covered and eligible workers who may be impacted by the military family leave provisions of H.R. 4986. Commenters are invited to submit any data relating to the economic impact of the military family leave provisions of H.R. 4986. Estimating such impacts is required under Executive Order 12866.

Impact of Section 585(a) of H.R. 4986 on the Number of FMLA Covered Employers and Eligible Workers

Section 585(a) of H.R. 4986 has no impact on the number of establishments covered by the FMLA, or on the number of workers eligible to take FMLA. Therefore, many of the estimates presented in the Chapter 1 of the PRIA (e.g., number of covered employers, covered establishments, workers employed at covered establishments and FMLA eligible workers) remain the same.

Impact of Section 585(a) of H.R. 4986 on the Number of Workers Who May Take FMLA Leave

Under the new military family leave provisions of H.R. 4986, workers who are eligible to take FMLA leave will be permitted to take protected leave under two new circumstances (i.e., to care for covered servicemembers, or for any qualifying exigency arising out of the fact that a covered family member is on active duty or has been notified of an impending call to active duty status in support of a contingency operation). Since both of these circumstances are related to family relationships with servicemembers, the first step in estimating the number of workers who may take FMLA Leave under the military family leave provisions of H.R. 4986 was to develop a family profile of servicemembers.

Using data from the Defense Manpower Data Center, the Current Population Survey (CPS), and the Decennial Census of Population, CONSAD developed a model to estimate the number of parents, spouses, and adult sons and daughters of

[79] *Id.* at 8.

[80] *See* RFI Report, 72 FR at 35632.

[81] *Id.*

servicemembers.[82] A summary of the methodology used by CONSAD to develop its estimates of the number of parents, spouses, and sons and daughters of servicemembers eligible to take FMLA leave is presented below.

CONSAD estimated the number of parents by first computing, for CPS reference persons in a set of age ranges that are compatible with the age ranges of servicemembers in general, the numbers and proportions of married males living with spouses, married females living with spouses, married males living separately, married females living separately, separated males, separated females, divorced males, divorced females, widowed males, widowed females, never married males, and never married females reported in the CPS for each age range.

Next, CONSAD made adjustments for the expected separate inclusion of both parents of the same child or children in two different categories (married living separately, separated, or divorced), for the expected remarriage of widowed or divorced parents, and for the expected death of both parents of some children. Then, CONSAD summed the adjusted estimates within each age range, to produce estimates of the proportion of people with parents in that age range who can be expected to have zero, one, or two living parents. For the estimate of the number of guardians and persons in loco parentis, CONSAD assumed that all servicemembers age 17 and 18 with no living parents would have one guardian or a person in loco parentis.

CONSAD estimated the proportion of servicemembers with spouses using data from the Defense Manpower Data Center.

CONSAD estimated the number of dependent adult children among servicemembers in different age ranges based upon data from the CPS.[83] First, CONSAD estimated the number of dependent children among servicemembers in different age ranges. Then based on those estimates, CONSAD estimated the number of children 16 years of age and over with parents in the age range of the military servicemembers to produce distributions of the number of children 16 years of age and over among servicemembers in each age range.

To calculate employment rates for parents and spouses who might need to take military family leave, CONSAD used the employment rates for age ranges expected to be associated with the age range of the military servicemembers.[84] CONSAD assumed that the employment rate of adult children who might need to take military family leave was 66 percent.[85] CONSAD also assumed that 60 percent of employed workers who might need to take military family leave would be FMLA covered and eligible.[86]

Impact of Leave to Care for Covered Servicemembers With Serious Injuries or Illnesses

Section 585(a) of H.R. 4986 amends the FMLA to permit an ''an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered servicemember'' to ''a total of 26 workweeks of leave during a 12-month period to care for the servicemember.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(3).

According to the President's Commission on Care for America's Returning Wounded Warriors, 3,082 servicemembers have been seriously injured since the beginning of hostilities in Iraq, or about 750 seriously injured servicemembers per year.[87] Assuming that an equal number of servicemembers have been seriously injured during preparation or training for combat, the total annual number is about 1,500.[88] Further, preliminary estimates from the Department of Defense suggest that the DOD Disability System separates (with benefits) 14,000 servicemembers annually. Consequently, at any one time the Department estimates that there are 1,500 to 14,000 seriously injured servicemembers whose potential caregivers may be eligible for FMLA leave under Section 585(a) of H.R. 4986.

Based on the assumption that the age distribution of seriously wounded servicemembers is the same as the age distribution of all military servicemembers deployed in Iraq or Afghanistan, the Department used CONSAD's model to compute the numbers of servicemembers with serious injuries or illnesses who will have no potential caregivers, and one, two, three, four, or five or more potential caregivers who may be eligible for FMLA leave.[89] The results of this analysis are presented in Table A–1.

TABLE A–1.—THE DISTRIBUTION OF SERVICEMEMBERS WITH SERIOUS INJURIES OR ILLNESSES BY AGE AND THE NUMBER OF POTENTIAL CAREGIVERS

Age of service-member	Number of service-members	Number of servicemembers with serious injuries or illnesses with n caregivers, where n =					
		0	1	2	3	4	5+
17–18	63	0	6	57	1	0	0

[82] CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.* CONSAD developed estimates for S. 1894 which did not include coverage of ''next of kin'' or ''nearest blood relative'' as H.R. 4986 does.

[83] The Department's estimates are based upon the dictionary definition of son and daughter rather than the definition in the FMLA. As was discussed in the Preamble above, this is an important distinction, since the FMLA defines ''son or daughter'' to mean a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under 18 years of age, or 18 years of age or older and incapable of self-care because of a mental or physical disability. Under the definition of ''son or daughter'' in FMLA, very few FMLA-eligible sons or daughters would be able to provide care to a covered servicemember with a serious injury or illness since, in order to meet the FMLA eligibility criteria, a son or daughter ages 18 and over must be incapable of self-care and would presumably be unable to care for a parent with a serious injury or illness. Further, very few parents would have FMLA-eligible sons or daughters who are called to active duty in the armed forces because, to be covered by the current FMLA definition of ''son or daughter,'' such sons or daughters must either be (1) under the age of 18 or (2) 18 years or older and incapable of self-care. (Only about 35,000 of the 1.4 million active duty servicemembers are under 18 years of age).

[84] For a more detailed explanation of the methodology see Appendix A in the CONSAD Report, 2007.

[85] According to the Bureau of Labor Statistics, the employment population ratio for civilians 16 years and over was 63% in 2007. CONSAD adjusted this upwards by 5% (3 percentage points) to 66% to account for the fact the working children of servicemembers are significantly younger than the overall workforce and the employment-population ratio of older workers is significantly lower than that of the overall workforce (*e.g.*, the employment population ratio of workers 55 years and over was 37.4 in 2007).

[86] The estimated 77.1 million FMLA eligible workers under Title I of the FMLA plus the 2.6 million Federal employees covered by Title 2 of the FMLA comprise about 60 percent of U.S. civilian employment.

[87] Department of Labor estimate based on 3,082 divided by 4.1 years (the elapsed time for the Commission's estimate).

[88] This assumption is based on preliminary discussions between the Departments of Defense and Labor.

[89] Based on the methodology in the CONSAD Report, 2007. It is possible for a seriously injured servicemember to have more than one caregiver such as a spouse, parent, and brother or sister.

TABLE A–1.—THE DISTRIBUTION OF SERVICEMEMBERS WITH SERIOUS INJURIES OR ILLNESSES BY AGE AND THE NUMBER OF POTENTIAL CAREGIVERS—Continued

Age of service-member	Number of service-members	Number of servicemembers with serious injuries or illnesses with n caregivers, where n =					
		0	1	2	3	4	5+
19–20	298	0	25	259	15	0	0
21–22	233	0	19	190	25	0	0
23–24	204	0	14	145	44	0	0
25–26	165	0	9	99	56	0	0
27–28	128	0	7	67	53	0	0
29–30	103	0	5	47	51	0	0
31–32	64	0	3	25	36	0	0
33–34	63	0	3	25	35	0	0
35–36	49	0	2	18	27	1	0
37–39	53	0	3	17	27	4	1
40–44	55	0	3	16	24	8	4
45–49	19	0	1	5	6	4	3
50+	7	0	1	2	2	2	2
Total	1,500	0	98	972	402	18	10

Note: Some numbers may not sum due to rounding.
Source: U.S. Department of Labor, based on CONSAD 2007.

Of the 1,500 servicemembers with serious injuries or illnesses, 98 are likely to have one caregiver, 972 are likely to have two caregivers, 402 are likely to have three caregivers, and 28 are likely to have four or more caregivers. Based upon Table A–1, the Department estimates that under the assumption of 1,500 servicemembers with serious injuries or illnesses each year, 3,370 caregivers would be available (i.e., $3{,}370 = 98 + 972 \times 2 + 402 \times 3 + 18 \times 4 + 10 \times 5$); however, not all of these caregivers are employed. Utilizing the CONSAD model described above, the Department estimates that there is about 1,900 potential FMLA covered and eligible caregivers for the 1,500 seriously injured and ill servicemembers under Section 585(a) of H.R. 4986.[90]

Alternatively, preliminary estimates from the Department of Defense suggest that the DOD Disability System separates (with benefits) or retires 14,000 servicemembers annually. Using CONSAD's model and assuming each seriously injured and ill servicemember would have at least one FMLA-eligible caregiver, the Department estimates there would be about 17,700 potential caregivers for servicemembers who are separated through the DOD Disability System every year.

Thus, the Department estimates that between 1,900 and 17,700 potential caregivers of servicemembers with serious injuries or illnesses would be eligible for protected FMLA leave under Section 585(a) of H.R. 4986.

Impact of Leave for Qualifying Exigency

Section 585(a) of H.R. 4986 also adds an additional qualifying reason to take FMLA leave: ''[b]ecause of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on active duty (or has been notified of an impending call or order to active duty) in the Armed Forces in support of a contingency operation.'' This provision will be codified in the FMLA at 29 U.S.C. 2612(a)(1)(E).

Preliminary estimates from the Department of Defense suggest that there are approximately 339,000 servicemembers currently deployed on or activated for contingency operations. Based on these numbers, the Department used the model in the CONSAD Report to develop estimates of the number of FMLA covered and eligible workers who would take leave for a qualifying exigency.[91] Based on the age distribution of active duty servicemembers, the Department estimated the number of currently deployed or activated personnel in contingency operations by age and number of family members potentially eligible for qualifying exigency leave.[92] The results of this analysis are presented in Table A–2.

TABLE A–2.—DISTRIBUTION OF SERVICEMEMBERS DEPLOYED ON OR ACTIVATED FOR ACTIVE DUTY IN SUPPORT OF CONTINGENCY OPERATIONS BY AGE AND NUMBER OF COVERED FAMILY MEMBERS

Age of service-member	Thousands of service-members	Thousands of servicemembers with n family members, where n =					
		0	1	2	3	4	5+
17–18	9	0	1	8	0	0	0
19–20	39	0	3	34	2	0	0
21–22	49	0	4	40	5	0	0
23–24	43	0	3	31	9	0	0

[90] For a more detailed explanation of the methodology used to develop this estimate see Appendix A in the CONSAD Report, 2007. Further, since CONSAD's analysis did not account for the eligibility of next of kin, the Department also assumed each seriously injured and ill servicemember would be likely to have at least one FMLA-eligible caregiver.

[91] CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.*

[92] Based on the methodology in the CONSAD Report, 2007. It is possible for a servicemember on active duty or on call to active duty in support of a contingency operation to have more than one family member (such as a spouse, parent, and brother or sister) eligible for leave for a qualified exigency.

TABLE A–2.—DISTRIBUTION OF SERVICEMEMBERS DEPLOYED ON OR ACTIVATED FOR ACTIVE DUTY IN SUPPORT OF CONTINGENCY OPERATIONS BY AGE AND NUMBER OF COVERED FAMILY MEMBERS—Continued

Age of service-member	Thousands of service-members	Thousands of servicemembers with n family members, where n =					
		0	1	2	3	4	5+
25–26	35	0	2	21	12	0	0
27–28	27	0	1	14	11	0	0
29–30	22	0	1	10	11	0	0
31–32	19	0	1	8	11	0	0
33–34	19	0	1	7	11	0	0
35–36	18	0	1	6	10	1	0
37–39	23	0	1	8	12	2	0
40–44	25	0	1	7	11	3	2
45–49	8	0	1	2	3	2	1
50+	3	0	0	1	1	1	1
Total	339	0	21	197	108	8	4

Note: Some numbers may not sum due to rounding.
Source: U.S. DOL/Employment Standards Administration estimates based upon the model used in CONSAD 2007, and Department of Defense data.

Of the 339,000 servicemembers deployed on or activated for contingency operations, about 21,000 are likely to have one covered family member, 197,000 are likely to have two covered family members, 108,000 are likely to have three covered family members, and 12,000 are likely to have four or more covered family members. Based upon Table A–2, the Department estimates 792,000 adult family members would be impacted by servicemembers' call to active duty for a contingency operation (i.e., $792 = 21 + 197 \times 2 + 108 \times 3 + 8 \times 4 + 4 \times 5$); however, not all of these family members are employed. Utilizing the CONSAD model described above, the Department estimates that about 330,000 potential FMLA covered and eligible family members would be eligible to take leave for any qualifying exigency under Section 585(a) of H.R. 4986.[93]

Estimated Impacts

Based upon the preceding analyses, the Department estimates that the number of employees eligible to take FMLA leave under Section 585(a) of H.R. 4986 range from 332,000 to 348,000 workers. Although some of these workers may already be taking FMLA leave for other covered conditions, some may not. If the leave usage among the workers eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 and the costs of such leave are similar to current FMLA leave takers, then one would expect the costs of the FMLA to potentially increase by as much as 5 percent based upon the potential increased number of FMLA eligible workers with qualifying reasons to take FMLA leave.[94] However, there are other factors that must be considered.

- H.R. 4986 does not change the scope of the FMLA in terms of the establishments covered or the eligibility of workers. Many of the costs of the FMLA are related to the coverage of the establishment or the eligibility of workers rather than the number of workers taking leave. Since the former will not change, assuming a 5 percent cost increase may be an over-estimate.
- The Department estimates that the number of employees eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 range from 332,000 to 348,000 workers. However, just as all workers eligible to take FMLA leave do not take FMLA leave when they or a qualified family member have a serious health condition,[95] similarly, not all employees eligible to take FMLA leave under the new military family leave provisions of H.R. 4986 will take such leave. Therefore, assuming a 5 percent cost increase may be an over-estimate.

The Department requests information and data related to the impacts of workers taking FMLA leave and how these impacts might apply to workers taking FMLA under the additional qualifying circumstances permitted under Section 585(a) of H.R. 4986.

Regulatory Flexibility Act

The Regulatory Flexibility Act requires that agencies prepare initial regulatory flexibility analyses for proposed rules unless they are not expected to have a significant economic impact on a substantial number of small entities. 5 U.S.C. 603, 605(b).

The FMLA applies to public agencies and to private sector employers that employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. 29 U.S.C. 2611(4). In addition, the FMLA excludes employees from eligibility for FMLA leave if the total number of employees employed by that employer within 75 miles of that worksite is less than 50. 29 U.S.C. 2611(2)(B)(ii). As explained in the FMLA's legislative history, ''[t]he act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. * * * The employer must, in addition, employ at least 50 people within a 75-mile radius of the employee's worksite.'' S. Rep. No. 103–3, at 2 (1993).

The Department has examined the impact of these proposed revisions on all the firms covered under the FMLA, including those with 50 to 500 employees, and has estimated the net impact of the proposed changes would reduce the overall costs for all firms, both large and small. Most small businesses (establishments), 89.4 percent, were excluded from coverage under the FMLA by Congress. However, 6.3 percent of establishments with less

[93] For a more detailed explanation of the methodology used to develop this estimate see Appendix A in the CONSAD Report, 2007, available at: *http://www.wagehour.dol.gov.*

[94] The Department estimates that 7.0 million workers took FMLA leave under the current statute in 2005; 332,000 to 348,000 additional workers represents an increase of 4.7 to 5.0 percent.

[95] For example, only one family member may choose to act as the caregiver even though other family members are eligible to take family leave (e.g., two spouses may be eligible to take FMLA leave for a seriously ill child but only one may choose to do so).

than 50 employees are covered by the Act due to the ''75 mile'' provision in the statute. The Department estimates that 633,000 of the 1.1 million covered establishments, or 55.8 percent, have less than 50 employees. Another 481,000 establishments have 50 to 500 employees. Clearly, this is a substantial number (although small percentage—10.6%) of small employers.[96]

On average the proposed rule is estimated to have a net cost for these small businesses of $13 in the first year,[97] and a net recurring savings of $40 per small business every year after that.[98] Consequently, the Department has determined that because the proposed revisions primarily clarify the existing rules and reduce overall costs to all firms (both large and small), the proposed rule as drafted will not have a *significant economic impact* on a substantial number of small entities within the meaning of the Regulatory Flexibility Act and the Department has certified to this effect to the Chief Counsel for Advocacy of the SBA. Therefore, an initial regulatory flexibility analysis is not required for this proposed rule.

However, the new military family leave provisions of H.R. 4986 will result in an increase in the annual number of FMLA leaves taken. If these additional leaves significantly increase the economic impacts imposed by the FMLA regulation on a substantial number of small businesses, then a regulatory flexibility analysis will be required.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501 *et seq,* requires agencies to prepare a written statement that identifies the: (1) Authorizing legislation; (2) cost-benefit analysis; (3) macro-economic effects; (4) summary of State, local, and tribal government input; and (5) identification of reasonable alternatives and selection, or explanation of non-selection, of the least costly, most cost-effective or least burdensome alternative; for proposed rules that include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more inflation adjusted in any one year, or approximately $135 million in 2007 dollars.

(1) Authorizing Legislation

This rule is issued pursuant to Family and Medical Leave Act of 1993 (FMLA), Public Law 103–3, 107 Stat. 6 (29 U.S.C. 2601 *et seq.*). The FMLA entitles eligible employees of covered employers to take up to a total of twelve weeks of unpaid leave during a twelve month period for the birth of a child; for the placement of a child for adoption or foster care; to care for a newborn or newly-placed child; to care for a spouse, parent, son or daughter with a serious health condition; or when the employee is unable to work due to the employee's own serious health condition. *See* 29 U.S.C. 2612.

Title I of the FMLA applies to private sector employers of fifty or more employees, public agencies and certain Federal employers and entities, such as the U.S. Postal Service and Postal Regulatory Commission. While Title I generally covers employers with 50 or more employees, public agencies are covered employers without regard to the number of workers employed.

The FMLA references the definition of employee in the Fair Labor Standards Act, 29 U.S.C. 203(e) so that most individuals employed by a State, political subdivision of a State, or interstate governmental agency meet the definition of employee.

(2) Cost-Benefit Analysis

Based upon Table 2.2 in the CONSAD Report, the Department estimates that approximately 90,000 State and local governmental entities will be affected by the proposed rule. Nationwide, these entities employ more than 19 million workers and their annual payrolls are $591 billion.[99]

The Department's Preliminary Regulatory Impact Analysis (PRIA) includes estimates of the net costs associated with the proposed rule. The Department estimates that the proposed revisions will result in a total first year net costs of about $26.1 million, and a net savings of about $33.9 million, each year thereafter. Moreover, this does not include the additional savings expected in the time-sensitive high-impact operations such as public safety.

On average the proposed rule is estimated to have a net cost per employer, including State and local governmental entities, of $13 in the first year,[100] and a net recurring savings of $40 per such entities every year after that.[101] Consequently, the Department concludes that the primary impact of the proposed revisions will be to reduce the burden of the FMLA regulations on employers, including State and local governmental entities.

The most significant costs associated with the proposed revisions will be the first year cost of reviewing and implementing the proposed revisions ($60 million) and the cost of providing employees with additional and more specific notifications ($139 million). Based upon their share of covered employment, the share of these first year costs for State and local governmental entities will be about $50 million, and the share of the first year costs for the private sector will be about $149 million.[102]

Under the worst case assumption that no offsetting savings will occur to the State and local entities during the first year, these $50 million first year costs would be equivalent to raising State and local payrolls by less than one-hundredth percent (0.01 percent) of the $591 billion in total payrolls[103] for those entities for a single year. Therefore, we have tentatively concluded that even under the worst case scenario, this rulemaking does not increase expenditures by State, local, and tribal governments above the current unfunded mandate threshold.

Under the worst case assumption that no offsetting savings will occur to the private sector during the first year, we estimate that the first year impacts do exceed the approximately $135 million threshold under the Act for the private sector. The Department feels that this scenario is very unlikely, however, and that the net expenditures of the private sector will be less than the Unfunded Mandates threshold. The Department specifically requests comment on this conclusion. Nevertheless, we believe the

[96] The Department of Labor based these estimates on the Westat 2000 establishment survey data.

[97] This estimate is based on the first year costs of $14.8 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[98] This estimate is based on the recurring savings of $45.2 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[99] Estimates based upon Table 2.2 on page 7 of the 2007 CONSAD Report available at: *http://www.wagehour.dol.gov.* Estimates presented above were developed by summing the CONSAD estimates for Public Utilities, Public Transit, Public Educational Services and Public Administration. Note, however that CONSAD did not have an estimate for the number of establishments in public utilities.

[100] This estimate is based on the first year costs for all covered establishments of $14.8 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA). [Note—these numbers are all employers, not just State and local government entities.]

[101] This estimate is based on the recurring savings for all covered establishments of $45.2 million (*see* Table 6 of the PRIA) and 1.1 million establishments (*see* Table 4 of the PRIA).

[102] State and local governmental entities employ about one-quarter (19 million) of the 77 million workers covered by Title I of the FMLA. One quarter of $200 million is $50 million.

[103] *See* Table 2.2 on page 7 of the 2007 CONSAD Report. The $591 billion estimate was the sum of the payrolls in Public Utilities, Public Transit, Public Educational Services and Public Administration.

cost-benefit analysis provided pursuant to the requirements under Executive Order 12866 for this economically significant rulemaking would meet the requirements for analysis under the Unfunded Mandates Reform Act.

The above analysis does not include an assessment of the impact of the new military family leave provisions of H.R. 4986. The Department anticipates that the new military family leave provisions of H.R. 4986 will increase the annual number of FMLA leaves taken. If these additional leaves increase the economic impacts imposed by the FMLA regulation on State and local entities, then the Department will appropriately revise this analysis for the final rule.

The FMLA does not provide for Federal financial assistance or other Federal resources to meet the requirements of its intergovernmental mandates. The Federal mandate imposed by this proposed rule is not expected to have a measurable effect on health, safety, or the natural environment.

(3) Macro-Economic Effects

Agencies are expected to estimate the effect of a regulation on the national economy, such as the effect on productivity, economic growth, full employment, creation of productive jobs, and international competitiveness of United States goods and services, if accurate estimates are reasonably feasible and the effect is relevant and material. 5 U.S.C. 1532(a)(4). However, OMB guidance on this requirement notes that such macro-economic effects tend to be measurable in nationwide econometric models only if the economic impact of the regulation reaches 0.25 percent to 0.5 percent of gross domestic product, or in the range of $1.5 billion to $3.0 billion.[104] A regulation with smaller aggregate effect is not likely to have a measurable impact in macro-economic terms unless it is highly focused on a particular geographic region or economic sector, which is not the case with this proposed rule.

The Department's PRIA estimates that the total aggregate economic impact of this proposed rule ranges from total first year net costs of about $26.1 million to total net savings of about $33.9 million, each year thereafter. Therefore, the Department has determined that a full macro-economic analysis is not likely to show any measurable impact on the economy. However, the analysis in the PRIA does not include an assessment of the impact of the new military family leave provisions of H.R. 4986. The Department anticipates that the new military family leave provisions of H.R. 4986 will increase the annual number of FMLA leaves taken. If these additional leaves substantially increase the economic impacts imposed by the FMLA regulation, then the Department will appropriately reassess this conclusion for the final rule.

(4) Summary of State, Local, and Tribal Government Input

On December 1, 2006, the Department published a Request for Information (RFI) in the **Federal Register** (71 FR 69504). The RFI asked the public, including State, local, and tribal governments, to comment on their experiences with, and observations of, the Department's administration of the law and the effectiveness of the FMLA regulations. More than 15,000 comments were received from workers, family members, employers, academics, and other interested parties.[105] This input ranged from personal accounts, legal reviews, industry and academic studies, and surveys, to recommendations for regulatory and statutory changes to address particular areas of concern. The Department published a Report on the comments received in response to the Department's RFI in June 2007 (*see* 72 FR 35550).[106]

The Department received in response to the RFI a number of comments from various State and local government entities across the country, including the City of Philadelphia, the City of Gillette, the City of Portland , the City of New York, the City of Los Angeles, Ohio Department of Administrative Services, the Ohio Public Employer Labor Relations Association, the Commonwealth of Pennsylvania, the Indiana State Personnel Department, Spokane County, the University of Wisconsin-Milwaukee, Fairfax County Public Schools, the University of Minnesota, Washington Metropolitan Area Transit Authority, Metro Regional Transit Authority (Akron, Ohio), the Port Authority of Allegheny County (PA), the Transit Authority (Huntington, WV), and the Milwaukee Transport Services. Many of these entities provided input, for instance, on applying uniform call-in procedures and seeking medical re-certifications and return to work certifications. The comments by State and local government entities were considered by the Department in developing this proposed rule and are addressed above under the sections of the rule on which they commented (see, *e.g.*, preamble discussion of §§ 825.302, 825.303, 825.308, and 825.310).

(5) Least Burdensome Option or Explanation Required

The Department's consideration of various options is described in the preceding section in the preamble. The Department believes that it has chosen the least burdensome option that updates, clarifies, and simplifies the rule.

Executive Order 13132 (Federalism)

The proposed rule does not have federalism implications as outlined in Executive Order 13132 regarding federalism. The proposed rule does not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

Executive Order 13175, Indian Tribal Governments

This proposed rule was reviewed under the terms of Executive Order 13175 and determined not to have ''tribal implications.'' The proposed rule does not have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.'' As a result, no tribal summary impact statement has been prepared.

Effects on Families

The undersigned hereby certify that this proposed rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

Executive Order 13045, Protection of Children

Executive Order 13045, dated April 23, 1997 (62 FR 19885), applies to any rule that (1) is determined to be ''economically significant'' as defined in Executive Order 12866, and (2) concerns an environmental health or safety risk that the promulgating agency has reason to believe may have a disproportionate effect on children. This proposal is not

[104] OMB Guidance on Implementing Title II of S.1, March 31, 1995 Memorandum from Sally Kazten to the Heads of Executive Departments and Agencies, available at *http://www.fws.gov/policy/library/rgkatze.pdf.*

[105] All comments are available for viewing via the public docket of the Wage and Hour Division of the Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. Many comments are also available on http://www.regulations.gov.

[106] Also available at *http://www.dol.gov/esa/whd/fmla2007report.htm.*

subject to Executive Order 13045 because, although this proposed rule addresses family and medical leave provisions of the FMLA including the rights of employees to take leave for the birth or adoption of a child and to care for a healthy newborn or adopted child, and to take leave to care for a son or daughter with a serious health condition, it has no environmental health or safety risks that may disproportionately affect children.

Environmental Impact Assessment

A review of this proposal in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*; the regulations of the Council on Environmental Quality, 40 CFR 1500 *et seq.*; and the Departmental NEPA procedures, 29 CFR part 11, indicates that the proposed rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

Executive Order 13211, Energy Supply

This proposed rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 12630, Constitutionally Protected Property Rights

This proposal is not subject to Executive Order 12630, because it does not involve implementation of a policy ''that has takings implications'' or that could impose limitations on private property use.

Executive Order 12988, Civil Justice Reform Analysis

This proposed rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The proposed rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects in 29 CFR Part 825

Employee benefit plans, Health, Health insurance, Labor management relations, Maternal and child health, Teachers.

Signed at Washington, DC, this 31st day of January 2008.

Victoria A. Lipnic,

Assistant Secretary, Employment Standards Administration.

Alexander J. Passantino,

Acting Administrator, Wage and Hour Division.

For the reasons set out in the preamble, the DOL proposes to revise Title 29 part 825 of the Code of Federal Regulations as follows:

PART 825—THE FAMILY AND MEDICAL LEAVE ACT OF 1993

Subpart A—Coverage Under the Family and Medical Leave Act

Sec.
825.100 The Family and Medical Leave Act.
825.101 Purpose of the Act.
825.102 [Reserved]
825.103 [Reserved]
825.104 Covered employer.
825.105 Counting employees for determining coverage.
825.106 Joint employer coverage.
825.107 Successor in interest coverage.
825.108 Public agency coverage.
825.109 Federal agency coverage.
825.110 Eligible employee.
825.111 Determining whether 50 employees are employed within 75 miles.
825.112 Qualifying reasons for leave, general rule.
825.113 Serious health condition.
825.114 Inpatient care.
825.115 Continuing treatment.
825.116 [Reserved]
825.117 [Reserved]
825.118 [Reserved]
825.119 Leave for treatment of substance abuse.
825.120 Leave for pregnancy or birth.
825.121 Leave for adoption or foster care.
825.122 Definitions of spouse, parent, son or daughter, adoption, and foster care.
825.123 Unable to perform the functions of the position.
825.124 Needed to care for a family member.
825.125 Definition of health care provider.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

825.200 Amount of leave.
825.201 Leave to care for a parent.
825.202 Intermittent leave or reduced leave schedule.
825.203 Scheduling of intermittent or reduced schedule leave.
825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.
825.205 Increments of leave for intermittent or reduced schedule leave.
825.206 Interaction with the FLSA.
825.207 Substitution of paid leave.
825.208 [Reserved]
825.209 Maintenance of employee benefits.
825.210 Employee payment of group health benefit premiums.
825.211 Maintenance of benefits under multi-employer health plans.
825.212 Employee failure to pay health plan premium payments.
825.213 Employer recovery of benefit costs.
825.214 Employee right to reinstatement.
825.215 Equivalent position.
825.216 Limitations on an employee's right to reinstatement.
825.217 Key employee, general rule.
825.218 Substantial and grievous economic injury.
825.219 Rights of a key employee.
825.220 Protection for employees who request leave or otherwise assert FMLA rights.

Subpart C—Employee and Employer Rights and Obligations Under the Act

825.300 Employer notice requirements.
825.301 Employer designation of FMLA leave.
825.302 Employee notice requirements for foreseeable FMLA leave.
825.303 Employee notice requirements for unforeseeable FMLA leave.
825.304 Employee failure to provide notice.
825.305 Medical certification, general rule.
825.306 Content of medical certification.
825.307 Authentication and clarification of medical certification.
825.308 Recertifications.
825.309 Intent to return to work.
825.310 Fitness-for-duty certification.
825.311 Failure to provide medical certification.

Subpart D—Enforcement Mechanisms

825.400 Enforcement, general rules.
825.401 Filing a complaint with the Federal Government.
825.402 Violations of the posting requirement.
825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.
825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

Subpart E—Recordkeeping Requirements

825.500 Recordkeeping requirements.

Subpart F—Special Rules Applicable to Employees of Schools

825.600 Special rules for school employees, definitions.
825.601 Special rules for school employees, limitations on intermittent leave.
825.602 Special rules for school employees, limitations on leave near the end of an academic term.
825.603 Special rules for school employees, duration of FMLA leave.
825.604 Special rules for school employees, restoration to ''an equivalent position.''

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

825.700 Interaction with employer's policies.
825.701 Interaction with State laws.
825.702 Interaction with Federal and State anti-discrimination laws.

Subpart H—Definitions

825.800 Definitions.

Appendix A to Part 825—Index [Reserved]
Appendix B to Part 825—Certification of Health Care Provider (Form WH–380)
Appendix C to Part 825—Notice to Employees of Rights Under FMLA (WH Publication 1420)
Appendix D to Part 825—Eligibility Notice to Employees Under FMLA (Form WH–381)
Appendix E to Part 825—Designation Notice Under FMLA (Form WH–382)

Authority: 29 U.S.C. 2654.

Subpart A—Coverage Under the Family and Medical Leave Act

§ 825.100 The Family and Medical Leave Act.

(a) The Family and Medical Leave Act of 1993 (FMLA or Act) allows ''eligible'' employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition, or because the employee's own serious health condition makes the employee unable to perform the functions of his or her job (*see* § 825.306(b)(4)). In certain cases, this leave may be taken on an intermittent basis rather than all at once, or the employee may work a part-time schedule.

(b) An employee on FMLA leave is also entitled to have health benefits maintained while on leave as if the employee had continued to work instead of taking the leave. If an employee was paying all or part of the premium payments prior to leave, the employee would continue to pay his or her share during the leave period. The employer may recover its share only if the employee does not return to work for a reason other than the serious health condition of the employee or the employee's covered family member, or another reason beyond the employee's control.

(c) An employee generally has a right to return to the same position or an equivalent position with equivalent pay, benefits, and working conditions at the conclusion of the leave. The taking of FMLA leave cannot result in the loss of any benefit that accrued prior to the start of the leave.

(d) The employer has a right to 30 days advance notice from the employee where practicable. In addition, the employer may require an employee to submit certification from a health care provider to substantiate that the leave is due to the serious health condition of the employee or the employee's covered family member. Failure to comply with these requirements may result in a delay in the start of FMLA leave. Pursuant to a uniformly applied policy, the employer may also require that an employee present a certification of fitness to return to work when the absence was caused by the employee's serious health condition (*see* §§ 825.310 and 825.311(d)). The employer may delay restoring the employee to employment without such certificate relating to the health condition which caused the employee's absence.

§ 825.101 Purpose of the Act.

(a) FMLA is intended to allow employees to balance their work and family life by taking reasonable unpaid leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition. The Act is intended to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity. It was intended that the Act accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the 14th amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.

(b) The enactment of FMLA was predicated on two fundamental concerns—the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

(c) The FMLA is both intended and expected to benefit employers as well as their employees. A direct correlation exists between stability in the family and productivity in the workplace. FMLA will encourage the development of high-performance organizations. When workers can count on durable links to their workplace they are able to make their own full commitments to their jobs. The record of hearings on family and medical leave indicate the powerful productive advantages of stable workplace relationships, and the comparatively small costs of guaranteeing that those relationships will not be dissolved while workers attend to pressing family health obligations or their own serious illness.

§ 825.102 [Reserved]

§ 825.103 [Reserved]

§ 825.104 Covered employer.

(a) An employer covered by FMLA is any person engaged in commerce or in any industry or activity affecting commerce, who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. Employers covered by FMLA also include any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer, any successor in interest of a covered employer, and any public agency. Public agencies are covered employers without regard to the number of employees employed. Public as well as private elementary and secondary schools are also covered employers without regard to the number of employees employed. (*See* § 825.600.)

(b) The terms ''commerce'' and ''industry affecting commerce'' are defined in accordance with section 501(1) and (3) of the Labor Management Relations Act of 1947 (LMRA) (29 U.S.C. 142(1) and (3)), as set forth in the definitions at § 825.800 of this part. For purposes of the FMLA, employers who meet the 50-employee coverage test are deemed to be engaged in commerce or in an industry or activity affecting commerce.

(c) Normally the legal entity which employs the employee is the employer under FMLA. Applying this principle, a corporation is a single employer rather than its separate establishments or divisions.

(1) Where one corporation has an ownership interest in another corporation, it is a separate employer unless it meets the ''joint employment'' test discussed in § 825.106, or the ''integrated employer'' test contained in paragraph (c)(2) of this section.

(2) Separate entities will be deemed to be parts of a single employer for purposes of FMLA if they meet the ''integrated employer'' test. Where this test is met, the employees of all entities making up the integrated employer will be counted in determining employer coverage and employee eligibility. A determination of whether or not separate entities are an integrated

employer is not determined by the application of any single criterion, but rather the entire relationship is to be reviewed in its totality. Factors considered in determining whether two or more entities are an integrated employer include:

(i) Common management;

(ii) Interrelation between operations;

(iii) Centralized control of labor relations; and

(iv) Degree of common ownership/financial control.

(d) An ''employer'' includes any person who acts directly or indirectly in the interest of an employer to any of the employer's employees. The definition of ''employer'' in section 3(d) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 203(d), similarly includes any person acting directly or indirectly in the interest of an employer in relation to an employee. As under the FLSA, individuals such as corporate officers ''acting in the interest of an employer'' are individually liable for any violations of the requirements of FMLA.

§ 825.105 Counting employees for determining coverage.

(a) The definition of ''employ'' for purposes of FMLA is taken from the Fair Labor Standards Act, § 3(g). The courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept of master and servant. The difference between the employment relationship under the FLSA and that under the common law arises from the fact that the term ''employ'' as defined in the Act includes ''to suffer or permit to work.'' The courts have indicated that, while ''to permit'' requires a more positive action than ''to suffer,'' both terms imply much less positive action than required by the common law. Mere knowledge by an employer of work done for the employer by another is sufficient to create the employment relationship under the Act. The courts have said that there is no definition that solves all problems as to the limitations of the employer/employee relationship under the Act; and that determination of the relation cannot be based on ''isolated factors'' or upon a single characteristic or ''technical concepts,'' but depends ''upon the circumstances of the whole activity'' including the underlying ''economic reality.'' In general an employee, as distinguished from an independent contractor who is engaged in a business of his/her own, is one who ''follows the usual path of an employee'' and is dependent on the business which he/she serves.

(b) Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

(c) Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when an employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

(d) An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

(e) A private employer is covered if it maintained 50 or more employees on the payroll during 20 or more calendar workweeks (not necessarily consecutive workweeks) in either the current or the preceding calendar year.

(f) Once a private employer meets the 50 employees/20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year. For example, if an employer who met the 50 employees/20 workweeks test in the calendar year as of September 1, 2007, subsequently dropped below 50 employees before the end of 2007 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2008, the employer would continue to be covered throughout calendar year 2008 because it met the coverage criteria for 20 workweeks of the preceding (*i.e.*, 2007) calendar year.

§ 825.106 Joint employer coverage.

(a) Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA. Joint employers may be separate and distinct entities with separate owners, managers and facilities. Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

(1) Where there is an arrangement between employers to share an employee's services or to interchange employees;

(2) Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or,

(3) Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.

(b)(1) A determination of whether or not a joint employment relationship exists is not determined by the application of any single criterion, but rather the entire relationship is to be viewed in its totality. For example, joint employment will ordinarily be found to exist when a temporary or leasing agency supplies employees to a second employer.

(2) A type of company that is often called a ''Professional Employment Organization'' (PEO) or ''HR Outsourcing Vendor'' contracts with client employers merely to perform administrative functions—including payroll, benefits, regulatory paperwork, and updating employment policies. A PEO does not enter into a joint employment relationship with the employees of its client companies provided it merely performs these administrative functions. On the other hand, if in a particular fact situation, a PEO has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work that the employees perform, such a PEO would be a joint employer with the client employer.

(c) In joint employment relationships, only the primary employer is responsible for giving required notices to its employees, providing FMLA leave, and maintenance of health benefits. Factors considered in determining which is the ''primary'' employer include authority/responsibility to hire and fire, assign/place the employee, make payroll, and provide employment benefits. For employees of temporary help or leasing agencies, for example, the placement agency most commonly would be the primary employer.

(d) Employees jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payroll, in determining employer coverage and employee eligibility. For example, an employer who jointly employs 15 workers from a leasing or temporary help agency and 40 permanent workers is covered by FMLA. (A special rule applies to employees jointly employed who physically work at a facility of the secondary employer for a period of at least one year. *See* § 825.111(a)(3).) An employee on leave who is working for a secondary employer is considered employed by the secondary employer, and must be counted for coverage and eligibility purposes, as long as the employer has a reasonable expectation that that employee will return to employment with that employer.

(e) Job restoration is the primary responsibility of the primary employer. The secondary employer is responsible for accepting the employee returning from FMLA leave in place of the replacement employee if the secondary employer continues to utilize an employee from the temporary or leasing agency, and the agency chooses to place the employee with the secondary employer. A secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees, whether or not the secondary employer is covered by FMLA (*see* § 825.220(a)). The prohibited acts include prohibitions against interfering with an employee's attempt to exercise rights under the Act, or discharging or discriminating against an employee for opposing a practice which is unlawful under FMLA. A covered secondary employer will be responsible for compliance with all the provisions of the FMLA with respect to its regular, permanent workforce.

§ 825.107 Successor in interest coverage.

(a) For purposes of FMLA, in determining whether an employer is covered because it is a ''successor in interest'' to a covered employer, the factors used under Title VII of the Civil Rights Act and the Vietnam Era Veterans' Adjustment Act will be considered. However, unlike Title VII, whether the successor has notice of the employee's claim is not a consideration. Notice may be relevant, however, in determining successor liability for violations of the predecessor. The factors to be considered include:

(1) Substantial continuity of the same business operations;

(2) Use of the same plant;

(3) Continuity of the workforce;

(4) Similarity of jobs and working conditions;

(5) Similarity of supervisory personnel;

(6) Similarity in machinery, equipment, and production methods;

(7) Similarity of products or services; and

(8) The ability of the predecessor to provide relief.

(b) A determination of whether or not a ''successor in interest'' exists is not determined by the application of any single criterion, but rather the entire circumstances are to be viewed in their totality.

(c) When an employer is a ''successor in interest,'' employees' entitlements are the same as if the employment by the predecessor and successor were continuous employment by a single employer. For example, the successor, whether or not it meets FMLA coverage criteria, must grant leave for eligible employees who had provided appropriate notice to the predecessor, or continue leave begun while employed by the predecessor, including maintenance of group health benefits during the leave and job restoration at the conclusion of the leave. A successor which meets FMLA's coverage criteria must count periods of employment and hours worked for the predecessor for purposes of determining employee eligibility for FMLA leave.

§ 825.108 Public agency coverage.

(a) An ''employer'' under FMLA includes any ''public agency,'' as defined in section 3(x) of the Fair Labor Standards Act, 29 U.S.C. 203(x). Section 3(x) of the FLSA defines ''public agency'' as the government of the United States; the government of a State or political subdivision of a State; or an agency of the United States, a State, or a political subdivision of a State, or any interstate governmental agency. ''State'' is further defined in Section 3(c) of the FLSA to include any State of the United States, the District of Columbia, or any Territory or possession of the United States.

(b) The determination of whether an entity is a ''public'' agency, as distinguished from a private employer, is determined by whether the agency has taxing authority, or whether the chief administrative officer or board, *etc.*, is elected by the voters-at-large or their appointment is subject to approval by an elected official.

(c)(1) A State or a political subdivision of a State constitutes a single public agency and, therefore, a single employer for purposes of determining employee eligibility. For example, a State is a single employer; a county is a single employer; a city or town is a single employer. Where there is any question about whether a public entity is a public agency, as distinguished from a part of another public agency, the U.S. Bureau of the Census' ''Census of Governments'' will be determinative, except for new entities formed since the most recent publication of the ''Census.'' For new entities, the criteria used by the Bureau of the Census will be used to determine whether an entity is a public agency or a part of another agency, including existence as an organized entity, governmental character, and substantial autonomy of the entity.

(2) The Census Bureau takes a census of governments at 5-year intervals. Volume I, Government Organization, contains the official counts of the number of State and local governments. It includes tabulations of governments by State, type of government, size, and county location. Also produced is a universe list of governmental units, classified according to type of government. Copies of Volume I, Government Organization, and subsequent volumes are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, U.S. Department of Commerce District Offices, or can be found in Regional and selective depository libraries. For a list of all depository libraries, write to the Government Printing Office, 710 N. Capitol St., NW., Washington, DC 20402.

(d) All public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees carried on the payroll each day for 20 or more weeks in a year. However, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer (*e.g.*, State) employ 50 employees at the worksite or within 75 miles.

§ 825.109 Federal agency coverage.

(a) Most employees of the government of the United States, if they are covered by the FMLA, are covered under Title II of the FMLA (incorporated in Title V, Chapter 63, Subchapter 5 of the United States Code) which is administered by the U.S. Office of Personnel Management (OPM). OPM has separate regulations at 5 CFR Part 630, Subpart L. Employees of the Government Printing Office are covered by Title II. While employees of the Government Accountability Office and the Library of Congress are covered by Title I of the FMLA, the Comptroller General of the

United States and the Librarian of Congress, respectively, have responsibility for the administration of the FMLA with respect to these employees. Other legislative branch employees, such as employees of the Senate and House of Representatives, are covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(b) The Federal Executive Branch employees within the jurisdiction of these regulations include:

(1) Employees of the Postal Service;

(2) Employees of the Postal Regulatory Commission;

(3) A part-time employee who does not have an established regular tour of duty during the administrative workweek; and,

(4) An employee serving under an intermittent appointment or temporary appointment with a time limitation of one year or less.

(c) Employees of other Federal executive agencies are also covered by these regulations if they are not covered by Title II of FMLA.

(d) Employees of the judicial branch of the United States are covered by these regulations only if they are employed in a unit which has employees in the competitive service. For example, employees of the U.S. Tax Court are covered by these regulations.

(e) For employees covered by these regulations, the U.S. Government constitutes a single employer for purposes of determining employee eligibility. These employees must meet all of the requirements for eligibility, including the requirement that the Federal Government employ 50 employees at the worksite or within 75 miles.

§ 825.110 Eligible employee.

(a) An ''eligible employee'' is an employee of a covered employer who:

(1) Has been employed by the employer for at least 12 months, and

(2) Has been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave, and

(3) Is employed at a worksite where 50 or more employees are employed by the employer within 75 miles of that worksite. (*See* § 825.105(b) regarding employees who work outside the U.S.)

(b) The 12 months an employee must have been employed by the employer need not be consecutive months, *provided*

(1) Subject to the exceptions provided in paragraph (b)(2) of this section, employment periods prior to a break in service of five years or more need not be counted in determining whether the employee has been employed by the employer for at least 12 months.

(2) Employment periods preceding a break in service of more than five years must be counted in determining whether the employee has been employed by the employer for at least 12 months where:

(i) The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer. However, this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes).

(3) If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (*e.g.*, workers' compensation, group health plan benefits, etc.), the week counts as a week of employment. For purposes of determining whether intermittent/occasional/casual employment qualifies as ''at least 12 months,'' 52 weeks is deemed to be equal to 12 months.

(4) Nothing in this section prevents employers from considering employment prior to a continuous break in service of more than five years when determining whether an employee has met the 12–month employment requirement. However, if an employer chooses to recognize such prior employment, the employer must do so uniformly, with respect to all employees with similar breaks in service.

(c)(1) Except as provided in paragraph (c)(2) of this section, whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. (*See* 29 CFR part 785.) The determining factor is the number of hours an employee has worked for the employer within the meaning of the FLSA. The determination is not limited by methods of recordkeeping, or by compensation agreements that do not accurately reflect all of the hours an employee has worked for or been in service to the employer. Any accurate accounting of actual hours worked under FLSA's principles may be used.

(2) An employee returning from fulfilling his or her National Guard or Reserve military obligation shall be credited with the hours-of-service that would have been performed *but for* the period of military service in determining whether the employee worked the 1,250 hours of service. Accordingly, a person reemployed following military service has the hours that would have been worked for the employer added to any hours actually worked during the previous 12-month period to meet the 1,250 hour requirement. In order to determine the hours that would have been worked during the period of military service, the employee's pre-service work schedule can generally be used for calculations.

(3) In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (*e.g.*, bona fide executive, administrative, and professional employees as defined in FLSA Regulations, 29 CFR part 541), the employer has the burden of showing that the employee has not worked the requisite hours. An employer must be able to clearly demonstrate, for example, that full-time teachers (*see* § 825.800 for definition) of an elementary or secondary school system, or institution of higher education, or other educational establishment or institution (who often work outside the classroom or at their homes) did not work 1,250 hours during the previous 12 months in order to claim that the teachers are not eligible for FMLA leave.

(d) The determination of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date the FMLA leave is to start. An employee may be on ''non-FMLA leave'' at the time he/she meets the eligibility requirements, and in that event, any portion of the leave taken for an FMLA-qualifying reason after the employee meets the eligibility requirement would be ''FMLA leave.'' (*See* § 825.300(b) for rules governing the content of the eligibility notice given to employees.)

(e) Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in

response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50. For example, if an employer employs 60 employees in August, but expects that the number of employees will drop to 40 in December, the employer must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

§ 825.111 Determining whether 50 employees are employed within 75 miles.

(a) Generally, a worksite can refer to either a single location or a group of contiguous locations. Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

(1) Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

(2) For employees with no fixed worksite, *e.g.*, construction workers, transportation workers (*e.g.*, truck drivers, seamen, pilots), salespersons, *etc.*, the ''worksite'' is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, *etc.* If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, *etc.*, from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their ''worksite.'' The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey. For transportation employees, their worksite is the terminal to which they are assigned, report for work, depart, and return after completion of a work assignment. For example, an airline pilot may work for an airline with headquarters in New York, but the pilot regularly reports for duty and originates or begins flights from the company's facilities located in an airport in Chicago and returns to Chicago at the completion of one or more flights to go off duty. The pilot's worksite is the facility in Chicago. An employee's personal residence is not a worksite in the case of employees such as salespersons who travel a sales territory and who generally leave to work and return from work to their personal residence, or employees who work at home, as under the concept of flexiplace or telecommuting. Rather, their worksite is the office to which they report and from which assignments are made.

(3) For purposes of determining that employee's eligibility, when an employee is jointly employed by two or more employers (*see* § 825.106), the employee's worksite is the primary employer's office from which the employee is assigned or reports, unless the employee has physically worked for at least one year at a facility of a secondary employer, in which case the employee's worksite is that location. The employee is also counted by the secondary employer to determine eligibility for the secondary employer's full-time or permanent employees.

(b) The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (*e.g.*, airline miles).

(c) The determination of how many employees are employed within 75 miles of the worksite of an employee is based on the number of employees maintained on the payroll. Employees of educational institutions who are employed permanently or who are under contract are ''maintained on the payroll'' during any portion of the year when school is not in session. *See* § 825.105(c).

§ 825.112 Qualifying reasons for leave, general rule.

(a) *Circumstances qualifying for leave.* Employers covered by FMLA are required to grant leave to eligible employees:

(1) For birth of a son or daughter, and to care for the newborn child (*see* § 825.120);

(2) For placement with the employee of a son or daughter for adoption or foster care (*see* § 825.121);

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition (*see* §§ 825.113 and 825.122); and

(4) Because of a serious health condition that makes the employee unable to perform the functions of the employee's job (*see* §§ 825.113 and 825.123).

(b) *Equal application.* The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child.

(c) *Active employee.* In situations where the employer/employee relationship has been interrupted, such as an employee who has been on layoff, the employee must be recalled or otherwise be re-employed before being eligible for FMLA leave. Under such circumstances, an eligible employee is immediately entitled to further FMLA leave for a qualifying reason.

§ 825.113 Serious health condition.

(a) For purposes of FMLA, ''serious health condition'' entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115.

(b) The term ''incapacity'' means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom.

(c) The term ''treatment'' includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye

examinations, or dental examinations. A regimen of continuing treatment includes, for example, a course of prescription medication (*e.g.*, an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (*e.g.*, oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

(d) Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, *etc.*, are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress, or allergies may be serious health conditions, but only if all the conditions of this section are met.

§ 825.114 Inpatient care.

Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity as defined in § 825.113(b), or any subsequent treatment in connection with such inpatient care.

§ 825.115 Continuing treatment.

A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) *Incapacity and treatment.* A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(1) Treatment two or more times, within a 30-day period unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider.

(b) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(c) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(1) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(2) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(3) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(d) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(e) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(1) Restorative surgery after an accident or other injury; or

(2) A condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(f) Absences attributable to incapacity under paragraph (b) or (c) of this section qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

§ 825.116 [Reserved]

§ 825.117 [Reserved]

§ 825.118 [Reserved]

§ 825.119 Leave for treatment of substance abuse.

(a) Substance abuse may be a serious health condition if the conditions of §§ 825.113 through 825.115 are met. However, FMLA leave may only be taken for treatment for substance abuse by a health care provider or by a provider of health care services on referral by a health care provider. On the other hand, absence because of the employee's use of the substance, rather than for treatment, does not qualify for FMLA leave.

(b) Treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave. An employee may also take FMLA leave to care for a covered family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for a covered family member receiving treatment for substance abuse.

§ 825.120 Leave for pregnancy or birth.

(a) *General rules.* Eligible employees are entitled to FMLA leave for pregnancy or birth of a child as follows:

(1) Both the mother and father are entitled to FMLA leave for the birth of their child.

(2) Both the mother and father are entitled to FMLA leave to be with the healthy newborn child (*i.e.*, bonding time) during the 12-month period beginning on the date of birth. An employee's entitlement to leave for a birth expires at the end of the 12-month period beginning on the date of the birth, unless State law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, *see* § 825.701

regarding non-FMLA leave which may be available under applicable State laws. Under this section, both the mother and father are entitled to FMLA leave even if the newborn does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for birth of the employee's son or daughter or to care for the child after birth, for placement of a son or daughter with the employee for adoption or foster care, or to care for the child after placement, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newborn child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition. Note, too, that many State pregnancy disability laws specify a period of disability either before or after the birth of a child; such periods would also be considered FMLA leave for a serious health condition of the mother, and would not be subject to the combined limit.

(4) The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant employee may be unable to report to work because of severe morning sickness.

(5) The father is entitled to FMLA leave if needed to care for his pregnant spouse who is incapacitated or for prenatal care, or if needed to care for the spouse following the birth of a child if the spouse has a serious health condition. *See* § 825.124.

(6) Both the mother and father are entitled to FMLA leave if needed to care for a child with a serious health condition if the requirements of §§ 825.113 through 825.115 and .122(c) are met. Thus, a husband and wife may each take their 12 weeks of FMLA leave if needed to care for their newborn child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the birth to be with a healthy newborn child only if the employer agrees. For example, an employer and employee may agree to a part-time work schedule after the birth. If the employer agrees to permit intermittent or reduced schedule leave for the birth of a child, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the mother or newborn child. *See* §§ 825.202-.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.121 for rules governing leave for adoption or foster care. *See* § 825.601 for special rules applicable to instructional employees of schools.

§ 825.121 Leave for adoption or foster care.

(a) *General rules.* Eligible employees are entitled to FMLA leave for placement with the employee of a son or daughter for adoption or foster care as follows:

(1) Employees may take FMLA leave before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, submit to a physical examination, or travel to another country to complete an adoption. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

(2) An employee's entitlement to leave for adoption or foster care expires at the end of the 12-month period beginning on the date of the placement, unless State law allows, or the employer permits, leave to be taken for a longer period. Any such FMLA leave must be concluded within this one-year period. However, see § 825.701 regarding non-FMLA leave which may be available under applicable State laws. Under this section, the employee is entitled to FMLA leave even if the adopted or foster child does not have a serious health condition.

(3) A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken for the placement of the employee's son or daughter or to care for the child after placement, for the birth of the employee's son or daughter or to care for the child after birth, or to care for the employee's parent with a serious health condition. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the

husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a healthy, newly placed child, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

(4) An eligible employee is entitled to FMLA leave in order to care for an adopted or foster child with a serious health condition if the requirements of §§ 825.113 through 825.115 and .122(c) are met. Thus, a husband and wife may each take 12 weeks of FMLA leave if needed to care for an adopted or foster child with a serious health condition, even if both are employed by the same employer, provided they have not exhausted their entitlements during the applicable 12-month FMLA leave period.

(b) *Use of intermittent and reduced schedule leave.* An eligible employee may use intermittent or reduced schedule leave after the placement of a healthy child for adoption or foster care only if the employer agrees. Thus, for example, the employer and employee may agree to a part-time work schedule after the placement for bonding purposes. If the employer agrees to permit intermittent or reduced schedule leave for the placement for adoption or foster care, the employer may require the employee to transfer temporarily, during the period the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced leave. The employer's agreement is not required for intermittent leave required by the serious health condition of the adopted or foster child. *See* §§ 825.202 through 825.205 for general rules governing the use of intermittent and reduced schedule leave. *See* § 825.120 for general rules governing leave for pregnancy and birth of a child. *See* § 825.601 for special rules applicable to instructional employees of schools.

§ 825.122 Definitions of spouse, parent, son or daughter, adoption and foster care.

(a) *Spouse.* Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

(b) *Parent.* Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined in paragraph (c) of this section. This term does not include parents ''in law.''

(c) *Son or daughter.* Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

(1) ''Incapable of self-care'' means that the individual requires active assistance or supervision to provide daily self-care in three or more of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, *etc.*

(2) ''Physical or mental disability'' means a physical or mental impairment that substantially limits one or more of the major life activities of an individual. Regulations at 29 CFR 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

(3) Persons who are ''in loco parentis'' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

(d) *Adoption.* ''Adoption'' means legally and permanently assuming the responsibility of raising a child as one's own. The source of an adopted child (*e.g.*, whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for FMLA leave. *See* § 825.121 for rules governing leave for adoption.

(e) *Foster care.* Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody. *See* § 825.121 for rules governing leave for foster care.

(f) *Documenting relationships.* For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a child's birth certificate, a court document, a sworn notarized statement, a submitted and signed tax return, *etc.* The employer is entitled to examine documentation such as a birth certificate, *etc.,* but the employee is entitled to the return of the official document submitted for this purpose.

§ 825.123 Unable to perform the functions of the position.

(a) *Definition.* An employee is ''unable to perform the functions of the position'' where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position within the meaning of the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, and the regulations at 29 CFR 1630.2(n). An employee who must be absent from work to receive medical treatment for a serious health condition is considered to be unable to perform the essential functions of the position during the absence for treatment.

(b) *Statement of functions.* An employer has the option, in requiring certification from a health care provider, to provide a statement of the essential functions of the employee's position for the health care provider to review. For purposes of FMLA, the essential functions of the employee's position are to be determined with reference to the position the employee held at the time notice is given or leave commenced, whichever is earlier. A sufficient medical certification must specify what functions of the employee's position the employee is unable to perform. *See* § 825.306.

§ 825.124 Needed to care for a family member.

(a) The medical certification provision that an employee is ''needed to care for'' a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, *etc.* The term also includes providing psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

(b) The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home. The employee need not be the only individual or family member available to care for the qualified family member.

(c) An employee's intermittent leave or a reduced leave schedule necessary to care for a family member includes not only a situation where the family member's condition itself is intermittent, but also where the employee is only needed intermittently—such as where other care is normally available, or care responsibilities are shared with another member of the family or a third party. *See* §§ 825.202 through 825.205 for rules governing the use of intermittent or reduced schedule leave.

§ 825.125 Definition of health care provider.

(a) The Act defines ''health care provider'' as:

(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(2) Any other person determined by the Secretary to be capable of providing health care services.

(b) Others ''capable of providing health care services'' include only:

(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(2) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(3) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(c) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Subpart B—Employee Leave Entitlements Under the Family and Medical Leave Act

§ 825.200 Amount of leave.

(a) An eligible employee's FMLA leave entitlement is limited to a total of 12 workweeks of leave during any 12-month period for any one, or more, of the following reasons:

(1) The birth of the employee's son or daughter, and to care for the newborn child;

(2) The placement with the employee of a son or daughter for adoption or foster care, and to care for the newly placed child;

(3) To care for the employee's spouse, son, daughter, or parent with a serious health condition; and

(4) Because of a serious health condition that makes the employee unable to perform one or more of the essential functions of his or her job.

(b) An employer is permitted to choose any one of the following methods for determining the ''12-month period'' in which the 12 weeks of leave entitlement occurs:

(1) The calendar year;

(2) Any fixed 12-month ''leave year,'' such as a fiscal year, a year required by State law, or a year starting on an employee's ''anniversary'' date;

(3) The 12-month period measured forward from the date any employee's first FMLA leave begins; or,

(4) A ''rolling'' 12-month period measured backward from the date an employee uses any FMLA leave.

(c) Under methods in paragraphs (b)(1) and (b)(2) of this section an employee would be entitled to up to 12 weeks of FMLA leave at any time in the fixed 12-month period selected. An employee could, therefore, take 12 weeks of leave at the end of the year and 12 weeks at the beginning of the following year. Under the method in paragraph (b)(3) of this section, an employee would be entitled to 12 weeks of leave during the year beginning on the first date FMLA leave is taken; the next 12-month period would begin the first time FMLA leave is taken after completion of any previous 12-month period. Under the method in paragraph (b)(4) of this section, the ''rolling'' 12-month period, each time an employee takes FMLA leave the remaining leave entitlement would be any balance of the 12 weeks which has not been used during the immediately preceding 12 months. For example, if an employee has taken eight weeks of leave during the past 12 months, an additional four weeks of leave could be taken. If an employee used four weeks beginning February 1, 2007, four weeks beginning June 1, 2007, and four weeks beginning December 1, 2007, the employee would not be entitled to any additional leave until February 1, 2008. However, beginning on February 1, 2008, the employee would be entitled to four weeks of leave, on June 1 the employee would be entitled to an additional four weeks, *etc.*

(d)(1) Employers will be allowed to choose any one of the alternatives in paragraph (b) of this section provided the alternative chosen is applied consistently and uniformly to all employees. An employer wishing to change to another alternative is required to give at least 60 days notice to all employees, and the transition must take place in such a way that the employees retain the full benefit of 12 weeks of leave under whichever method affords the greatest benefit to the employee. Under no circumstances may a new method be implemented in order to avoid the Act's leave requirements.

(2) An exception to this required uniformity would apply in the case of a multi-State employer who has eligible employees in a State which has a family and medical leave statute. The State may require a single method of determining the period during which use of the leave entitlement is measured. This method may conflict

with the method chosen by the employer to determine ''any 12 months'' for purposes of the Federal statute. The employer may comply with the State provision for all employees employed within that State, and uniformly use another method provided by this regulation for all other employees.

(e) If an employer fails to select one of the options in paragraph (b) of this section for measuring the 12-month period, the option that provides the most beneficial outcome for the employee will be used. The employer may subsequently select an option only by providing the 60-day notice to all employees of the option the employer intends to implement. During the running of the 60-day period any other employee who needs FMLA leave may use the option providing the most beneficial outcome to that employee. At the conclusion of the 60-day period the employer may implement the selected option.

(f) For purposes of determining the amount of leave used by an employee, the fact that a holiday may occur within the week taken as FMLA leave has no effect; the week is counted as a week of FMLA leave. However, if an employee is using FMLA leave in increments of less than one week, the holiday will not count against the employee's FMLA entitlement unless the employee was otherwise scheduled and expected to work during the holiday. Similarly, if for some reason the employer's business activity has temporarily ceased and employees generally are not expected to report for work for one or more weeks (*e.g.*, a school closing two weeks for the Christmas/New Year holiday or the summer vacation or an employer closing the plant for retooling or repairs), the days the employer's activities have ceased do *not* count against the employee's FMLA leave entitlement. Methods for determining an employee's 12-week leave entitlement are also described in § 825.205.

§ 825.201 Leave to care for a parent.

(a) *General rule.* An eligible employee is entitled to FMLA leave if needed to care for the employee's parent with a serious health condition. Care for parents-in-law is not covered by the FMLA. *See* § 825.122(b) for definition of parent.

(b) *''Same employer'' limitation.* A husband and wife who are eligible for FMLA leave and are employed by the same covered employer may be limited to a combined total of 12 weeks of leave during any 12-month period if the leave is taken to care for the employee's parent with a serious health condition, for the birth of the employee's son or daughter or to care for the child after the birth, or for placement of a son or daughter with the employee for adoption or foster care or to care for the child after placement. This limitation on the total weeks of leave applies to leave taken for the reasons specified as long as a husband and wife are employed by the ''same employer.'' It would apply, for example, even though the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. On the other hand, if one spouse is ineligible for FMLA leave, the other spouse would be entitled to a full 12 weeks of FMLA leave. Where the husband and wife both use a portion of the total 12-week FMLA leave entitlement for either the birth of a child, for placement for adoption or foster care, or to care for a parent, the husband and wife would each be entitled to the difference between the amount he or she has taken individually and 12 weeks for FMLA leave for other purposes. For example, if each spouse took 6 weeks of leave to care for a parent, each could use an additional 6 weeks due to his or her own serious health condition or to care for a child with a serious health condition.

§ 825.202 Intermittent leave or reduced leave schedule.

(a) *Definition.* FMLA leave may be taken ''intermittently or on a reduced leave schedule'' under certain circumstances. Intermittent leave is FMLA leave taken in separate blocks of time due to a single qualifying reason. A reduced leave schedule is a leave schedule that reduces an employee's usual number of working hours per workweek, or hours per workday. A reduced leave schedule is a change in the employee's schedule for a period of time, normally from full-time to part-time.

(b) *Medical necessity.* For intermittent leave or leave on a reduced leave schedule, there must be a medical need for leave (as distinguished from voluntary treatments and procedures) and it must be that such medical need can be best accommodated through an intermittent or reduced leave schedule. The treatment regimen and other information described in the certification of a serious health condition (*see* § 825.306) meets the requirement for certification of the medical necessity of intermittent leave or leave on a reduced leave schedule. Leave may be taken intermittently or on a reduced leave schedule when medically necessary for planned and/or unanticipated medical treatment of a related serious health condition by or under the supervision of a health care provider, or for recovery from treatment or recovery from a serious health condition. It may also be taken to provide care or psychological comfort to a covered family member with a serious health condition.

(1) Intermittent leave may be taken for a serious health condition which requires treatment by a health care provider periodically, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy. A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness. An example of an employee taking leave on a reduced leave schedule is an employee who is recovering from a serious health condition and is not strong enough to work a full-time schedule.

(2) Intermittent or reduced schedule leave may be taken for absences where the employee or family member is incapacitated or unable to perform the essential functions of the position because of a chronic serious health condition even if he or she does not receive treatment by a health care provider. *See* § 825.113.

(c) *Birth or placement.* When leave is taken after the birth of a healthy child or placement of a healthy child for adoption or foster care, an employee may take leave intermittently or on a reduced leave schedule only if the employer agrees. Such a schedule reduction might occur, for example, where an employee, with the employer's agreement, works part-time after the birth of a child, or takes leave in several segments. The employer's agreement is not required, however, for leave during which the mother has a serious health condition in connection with the birth of her child or if the newborn child has a serious health condition. *See* § 825.204 for rules governing transfer to an alternative position that better accommodates intermittent leave. *See also* § 825.120 (pregnancy) and § 825.121 (adoption and foster care).

§ 825.203 Scheduling of intermittent or reduced schedule leave.

Eligible employees may take FMLA leave on an intermittent or reduced schedule basis when medically necessary due to the serious health condition of a qualified family member

or the employee. *See* § 825.202. If an employee needs leave intermittently or on a reduced leave schedule for planned medical treatment, then the employee must make a reasonable effort to schedule the leave so as not to disrupt unduly the employer's operations.

§ 825.204 Transfer of an employee to an alternative position during intermittent leave or reduced schedule leave.

(a) *Transfer or reassignment.* If an employee needs intermittent leave or leave on a reduced leave schedule that is foreseeable based on planned medical treatment for the employee or a family member, including during a period of recovery from a serious health condition, or if the employer agrees to permit intermittent or reduced schedule leave for the birth of a child or for placement of a child for adoption or foster care, the employer may require the employee to transfer temporarily, during the period that the intermittent or reduced leave schedule is required, to an available alternative position for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. *See* § 825.601 for special rules applicable to instructional employees of schools.

(b) *Compliance.* Transfer to an alternative position may require compliance with any applicable collective bargaining agreement, Federal law (such as the Americans with Disabilities Act), and State law. Transfer to an alternative position may include altering an existing job to better accommodate the employee's need for intermittent or reduced schedule leave.

(c) *Equivalent pay and benefits.* The alternative position must have equivalent pay and benefits. An alternative position for these purposes does not have to have equivalent duties. The employer may increase the pay and benefits of an existing alternative position, so as to make them equivalent to the pay and benefits of the employee's regular job. The employer may also transfer the employee to a part-time job with the same hourly rate of pay and benefits, provided the employee is not required to take more leave than is medically necessary. For example, an employee desiring to take leave in increments of four hours per day could be transferred to a half-time job, or could remain in the employee's same job on a part-time schedule, paying the same hourly rate as the employee's previous job and enjoying the same benefits. The employer may not eliminate benefits which otherwise would not be provided to part-time employees; however, an employer may proportionately reduce benefits such as vacation leave where an employer's normal practice is to base such benefits on the number of hours worked.

(d) *Employer limitations.* An employer may not transfer the employee to an alternative position in order to discourage the employee from taking leave or otherwise work a hardship on the employee. For example, a white collar employee may not be assigned to perform laborer's work; an employee working the day shift may not be reassigned to the graveyard shift; an employee working in the headquarters facility may not be reassigned to a branch a significant distance away from the employee's normal job location. Any such attempt on the part of the employer to make such a transfer will be held to be contrary to the prohibited acts of the FMLA.

(e) *Reinstatement of employee.* When an employee who is taking leave intermittently or on a reduced leave schedule and has been transferred to an alternative position no longer needs to continue on leave and is able to return to full-time work, the employee must be placed in the same or equivalent job as the job he/she left when the leave commenced. An employee may not be required to take more leave than necessary to address the circumstance that precipitated the need for leave.

§ 825.205 Increments of leave for intermittent or reduced schedule leave.

(a) *Minimum increment.* When an employee takes leave on an intermittent or reduced leave schedule, an employer may limit leave increments to the shortest period of time that the employer's payroll system uses to account for absences or use of leave, provided it is one hour or less. If an employee takes leave on an intermittent or reduced leave schedule, only the amount of leave actually taken may be counted toward the 12 weeks of leave to which an employee is entitled. The normal workweek is the basis of leave entitlement. Therefore, if an employee who normally works five days a week takes off one day, the employee would use 1/5 of a week of FMLA leave. Similarly, if a full-time employee who normally works 8-hour days works 4-hour days under a reduced leave schedule, the employee would use 1/2 week of FMLA leave.

(b) *Calculation of leave.* (1) Where an employee normally works a part-time schedule or variable hours, the amount of leave to which an employee is entitled is determined on a pro rata or proportional basis by comparing the new schedule with the employee's normal schedule. For example, if an employee who normally works 30 hours per week works only 20 hours a week under a reduced leave schedule, the employee's ten hours of leave would constitute one-third of a week of FMLA leave for each week the employee works the reduced leave schedule.

(2) If an employer has made a permanent or long-term change in the employee's schedule (for reasons other than FMLA, and prior to the notice of need for FMLA leave), the hours worked under the new schedule are to be used for making this calculation.

(3) If an employee's schedule varies from week to week, a weekly average of the hours worked over the 12 weeks prior to the beginning of the leave period would be used for calculating the employee's normal workweek.

§ 825.206 Interaction with the FLSA.

(a) Leave taken under FMLA may be unpaid. If an employee is otherwise exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA) as a salaried executive, administrative, professional, or computer employee (under regulations issued by the Secretary), 29 CFR part 541, providing unpaid FMLA-qualifying leave to such an employee will not cause the employee to lose the FLSA exemption. *See* 29 CFR 541.602(b)(7). This means that under regulations currently in effect, where an employee meets the specified duties test, is paid on a salary basis, and is paid a salary of at least the amount specified in the regulations, the employer may make deductions from the employee's salary for any hours taken as intermittent or reduced FMLA leave within a workweek, without affecting the exempt status of the employee. The fact that an employer provides FMLA leave, whether paid or unpaid, and maintains records required by this part regarding FMLA leave, will not be relevant to the determination whether an employee is exempt within the meaning of 29 CFR part 541.

(b) For an employee paid in accordance with the fluctuating workweek method of payment for overtime (*see* 29 CFR 778.114), the employer, during the period in which intermittent or reduced schedule FMLA leave is scheduled to be taken, may compensate an employee on an hourly basis and pay only for the hours the employee works, including time and one-half the employee's regular rate for overtime hours. The change to payment on an hourly basis would include the entire period during which the employee is taking intermittent leave, including weeks in which no leave is taken. The hourly rate shall be

determined by dividing the employee's weekly salary by the employee's normal or average schedule of hours worked during weeks in which FMLA leave is not being taken. If an employer chooses to follow this exception from the fluctuating workweek method of payment, the employer must do so uniformly, with respect to all employees paid on a fluctuating workweek basis for whom FMLA leave is taken on an intermittent or reduced leave schedule basis. If an employer does not elect to convert the employee's compensation to hourly pay, no deduction may be taken for FMLA leave absences. Once the need for intermittent or reduced scheduled leave is over, the employee may be restored to payment on a fluctuating work week basis.

(c) This special exception to the ''salary basis'' requirements of the FLSA exemption or fluctuating workweek payment requirements applies only to employees of covered employers who are eligible for FMLA leave, and to leave which qualifies as (one of the four types of) FMLA leave. Hourly or other deductions which are not in accordance with 29 CFR part 541 or 29 CFR 778.114 may not be taken, for example, from the salary of an employee who works for an employer with fewer than 50 employees, or where the employee has not worked long enough to be eligible for FMLA leave without potentially affecting the employee's eligibility for exemption. Nor may deductions which are not permitted by 29 CFR part 541 or 29 CFR 778.114 be taken from such an employee's salary for any leave which does not qualify as FMLA leave, for example, deductions from an employee's pay for leave required under State law or under an employer's policy or practice for a reason which does not qualify as FMLA leave, *e.g.*, leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition; or for leave which is more generous than provided by FMLA, such as leave in excess of 12 weeks in a year. Employers may comply with State law or the employer's own policy/practice under these circumstances and maintain the employee's eligibility for exemption or for the fluctuating workweek method of pay by not taking hourly deductions from the employee's pay, in accordance with FLSA requirements, or may take such deductions, treating the employee as an ''hourly'' employee and pay overtime premium pay for hours worked over 40 in a workweek.

§ 825.207 Substitution of paid leave.

(a) Generally, FMLA leave is unpaid leave. However, under the circumstances described in this section, FMLA permits an eligible employee to choose to substitute paid leave for FMLA leave. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave. The term ''substitute'' means that the paid leave provided by the employer, and accrued pursuant to established policies of the employer, will run concurrently with the unpaid FMLA leave. Accordingly, the employee receives pay pursuant to the employer's applicable paid leave policy during the period of otherwise unpaid FMLA leave. An employee's ability to use accrued paid leave is determined by the terms and conditions of the employer's normal leave policy. Employers may not discriminate against employees on FMLA leave in the administration of their leave policies. When an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that the employee must satisfy any procedural requirements and meet any additional qualifying standards of the paid leave policy only in connection with the receipt of such payment or benefit. If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to all the protections of unpaid FMLA leave.

(b) If neither the employee nor the employer elects to substitute paid leave for unpaid FMLA leave under the above conditions and circumstances, the employee will remain entitled to all the paid leave which is earned or accrued under the terms of the employer's plan.

(c) If an employee uses paid leave under circumstances which do not qualify as FMLA leave, the leave will not count against the 12 weeks of FMLA leave to which the employee is entitled. For example, paid sick leave used for a medical condition which is not a serious health condition does not count against the 12 weeks of FMLA leave entitlement.

(d) Disability leave for the birth of a child would be considered FMLA leave for a serious health condition and counted in the 12 weeks of leave permitted under FMLA. Because the leave pursuant to a temporary disability benefit plan is not unpaid, the provision for substitution of paid leave is inapplicable. However, the employer may designate the leave as FMLA leave and count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement. Employers and employees also may agree, where State law permits, to have paid leave supplement the temporary disability benefits, such as in the case where a plan only provides replacement income for two-thirds of an employee's salary.

(e) The Act provides that a serious health condition may result from injury to the employee ''on or off'' the job. If the employer designates the leave as FMLA leave in accordance with § 825.301, the employee's FMLA 12-week leave entitlement may run concurrently with a workers' compensation absence when the injury is one that meets the criteria for a serious health condition. As the workers' compensation absence is not unpaid leave, the provision for substitution of the employee's accrued paid leave is not applicable. However, if the health care provider treating the employee for the workers' compensation injury certifies the employee is able to return to a ''light duty job'' but is unable to return to the same or equivalent job, the employee may decline the employer's offer of a ''light duty job.'' As a result the employee may lose workers' compensation payments, but is entitled to remain on unpaid FMLA leave until the 12-week entitlement is exhausted. As of the date workers' compensation benefits cease, the substitution provision becomes applicable and either the employee may elect or the employer may require the use of accrued paid leave. *See also* §§ 825.210(f), 825.216(d), 825.220(d), 825.307(a) and 825.702(d) (1) and (2) regarding the relationship between workers' compensation absences and FMLA leave.

(f) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). In addition, under the FLSA, an employer always has the right to cash out an employee's compensatory time or to require the employee to use the time. Therefore, if an employee requests and is permitted to use accrued compensatory time to receive pay for time taken off for an FMLA reason, or if the employer requires such use pursuant to the FLSA, the time taken off

for an FMLA reason may be counted against the employee's FMLA leave entitlement.

§ 825.208 [Reserved]

§ 825.209 Maintenance of employee benefits.

(a) During any FMLA leave, an employer must maintain the employee's coverage under any group health plan (as defined in the Internal Revenue Code of 1986 at 26 U.S.C. 5000(b)(1)) on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period. All employers covered by FMLA, including public agencies, are subject to the Act's requirements to maintain health coverage. The definition of ''group health plan'' is set forth in § 825.800. For purposes of FMLA, the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

(b) The same group health plan benefits provided to an employee prior to taking FMLA leave must be maintained during the FMLA leave. For example, if family member coverage is provided to an employee, family member coverage must be maintained during the FMLA leave. Similarly, benefit coverage during FMLA leave for medical care, surgical care, hospital care, dental care, eye care, mental health counseling, substance abuse treatment, *etc.*, must be maintained during leave if provided in an employer's group health plan, including a supplement to a group health plan, whether or not provided through a flexible spending account or other component of a cafeteria plan.

(c) If an employer provides a new health plan or benefits or changes health benefits or plans while an employee is on FMLA leave, the employee is entitled to the new or changed plan/benefits to the same extent as if the employee were not on leave. For example, if an employer changes a group health plan so that dental care becomes covered under the plan, an employee on FMLA leave must be given the same opportunity as other employees to receive (or obtain) the dental care coverage. Any other plan changes (*e.g.*, in coverage, premiums, deductibles, *etc.*) which apply to all employees of the workforce would also apply to an employee on FMLA leave.

(d) Notice of any opportunity to change plans or benefits must also be given to an employee on FMLA leave. If the group health plan permits an employee to change from single to family coverage upon the birth of a child or otherwise add new family members, such a change in benefits must be made available while an employee is on FMLA leave. If the employee requests the changed coverage it must be provided by the employer.

(e) An employee may choose not to retain group health plan coverage during FMLA leave. However, when an employee returns from leave, the employee is entitled to be reinstated on the same terms as prior to taking the leave, including family or dependent coverages, without any qualifying period, physical examination, exclusion of pre-existing conditions, *etc. See* § 825.212(c).

(f) Except as required by the Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) and for ''key'' employees (as discussed below), an employer's obligation to maintain health benefits during leave (and to restore the employee to the same or equivalent employment) under FMLA ceases if and when the employment relationship would have terminated if the employee had not taken FMLA leave (*e.g.*, if the employee's position is eliminated as part of a nondiscriminatory reduction in force and the employee would not have been transferred to another position); an employee informs the employer of his or her intent not to return from leave (including before starting the leave if the employer is so informed before the leave starts); or the employee fails to return from leave or continues on leave after exhausting his or her FMLA leave entitlement in the 12-month period.

(g) If a ''key employee'' (*see* § 825.218) does not return from leave when notified by the employer that substantial or grievous economic injury will result from his or her reinstatement, the employee's entitlement to group health plan benefits continues unless and until the employee advises the employer that the employee does not desire restoration to employment at the end of the leave period, or FMLA leave entitlement is exhausted, or reinstatement is actually denied.

(h) An employee's entitlement to benefits other than group health benefits during a period of FMLA leave (*e.g.*, holiday pay) is to be determined by the employer's established policy for providing such benefits when the employee is on other forms of leave (paid or unpaid, as appropriate).

§ 825.210 Employee payment of group health benefit premiums.

(a) Group health plan benefits must be maintained on the same basis as coverage would have been provided if the employee had been continuously employed during the FMLA leave period. Therefore, any share of group health plan premiums which had been paid by the employee prior to FMLA leave must continue to be paid by the employee during the FMLA leave period. If premiums are raised or lowered, the employee would be required to pay the new premium rates. Maintenance of health insurance policies which are not a part of the employer's group health plan, as described in § 825.209(a)(1), are the sole responsibility of the employee. The employee and the insurer should make necessary arrangements for payment of premiums during periods of unpaid FMLA leave.

(b) If the FMLA leave is substituted paid leave, the employee's share of premiums must be paid by the method normally used during any paid leave, presumably as a payroll deduction.

(c) If FMLA leave is unpaid, the employer has a number of options for obtaining payment from the employee. The employer may require that payment be made to the employer or to the insurance carrier, but no additional charge may be added to the employee's premium payment for administrative expenses. The employer may require employees to pay their share of premium payments in any of the following ways:

(1) Payment would be due at the same time as it would be made if by payroll deduction;

(2) Payment would be due on the same schedule as payments are made under COBRA;

(3) Payment would be prepaid pursuant to a cafeteria plan at the employee's option;

(4) The employer's existing rules for payment by employees on ''leave without pay'' would be followed, provided that such rules do not require prepayment (*i.e.*, prior to the commencement of the leave) of the premiums that will become due during a period of unpaid FMLA leave or payment of higher premiums than if the employee had continued to work instead of taking leave; or,

(5) Another system voluntarily agreed to between the employer and the employee, which may include prepayment of premiums (*e.g.*, through increased payroll deductions when the need for the FMLA leave is foreseeable).

(d) The employer must provide the employee with advance written notice of the terms and conditions under which these payments must be made. (*See* § 825.300.)

(e) An employer may not require more of an employee using unpaid FMLA leave than the employer requires of other employees on ''leave without pay.''

(f) An employee who is receiving payments as a result of a workers' compensation injury must make arrangements with the employer for payment of group health plan benefits when simultaneously taking FMLA leave. *See* § 825.207(e).

§ 825.211 Maintenance of benefits under multi-employer health plans.

(a) A multi-employer health plan is a plan to which more than one employer is required to contribute, and which is maintained pursuant to one or more collective bargaining agreements between employee organization(s) and the employers.

(b) An employer under a multi-employer plan must continue to make contributions on behalf of an employee using FMLA leave as though the employee had been continuously employed, unless the plan contains an explicit FMLA provision for maintaining coverage such as through pooled contributions by all employers party to the plan.

(c) During the duration of an employee's FMLA leave, coverage by the group health plan, and benefits provided pursuant to the plan, must be maintained at the level of coverage and benefits which were applicable to the employee at the time FMLA leave commenced.

(d) An employee using FMLA leave cannot be required to use ''banked'' hours or pay a greater premium than the employee would have been required to pay if the employee had been continuously employed.

(e) As provided in § 825.209(f) of this part, group health plan coverage must be maintained for an employee on FMLA leave until:

(1) The employee's FMLA leave entitlement is exhausted;

(2) The employer can show that the employee would have been laid off and the employment relationship terminated; or,

(3) The employee provides unequivocal notice of intent not to return to work.

§ 825.212 Employee failure to pay health plan premium payments.

(a)(1) In the absence of an established employer policy providing a longer grace period, an employer's obligations to maintain health insurance coverage cease under FMLA if an employee's premium payment is more than 30 days late. In order to drop the coverage for an employee whose premium payment is late, the employer must provide written notice to the employee that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be dropped on a specified date at least 15 days after the date of the letter unless the payment has been received by that date. If the employer has established policies regarding other forms of unpaid leave that provide for the employer to cease coverage retroactively to the date the unpaid premium payment was due, the employer may drop the employee from coverage retroactively in accordance with that policy, provided the 15-day notice was given. In the absence of such a policy, coverage for the employee may be terminated at the end of the 30-day grace period, where the required 15-day notice has been provided.

(2) An employer has no obligation regarding the maintenance of a health insurance policy which is not a ''group health plan.'' *See* § 825.209(a).

(3) All other obligations of an employer under FMLA would continue; for example, the employer continues to have an obligation to reinstate an employee upon return from leave.

(b) The employer may recover the employee's share of any premium payments missed by the employee for any FMLA leave period during which the employer maintains health coverage by paying the employee's share after the premium payment is missed.

(c) If coverage lapses because an employee has not made required premium payments, upon the employee's return from FMLA leave the employer must still restore the employee to coverage/benefits equivalent to those the employee would have had if leave had not been taken and the premium payment(s) had not been missed, including family or dependent coverage. *See* § 825.215(d)(1) through (5). In such case, an employee may not be required to meet any qualification requirements imposed by the plan, including any new preexisting condition waiting period, to wait for an open season, or to pass a medical examination to obtain reinstatement of coverage. If an employer terminates an employee's insurance in accordance with this section and fails to restore the employee's health insurance as required by this section upon the employee's return, the employer may be liable for benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable relief tailored to the harm suffered.

§ 825.213 Employer recovery of benefit costs.

(a) In addition to the circumstances discussed in § 825.212(b), an employer may recover its share of health plan premiums during a period of unpaid FMLA leave from an employee if the employee fails to return to work after the employee's FMLA leave entitlement has been exhausted or expires, unless the reason the employee does not return is due to:

(1) The continuation, recurrence, or onset of a serious health condition of the employee or the employee's family member which would otherwise entitle the employee to leave under FMLA; or

(2) Other circumstances beyond the employee's control. Examples of ''other circumstances beyond the employee's control'' are necessarily broad. They include such situations as where a parent chooses to stay home with a newborn child who has a serious health condition; an employee's spouse is unexpectedly transferred to a job location more than 75 miles from the employee's worksite; a relative or individual other than a covered family member has a serious health condition and the employee is needed to provide care; the employee is laid off while on leave; or, the employee is a ''key employee'' who decides not to return to work upon being notified of the employer's intention to deny restoration because of substantial and grievous economic injury to the employer's operations and is not reinstated by the employer. Other circumstances beyond the employee's control would not include a situation where an employee desires to remain with a parent in a distant city even though the parent no longer requires the employee's care, or a parent chooses not to return to work

to stay home with a well, newborn child.

(3) When an employee fails to return to work because of the continuation, recurrence, or onset of a serious health condition, thereby precluding the employer from recovering its (share of) health benefit premium payments made on the employee's behalf during a period of unpaid FMLA leave, the employer may require medical certification of the employee's or the family member's serious health condition. Such certification is not required unless requested by the employer. The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification. The employee is required to provide medical certification in a timely manner which, for purposes of this section, is within 30 days from the date of the employer's request. For purposes of medical certification, the employee may use the optional DOL form developed for this purpose (*see* § 825.306(b) and Appendix B of this part). If the employer requests medical certification and the employee does not provide such certification in a timely manner (within 30 days), or the reason for not returning to work does not meet the test of other circumstances beyond the employee's control, the employer may recover 100% of the health benefit premiums it paid during the period of unpaid FMLA leave.

(b) Under some circumstances an employer may elect to maintain other benefits, *e.g.*, life insurance, disability insurance, *etc.,* by paying the employee's (share of) premiums during periods of unpaid FMLA leave. For example, to ensure the employer can meet its responsibilities to provide equivalent benefits to the employee upon return from unpaid FMLA leave, it may be necessary that premiums be paid continuously to avoid a lapse of coverage. If the employer elects to maintain such benefits during the leave, at the conclusion of leave, the employer is entitled to recover only the costs incurred for paying the employee's share of any premiums whether or not the employee returns to work.

(c) An employee who returns to work for at least 30 calendar days is considered to have ''returned'' to work. An employee who transfers directly from taking FMLA leave to retirement, or who retires during the first 30 days after the employee returns to work, is deemed to have returned to work.

(d) When an employee elects or an employer requires paid leave to be substituted for FMLA leave, the employer may not recover its (share of) health insurance or other non-health benefit premiums for any period of FMLA leave covered by paid leave. Because paid leave provided under a plan covering temporary disabilities (including workers' compensation) is not unpaid, recovery of health insurance premiums does not apply to such paid leave.

(e) The amount that self-insured employers may recover is limited to only the employer's share of allowable ''premiums'' as would be calculated under COBRA, excluding the 2 percent fee for administrative costs.

(f) When an employee fails to return to work, any health and non-health benefit premiums which this section of the regulations permits an employer to recover are a debt owed by the non-returning employee to the employer. The existence of this debt caused by the employee's failure to return to work does not alter the employer's responsibilities for health benefit coverage and, under a self-insurance plan, payment of claims incurred during the period of FMLA leave. To the extent recovery is allowed, the employer may recover the costs through deduction from any sums due to the employee (*e.g.*, unpaid wages, vacation pay, profit sharing, *etc.*), provided such deductions do not otherwise violate applicable Federal or State wage payment or other laws. Alternatively, the employer may initiate legal action against the employee to recover such costs.

§ 825.214 Employee right to reinstatement.

General rule. On return from FMLA leave, an employee is entitled to be returned to the same position the employee held when leave commenced, or to an equivalent position with equivalent benefits, pay, and other terms and conditions of employment. An employee is entitled to such reinstatement even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence. *See also* § 825.106(e) for the obligations of joint employers.

§ 825.215 Equivalent position.

(a) *Equivalent position.* An equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

(b) *Conditions to qualify.* If an employee is no longer qualified for the position because of the employee's inability to attend a necessary course, renew a license, fly a minimum number of hours, etc., as a result of the leave, the employee shall be given a reasonable opportunity to fulfill those conditions upon return to work.

(c) *Equivalent pay.* (1) An employee is entitled to any unconditional pay increases which may have occurred during the FMLA leave period, such as cost of living increases. Pay increases conditioned upon seniority, length of service, or work performed would not have to be granted unless it is the employer's policy or practice to do so with respect to other employees on ''leave without pay.'' In such case, any pay increase would be granted based on the employee's seniority, length of service, work performed, *etc.,* excluding the period of unpaid FMLA leave. An employee is entitled to be restored to a position with the same or equivalent pay premiums, such as a shift differential. If an employee departed from a position averaging ten hours of overtime (and corresponding overtime pay) each week, an employee is ordinarily entitled to such a position on return from FMLA leave.

(2) Equivalent pay includes any bonus or payment, whether it is discretionary or non-discretionary, made to employees consistent with the provisions of paragraph (c)(1) of this section. However, if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent non-FMLA leave status. For example, if an employee who used paid vacation leave for a non-FMLA purpose would receive the payment, then the employee who used vacation leave for an FMLA-protected purpose also must receive the payment.

(d) *Equivalent benefits.* ''Benefits'' include all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer through an employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3).

(1) At the end of an employee's FMLA leave, benefits must be resumed in the same manner and at the same levels as provided when the leave began, and subject to any changes in benefit levels that may have taken place during the

period of FMLA leave affecting the entire workforce, unless otherwise elected by the employee. Upon return from FMLA leave, an employee cannot be required to requalify for any benefits the employee enjoyed before FMLA leave began (including family or dependent coverages). For example, if an employee was covered by a life insurance policy before taking leave but is not covered or coverage lapses during the period of unpaid FMLA leave, the employee cannot be required to meet any qualifications, such as taking a physical examination, in order to requalify for life insurance upon return from leave. Accordingly, some employers may find it necessary to modify life insurance and other benefits programs in order to restore employees to equivalent benefits upon return from FMLA leave, make arrangements for continued payment of costs to maintain such benefits during unpaid FMLA leave, or pay these costs subject to recovery from the employee on return from leave. *See* § 825.213(b).

(2) An employee may, but is not entitled to, accrue any additional benefits or seniority during unpaid FMLA leave. Benefits accrued at the time leave began, however, (*e.g.*, paid vacation, sick or personal leave to the extent not substituted for FMLA leave) must be available to an employee upon return from leave.

(3) If, while on unpaid FMLA leave, an employee desires to continue life insurance, disability insurance, or other types of benefits for which he or she typically pays, the employer is required to follow established policies or practices for continuing such benefits for other instances of leave without pay. If the employer has no established policy, the employee and the employer are encouraged to agree upon arrangements before FMLA leave begins.

(4) With respect to pension and other retirement plans, any period of unpaid FMLA leave shall not be treated as or counted toward a break in service for purposes of vesting and eligibility to participate. Also, if the plan requires an employee to be employed on a specific date in order to be credited with a year of service for vesting, contributions or participation purposes, an employee on unpaid FMLA leave on that date shall be deemed to have been employed on that date. However, unpaid FMLA leave periods need not be treated as credited service for purposes of benefit accrual, vesting and eligibility to participate.

(5) Employees on unpaid FMLA leave are to be treated as if they continued to work for purposes of changes to benefit plans. They are entitled to changes in benefits plans, except those which may be dependent upon seniority or accrual during the leave period, immediately upon return from leave or to the same extent they would have qualified if no leave had been taken. For example if the benefit plan is predicated on a pre-established number of hours worked each year and the employee does not have sufficient hours as a result of taking unpaid FMLA leave, the benefit is lost. (In this regard, § 825.209 addresses health benefits.)

(e) *Other issues related to equivalent terms and conditions of employment.* An equivalent position must have substantially similar duties, conditions, responsibilities, privileges and status as the employee's original position.

(1) The employee must be reinstated to the same or a geographically proximate worksite (*i.e.*, one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed. If the employee's original worksite has been closed, the employee is entitled to the same rights as if the employee had not been on leave when the worksite closed. For example, if an employer transfers all employees from a closed worksite to a new worksite in a different city, the employee on leave is also entitled to transfer under the same conditions as if he or she had continued to be employed.

(2) The employee is ordinarily entitled to return to the same shift or the same or an equivalent work schedule.

(3) The employee must have the same or an equivalent opportunity for bonuses, profit-sharing, and other similar discretionary and non-discretionary payments.

(4) FMLA does not prohibit an employer from accommodating an employee's request to be restored to a different shift, schedule, or position which better suits the employee's personal needs on return from leave, or to offer a promotion to a better position. However, an employee cannot be induced by the employer to accept a different position against the employee's wishes.

(f) *De minimis exception.* The requirement that an employee be restored to the same or equivalent job with the same or equivalent pay, benefits, and terms and conditions of employment does not extend to *de minimis*, intangible, or unmeasurable aspects of the job.

§ 825.216 Limitations on an employee's right to reinstatement.

(a) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. An employer must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment. For example:

(1) If an employee is laid off during the course of taking FMLA leave and employment is terminated, the employer's responsibility to continue FMLA leave, maintain group health plan benefits and restore the employee cease at the time the employee is laid off, provided the employer has no continuing obligations under a collective bargaining agreement or otherwise. An employer would have the burden of proving that an employee would have been laid off during the FMLA leave period and, therefore, would not be entitled to restoration. Restoration to a job slated for lay-off when the employee's original position is not would not meet the requirements of an equivalent position.

(2) If a shift has been eliminated, or overtime has been decreased, an employee would not be entitled to return to work that shift or the original overtime hours upon restoration. However, if a position on, for example, a night shift has been filled by another employee, the employee is entitled to return to the same shift on which employed before taking FMLA leave.

(3) If an employee was hired for a specific term or only to perform work on a discrete project, the employer has no obligation to restore the employee if the employment term or project is over and the employer would not otherwise have continued to employ the employee. On the other hand, if an employee was hired to perform work on a contract, and after that contract period the contract was awarded to another contractor, the successor contractor may be required to restore the employee if it is a successor employer. *See* § 825.107.

(b) In addition to the circumstances explained above, an employer may deny job restoration to salaried eligible employees (''key employees,'' as defined in § 825.217(c)), if such denial is necessary to prevent substantial and grievous economic injury to the operations of the employer; or may delay restoration to an employee who fails to provide a fitness for duty certificate to return to work under the conditions described in § 825.310.

(c) If the employee is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition or an injury or illness also covered by workers'

compensation, the employee has no right to restoration to another position under the FMLA. However, the employer's obligations may be governed by the Americans with Disabilities Act (ADA). *See* § 825.702, State leave laws, or workers' compensation laws.

(d) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions.

(e) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section.

§ 825.217 Key employee, general rule.

(a) A ''key employee'' is a salaried FMLA-eligible employee who is among the highest paid 10 percent of all the employees employed by the employer within 75 miles of the employee's worksite.

(b) The term ''salaried'' means ''paid on a salary basis,'' as defined in 29 CFR 541.602. This is the Department of Labor regulation defining employees who may qualify as exempt from the minimum wage and overtime requirements of the FLSA as executive, administrative, professional, and computer employees.

(c) A ''key employee'' must be ''among the highest paid 10 percent'' of all the employees—both salaried and non-salaried, eligible and ineligible—who are employed by the employer within 75 miles of the worksite.

(1) In determining which employees are among the highest paid 10 percent, year-to-date earnings are divided by weeks worked by the employee (including weeks in which paid leave was taken). Earnings include wages, premium pay, incentive pay, and non-discretionary and discretionary bonuses. Earnings do not include incentives whose value is determined at some future date, *e.g.*, stock options, or benefits or perquisites.

(2) The determination of whether a salaried employee is among the highest paid 10 percent shall be made at the time the employee gives notice of the need for leave. No more than 10 percent of the employer's employees within 75 miles of the worksite may be ''key employees.''

§ 825.218 Substantial and grievous economic injury.

(a) In order to deny restoration to a key employee, an employer must determine that the restoration of the employee to employment will cause ''substantial and grievous economic injury'' to the operations of the employer, not whether the absence of the employee will cause such substantial and grievous injury.

(b) An employer may take into account its ability to replace on a temporary basis (or temporarily do without) the employee on FMLA leave. If permanent replacement is unavoidable, the cost of then reinstating the employee can be considered in evaluating whether substantial and grievous economic injury will occur from restoration; in other words, the effect on the operations of the company of reinstating the employee in an equivalent position.

(c) A precise test cannot be set for the level of hardship or injury to the employer which must be sustained. If the reinstatement of a ''key employee'' threatens the economic viability of the firm, that would constitute ''substantial and grievous economic injury.'' A lesser injury which causes substantial, long-term economic injury would also be sufficient. Minor inconveniences and costs that the employer would experience in the normal course of doing business would certainly not constitute ''substantial and grievous economic injury.''

(d) FMLA's ''substantial and grievous economic injury'' standard is different from and more stringent than the ''undue hardship'' test under the ADA (*see also* § 825.702).

§ 825.219 Rights of a key employee.

(a) An employer who believes that reinstatement may be denied to a key employee, must give written notice to the employee at the time the employee gives notice of the need for FMLA leave (or when FMLA leave commences, if earlier) that he or she qualifies as a key employee. At the same time, the employer must also fully inform the employee of the potential consequences with respect to reinstatement and maintenance of health benefits if the employer should determine that substantial and grievous economic injury to the employer's operations will result if the employee is reinstated from FMLA leave. If such notice cannot be given immediately because of the need to determine whether the employee is a key employee, it shall be given as soon as practicable after being notified of a need for leave (or the commencement of leave, if earlier). It is expected that in most circumstances there will be no desire that an employee be denied restoration after FMLA leave and, therefore, there would be no need to provide such notice. However, an employer who fails to provide such timely notice will lose its right to deny restoration even if substantial and grievous economic injury will result from reinstatement.

(b) As soon as an employer makes a good faith determination, based on the facts available, that substantial and grievous economic injury to its operations will result if a key employee who has given notice of the need for FMLA leave or is using FMLA leave is reinstated, the employer shall notify the employee in writing of its determination, that it cannot deny FMLA leave, and that it intends to deny restoration to employment on completion of the FMLA leave. It is anticipated that an employer will ordinarily be able to give such notice prior to the employee starting leave. The employer must serve this notice either in person or by certified mail. This notice must explain the basis for the employer's finding that substantial and grievous economic injury will result, and, if leave has commenced, must provide the employee a reasonable time in which to return to work, taking into account the circumstances, such as the length of the leave and the urgency of the need for the employee to return.

(c) If an employee on leave does not return to work in response to the employer's notification of intent to deny restoration, the employee continues to be entitled to maintenance of health benefits and the employer may not recover its cost of health benefit premiums. A key employee's rights under FMLA continue unless and until the employee either gives notice that he or she no longer wishes to return to work, or the employer actually denies reinstatement at the conclusion of the leave period.

(d) After notice to an employee has been given that substantial and grievous economic injury will result if the employee is reinstated to employment, an employee is still entitled to request reinstatement at the end of the leave period even if the employee did not return to work in response to the employer's notice. The employer must then again determine whether there will be substantial and grievous economic injury from reinstatement, based on the facts at that time. If it is determined that substantial and grievous economic injury will result, the employer shall notify the employee in writing (in person or by certified mail) of the denial of restoration.

§ 825.220 Protection for employees who request leave or otherwise assert FMLA rights.

(a) The FMLA prohibits interference with an employee's rights under the law, and with legal proceedings or inquiries relating to an employee's rights. More specifically, the law contains the following employee protections:

(1) An employer is prohibited from interfering with, restraining, or denying the exercise of (or attempts to exercise) any rights provided by the Act.

(2) An employer is prohibited from discharging or in any other way discriminating against any person (whether or not an employee) for opposing or complaining about any unlawful practice under the Act.

(3) All persons (whether or not employers) are prohibited from discharging or in any other way discriminating against any person (whether or not an employee) because that person has—

(i) Filed any charge, or has instituted (or caused to be instituted) any proceeding under or related to this Act;

(ii) Given, or is about to give, any information in connection with an inquiry or proceeding relating to a right under this Act;

(iii) Testified, or is about to testify, in any inquiry or proceeding relating to a right under this Act.

(b) Any violations of the Act or of these regulations constitute interfering with, restraining, or denying the exercise of rights provided by the Act. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). ''Interfering with'' the exercise of an employee's rights would include, for example, not only refusing to authorize FMLA leave, but discouraging an employee from using such leave. It would also include manipulation by a covered employer to avoid responsibilities under FMLA, for example:

(1) Transferring employees from one worksite to another for the purpose of reducing worksites, or to keep worksites, below the 50-employee threshold for employee eligibility under the Act;

(2) Changing the essential functions of the job in order to preclude the taking of leave;

(3) Reducing hours available to work in order to avoid employee eligibility.

(c) The Act's prohibition against ''interference'' prohibits an employer from discriminating or retaliating against an employee or prospective employee for having exercised or attempted to exercise FMLA rights. For example, if an employee on leave without pay would otherwise be entitled to full benefits (other than health benefits), the same benefits would be required to be provided to an employee on unpaid FMLA leave. By the same token, employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions; nor can FMLA leave be counted under ''no fault'' attendance policies. *See* § 825.215.

(d) Employees cannot waive, nor may employers induce employees to waive, their prospective rights under FMLA. For example, employees (or their collective bargaining representatives) cannot ''trade off'' the right to take FMLA leave against some other benefit offered by the employer. This does not prevent an employee's voluntary and uncoerced acceptance (not as a condition of employment) of a ''light duty'' assignment while recovering from a serious health condition (*see* § 825.702(d)). Nor does it prevent the settlement of past FMLA claims by employees without the approval of the Department of Labor or a court.

(e) Individuals, and not merely employees, are protected from retaliation for opposing (*e.g.*, filing a complaint about) any practice which is unlawful under the Act. They are similarly protected if they oppose any practice which they reasonably believe to be a violation of the Act or regulations.

Subpart C—Employee and Employer Rights and Obligations Under the Act

§ 825.300 Employer notice requirements.

(a) *General notice.* (1) Every employer covered by the FMLA is required to post and keep posted on its premises, in conspicuous places where employees are employed, a notice explaining the Act's provisions and providing information concerning the procedures for filing complaints of violations of the Act with the Wage and Hour Division. The notice must be posted prominently where it can be readily seen by employees and applicants for employment. The poster and the text must be large enough to be easily read and contain fully legible text. Electronic posting is sufficient to meet this posting requirement as long as it otherwise meets the requirements of this subsection. An employer that willfully violates the posting requirement may be assessed a civil money penalty by the Wage and Hour Division not to exceed $110 for each separate offense.

(2) Covered employers must post this general notice even if no employees are eligible for FMLA leave.

(3) If an FMLA-covered employer has any eligible employees, it shall also provide this general notice to each employee by either including the notice in employee handbooks distributed to all employees or distributing a copy of the general notice to each employee at least annually (distribution may be by electronic mail).

(4) To meet the general notice requirements of this section, employers may duplicate the text of the notice contained in Appendix C of this part. Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer shall be responsible for providing the general notices in a language in which the employees are literate. Prototypes are available in several languages from the nearest office of the Wage and Hour Division or on the Internet at *http://www.wagehour.dol.gov.* Employers furnishing FMLA notices to sensory impaired individuals must also comply with all applicable requirements under Federal or State law.

(b) *Eligibility notice.* (1) When an employee requests FMLA leave, or when the employer acquires knowledge that an employee's leave may be for an FMLA-qualifying condition, the employer must notify the employee within five business days of the employee's eligibility to take FMLA leave and any additional requirements for qualifying for such leave. This eligibility notice shall provide information regarding the employee's eligibility for FMLA leave, detail the specific responsibilities of the employee, and explain any consequences of a failure to meet these responsibilities. *See* § 825.110 for definition of an eligible employee.

(2) Specifically, the eligibility notice must state whether the employee is eligible for FMLA leave and whether the employee still has FMLA leave available in the current applicable 12-month FMLA leave period. If the employee is not eligible for FMLA leave, the notice must state the reasons why the employee is not eligible, including as applicable that the employee has no remaining FMLA leave available in the 12-month period, the number of months the employee has been employed by the employer, the number of hours of service during the 12-month period, and whether the employee is employed at a

worksite where 50 or more employees are employed by the employer within 75 miles of that worksite.

(3) If the employee is eligible for FMLA leave and has FMLA leave available, the eligibility notice must detail the specific expectations and obligations of the employee and explain any consequences of a failure to meet these obligations. Such specific notice must include, as appropriate:

(i) That the leave may be designated and counted against the employee's annual FMLA leave entitlement if qualifying (*see* §§ 825.300(c) and 825.301);

(ii) Any requirements for the employee to furnish medical certification of a serious health condition and the consequences of failing to do so (*see* § 825.305);

(iii) The employee's right to substitute paid leave, whether the employer will require the substitution of paid leave, the conditions related to any substitution, and the employee's entitlement to take unpaid FMLA leave if the employee does not comply;

(iv) Any requirement for the employee to make any premium payments to maintain health benefits and the arrangements for making such payments (*see* § 825.210), and the possible consequences of failure to make such payments on a timely basis (*i.e.*, the circumstances under which coverage may lapse);

(v) Any requirement for the employee to present a fitness-for-duty certificate to be restored to employment and a list of the essential functions of the employee's position if the employer will require that the fitness-for-duty certification address those functions (*see* § 825.310);

(vi) The employee's status as a ''key employee'' and the potential consequence that restoration may be denied following FMLA leave, explaining the conditions required for such denial (*see* § 825.218);

(vii) The employee's rights to maintenance of benefits during the FMLA leave and restoration to the same or an equivalent job upon return from FMLA leave (*see* §§ 825.214 and 825.604); and

(viii) The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work after taking FMLA leave (*see* § 825.213).

(4) The eligibility notice may include other information—*e.g.*, whether the employer will require periodic reports of the employee's status and intent to return to work—but is not required to do so.

(5) The eligibility notice should be accompanied by any required medical certification form.

(6) Except as provided in this section, the eligibility notice must be provided to the employee no less often than the first time in each six-month period that an employee gives notice of the need for FMLA leave (if FMLA leave is taken during the six-month period). The notice shall be given within a reasonable time after notice of the need for leave is given by the employee—within five business days if feasible. If leave has already begun, the notice should be mailed to the employee's address of record.

(7) If the specific information provided by the notice changes with respect to a subsequent period of FMLA leave during the six-month period, the employer shall, within five business days of receipt of the employee's notice of need for leave, provide written notice referencing the prior notice and setting forth any of the information in the eligibility notice which has changed. For example, if the initial leave period was paid leave and the subsequent leave period would be unpaid leave, the employer may need to give notice of the arrangements for making premium payments.

(8)(i) Except as provided in paragraph (b)(8)(ii) of this section, if the employer is requiring medical certification or a ''fitness-for-duty'' report, written notice of the requirement shall be given with respect to each employee notice of a need for leave.

(ii) Subsequent written notification shall not be required if the initial eligibility notice in the six-month period and the employer handbook or other written documents (if any) describing the employer's leave policies, clearly provided that certification or a ''fitness-for-duty'' report would be required (*e.g.*, by stating that certification would be required in all cases, by stating that certification would be required in all cases in which leave of more than a specified number of days is taken, or by stating that a ''fitness-for-duty'' report would be required in all cases for back injuries for employees in a certain occupation). Where subsequent written notice is not required, at least oral notice shall be provided. *See* § 825.305(a).

(9) Employers are also expected to responsively answer questions from employees concerning their rights and responsibilities under the FMLA.

(10) A prototype eligibility notice is contained in Appendix D of this part; the prototype may be obtained from local offices of the Wage and Hour Division or from the Internet at *http://www.wagehour.dol.gov.* Employers may adapt the prototype notice as appropriate to meet these notice requirements.

(c) *Designation notice.* (1) When the employer has enough information to determine whether the leave qualifies as FMLA leave (after receiving a medical certification, for example), the employer must notify the employee within five business days of making such determination whether the leave has or has not been designated as FMLA leave and the number of hours, days or weeks that will be counted against the employee's FMLA leave entitlement. If it is not possible to provide the hours, days or weeks that will be counted against the employee's FMLA leave entitlement (such as in the case of unforeseeable intermittent leave), then such information must be provided every 30 days to the employee if leave is taken during the prior 30-day period. If the employer requires paid leave to be substituted for unpaid leave, or that paid leave taken under an existing leave plan be counted as FMLA leave, this designation also must be made at the time of the FMLA designation.

(2) This designation notice must be in writing, but may be in any form, including a notation on the employee's pay stub. *See* § 825.301 for rules on leave designation. If the leave is not designated as FMLA leave because it does not meet the requirements of the Act, the notice to the employee that the leave is not designated as FMLA leave may be in the form of a simple written statement.

(3) If the employer has sufficient information to designate the leave as FMLA leave immediately after receiving notice of the employee's need for leave, an employer may provide an employee with the designation notice immediately, and also must provide the employee with the information required in the eligibility notice as set forth in paragraph (b)(3) of this section.

(4) A prototype designation notice is contained in Appendix E of this part; the prototype designation notice may be obtained from local offices of the Wage and Hour Division or from the Internet at *www.wagehour.dol.gov.*

(d) *Consequences of failing to provide notice.* Failure to follow the notice requirements set forth in this section may constitute an interference with, restraint or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment,

reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)).

§ 825.301 Employer designation of FMLA leave.

(a) *Employer responsibilities.* In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to give notice of the designation to the employee as provided in § 825.300. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (*e.g.*, if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of leave, the employer should inquire further of the employee or the spokesperson to ascertain whether paid leave is potentially FMLA-qualifying. Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must notify the employee within five business days, absent extenuating circumstances, that the leave is designated and will be counted as FMLA leave.

(b) *Employee responsibilities.* As noted in §§ 825.302(c) and 825.303(b), an employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave and otherwise satisfy the notice requirements set forth in § 825.302 or § 825.303 depending on whether the need for leave is foreseeable or unforeseeable. An employee giving notice of the need for FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave—consistent with the employer's established policy or practice—and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (*i.e.*, that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

(c) *Disputes.* If there is a dispute between an employer and an employee as to whether paid leave qualifies as FMLA leave, it should be resolved through discussions between the employee and the employer. Such discussions and the decision must be documented.

(d) *Retroactive designation.* If an employer does not designate leave as required by § 825.300, the employer may retroactively designate leave as FMLA leave with appropriate notice to the employee as required by § 825.300 provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases where leave would qualify for FMLA protections, an employer and an employee can mutually agree that leave be retroactively designated as FMLA leave.

(e) *Remedies.* If an employer's failure to timely designate leave in accordance with § 825.300 causes the employee to suffer harm, it may constitute an interference with, restraint of or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation, and for appropriate equitable or other relief, including employment, reinstatement, promotion, or any other relief tailored to the harm suffered (*see* § 825.400(c)). For example, if an employer that was put on notice that an employee needed FMLA leave failed to designate the leave properly, but the employee's own serious health condition prevented the employee from returning to work during that time period regardless of the designation, an employee may not be able to show that the employee suffered harm as a result of the employer's actions. However, if an employee took leave to provide care for a son or daughter with a serious health condition believing it would not count toward the employee's FMLA entitlement, and the employee planned to later use that FMLA leave to provide care for a spouse who would need assistance when recovering from surgery planned for a later date, the employee may be able to show that harm has occurred as a result of the employer's failure to designate properly. The employee might establish this by showing that he or she would have arranged for an alternative caregiver for the seriously-ill son or daughter if the leave had been designated timely.

§ 825.302 Employee notice requirements for foreseeable FMLA leave.

(a) *Timing of notice.* An employee must provide the employer at least 30 days' advance notice before FMLA leave is to begin if the need for the leave is foreseeable based on an expected birth, placement for adoption or foster care, or planned medical treatment for a serious health condition of the employee or of a family member. If 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable. For example, an employee's health condition may require leave to commence earlier than anticipated before the birth of a child. Similarly, little opportunity for notice may be given before placement for adoption. Whether the leave is to be continuous or is to be taken intermittently or on a reduced schedule basis, notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. In those cases where the employee does not provide at least 30 days notice of foreseeable leave, the employee shall explain the reasons why such notice was not practicable upon a request from the employer for such information.

(b) *As soon as practicable* means as soon as both possible and practical, taking into account all of the facts and circumstances in the individual case. For example, where an employee learns

during the work day on Monday that a scheduled doctor appointment has been rescheduled from Friday to Wednesday of the same week, it would ordinarily be practicable for the employee to provide notice of the schedule change to the employer before the end of the work day. If the employee did not learn of the change in the scheduled appointment until after work hours, the employee should be able to provide the employer with notice the next business day.

(c) *Content of notice.* An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (*see* § 825.305). An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(d) *Complying with employer policy.* An employer may require an employee to comply with the employer's usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances. For example, an employer may require that written notice set forth the reasons for the requested leave, the anticipated duration of the leave, and the anticipated start of the leave. An employee also may be required by an employer's policy to contact a specific individual. Unusual circumstances would include situations such as when an employee is unable to call in due to his/her medical condition and his/her spouse calls the direct supervisor to report the absence instead of calling the human resources department as required by the employer policy. Where an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied. However, FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section.

(e) *Scheduling planned medical treatment.* When planning medical treatment, the employee must consult with the employer and make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider. Employees are ordinarily expected to consult with their employers prior to the scheduling of treatment in order to work out a treatment schedule which best suits the needs of both the employer and the employee. If an employee who provides notice of the need to take FMLA leave on an intermittent basis for planned medical treatment neglects to consult with the employer to make a reasonable effort to arrange the schedule of treatments so as not to unduly disrupt the employer's operations, the employer may initiate discussions with the employee and require the employee to attempt to make such arrangements, subject to the approval of the health care provider. *See* §§ 825.203 and 825.205.

(f) In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

(g) An employer may waive employees' FMLA notice requirements.

§ 825.303 Employee notice requirements for unforeseeable FMLA leave.

(a) *Timing of notice.* When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. Where the need for leave is unforeseeable, it is expected that an employee will give notice to the employer promptly. Notice may be given by the employee's spokesperson (*e.g.*, spouse, adult family member or other responsible party) if the employee is unable to do so personally. For example, if an employee's child has a severe asthma attack and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

(b) *Content of notice.* An employee shall provide sufficient information for an employer to reasonably determine whether the FMLA may apply to the leave request. The employee need not expressly assert rights under the FMLA or even mention the FMLA. The employee must provide sufficient information that indicates that a condition renders the employee unable to perform the functions of the job, or if the leave is for a family member, that the condition renders the family member unable to perform daily activities; the anticipated duration of the absence; and whether the employee or the employee's family member intends to visit a health care provider or has a condition for which the employee or the employee's family member is under the continuing care of a health care provider. Calling in ''sick'' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act. The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying.

(c) *Complying with employer policy.* When the need for leave is not foreseeable, an employee must comply with the employer's usual and customary notice and procedural requirements for requesting leave, except when extraordinary circumstances exist. For example, an

employer may require employees to call a designated number or a specific individual to request leave. However, if an employee requires emergency medical treatment, he or she would not be required to follow the call-in procedure until his or her condition is stabilized and he or she has access to, and is able to use, a phone. FMLA-protected leave may not be delayed or denied where the employer's policy requires notice to be given sooner than set forth in paragraph (a) of this section and the employee provides timely notice as set forth in paragraph (a) of this section. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

§ 825.304 Employee failure to provide notice.

(a) *Waiver of notice.* An employer may waive employees' FMLA notice obligations or the employer's own internal rules on leave notice requirements. If an employer does not waive the employee's obligations under its internal leave rules, the employer may take appropriate action under its internal rules and procedures for failure to follow its usual and customary notification rules as long as the actions are taken in a manner that does not discriminate against employees taking FMLA leave and the rules are not inconsistent with § 825.303(a).

(b) *Foreseeable leave—30 days.* When the need for FMLA leave is foreseeable at least 30 days in advance and an employee fails to give timely advance notice with no reasonable excuse, the employer may delay FMLA coverage until 30 days after the date the employee provides notice. The need for leave and the approximate date leave would be taken must have been clearly foreseeable to the employee 30 days in advance of the leave. For example, knowledge that an employee would receive a telephone call about the availability of a child for adoption at some unknown point in the future would not be sufficient to establish the leave was clearly foreseeable 30 days in advance.

(c) *Foreseeable leave—less than 30 days.* When the need for FMLA leave is foreseeable fewer than 30 days in advance and an employee fails to give notice as soon as practicable under the particular facts and circumstances, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if an employee reasonably should have given the employer two weeks notice but instead only provided one week notice, then the employer may delay FMLA-protected leave for one week (thus, if the employer elects to delay FMLA coverage and the employee nonetheless takes leave one week after providing the notice (*i.e.*, a week before the two week notice period has been met) the leave will not be FMLA-protected).

(d) *Unforeseeable leave.* When the need for FMLA leave is unforeseeable and an employee fails to give notice in accordance with § 825.303, the extent to which an employer may delay FMLA coverage for leave depends on the facts of the particular case. For example, if it would have been practicable for an employee to have given the employer notice of the need for leave promptly, but instead the employee provided notice two days after the leave began, then the employer may delay FMLA coverage of the leave by two days.

(e) *Proper notice required.* In all cases, in order for the onset of an employee's FMLA leave to be delayed due to lack of required notice, it must be clear that the employee had actual notice of the FMLA notice requirements. This condition would be satisfied by the employer's proper posting of the required notice at the worksite where the employee is employed and the employer's provision of the required notice in either an employee handbook or annual distribution, as required by § 825.300.

§ 825.305 Medical certification, general rule.

(a) *General.* An employer may require that an employee's leave to care for the employee's seriously ill spouse, son, daughter, or parent, or due to the employee's own serious health condition that makes the employee unable to perform one or more of the essential functions of the employee's position, be supported by a certification issued by the health care provider of the employee or the employee's ill family member. An employer must give notice of a requirement for medical certification each time a certification is required; such notice must be written notice whenever required by § 825.300(b). An employer's oral request to an employee to furnish any subsequent medical certification is sufficient.

(b) *Timing.* In most cases, the employer should request that an employee furnish certification from a health care provider at the time the employee gives notice of the need for leave or within five business days thereafter, or, in the case of unforeseen leave, within five business days after the leave commences. The employer may request certification at some later date if the employer later has reason to question the appropriateness of the leave or its duration. The employee must provide the requested certification to the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(c) *Complete and sufficient certification.* The employee must provide a complete and sufficient medical certification to the employer if required by the employer in accordance with § 825.306. The employer shall advise an employee whenever the employer finds a certification incomplete or insufficient, and shall state in writing what additional information is necessary to make the certification complete and sufficient. A certification is considered incomplete if the employer receives a certification, but one or more of the applicable entries have not been completed. A certification is considered insufficient if the employer receives a complete certification, but the information provided is vague, ambiguous or non-responsive. The employer must provide the employee with seven calendar days (unless not practicable under the particular circumstances despite the employee's diligent good faith efforts) to cure any such deficiency. If the deficiencies specified by the employer are not cured in the resubmitted certification, the employer may deny the taking of FMLA leave, in accordance with § 825.311. A certification that is not returned to the employer is not considered incomplete or insufficient, but constitutes a failure to provide certification.

(d) *Consequences.* At the time the employer requests certification, the employer must also advise an employee of the anticipated consequences of an employee's failure to provide adequate certification. If the employee fails to provide the employer with a complete and sufficient medical certification, despite the opportunity to cure the certification as provided in paragraph (c) of this section, or fails to provide any certification, the employer may deny the taking of FMLA leave, in accordance with § 825.311. It is the employee's responsibility either to furnish a complete and sufficient certification or to furnish the health care provider providing the certification with any

necessary authorization from the employee or the employee's family member in order for the health care provider to release a complete and sufficient certification to the employer to support the employee's FMLA request. This provision will apply in any case where an employer requests a certification permitted by these regulations, whether it is the initial certification, a recertification, a second or third opinion, or a fitness for duty certificate, including any clarifications necessary to determine if such certifications are authentic and sufficient. *See* §§ 825.306, 825.307, 825.308, and 825.310.

(e) *Annual medical certification.* Where the employee's need for leave due to the employee's own serious health condition, or the serious health condition of the employee's spouse, son, daughter, or parent lasts beyond a single leave year (as defined in § 825.200), the employer may require the employee to provide a new medical certification in each subsequent leave year.

§ 825.306 Content of medical certification.

(a) *Required information.* An employer may require an employee to obtain a medical certification from a health care provider that sets forth the following information:

(1) The name, address, telephone number, and fax number of the health care provider and type of medical practice, including pertinent specialization;

(2) The approximate date on which the serious health condition commenced, and its probable duration;

(3) A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. The medical facts must be sufficient to support the need for leave. Such medical facts may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment;

(4) If the employee is the patient, information sufficient to establish that the employee cannot perform the functions of the employee's job, as well as the nature of any other work restrictions, and the likely duration of such inability (*see* § 825.123(b) and (c));

(5) If the patient is a qualified family member, information sufficient to establish that the family member is in need of care, as described in § 825.124, and an estimate of the frequency and duration of the leave required to care for the family member;

(6) If an employee requests leave on an intermittent or reduced schedule basis for planned medical treatment of the employee or a qualified family member, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the dates and duration of such treatments and any periods of recovery;

(7) If an employee requests leave on an intermittent or reduced schedule basis for the employee's health condition, including pregnancy, that may result in unforeseeable episodes of incapacity, information sufficient to establish the medical necessity for such intermittent or reduced schedule leave and an estimate of the frequency and duration of the episodes of incapacity; and

(8) If an employee requests leave on an intermittent or reduced schedule basis to care for a qualified family member, a statement that such leave is medically necessary to care for the family member, as described in §§ 825.124 and 825.203(b), which can include assisting in the family member's recovery, and an estimate of the frequency and duration of the required leave.

(b) DOL has developed an optional form (Form WH–380, as revised) for employees' (or their family members') use in obtaining medical certification, including second and third opinions, from health care providers that meets FMLA's certification requirements. (*See* Appendix B to these regulations.) This optional form reflects certification requirements so as to permit the health care provider to furnish appropriate medical information within his or her knowledge. Form WH–380, as revised, or another form containing the same basic information, may be used by the employer; however, no information may be required beyond that specified in §§ 825.306, 825.307, and 825.308. In all instances the information on the form must relate only to the serious health condition for which the current need for leave exists.

(c) If an employee is on FMLA leave running concurrently with a workers' compensation absence, and the provisions of the workers' compensation statute permit the employer or the employer's representative to request additional information from the employee's workers' compensation health care provider, the FMLA does not prevent the employer from following the workers' compensation provisions. Similarly, an employer may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided that the employer informs the employee that the additional information only needs to be provided in connection with receipt of such payments or benefits. If the employee fails to provide the information required for receipt of such payments or benefits, the employee's entitlement to take unpaid FMLA leave will not be affected. *See* § 825.207(a).

(d) If an employee's serious health condition may also be a disability within the meaning of the Americans with Disabilities Act (ADA), the FMLA does not prevent the employer from following the procedures for requesting medical information under the ADA.

(e) While an employee may choose to comply with the certification requirement by providing the employer with an authorization release or waiver allowing the employer to communicate directly with the employee's health care provider, the employee may not be required to provide such an authorization release or waiver. In all instances in which certification is requested, it is the employee's responsibility to provide the employer with complete and sufficient certification and failure to do so may result in the denial of FMLA leave. *See* § 825.305(d).

§ 825.307 Authentication and clarification of medical certification.

(a) *Clarification and authentication.* If an employee submits a complete and sufficient certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, the employer may contact the employee's health care provider for purposes of clarification and authentication of the medical certification (whether initial certification or recertification) after the employer has given the employee an opportunity to cure any deficiencies as set forth in § 825.305(c). For purposes of these regulations, ''authentication'' means providing the health care provider with a copy of the certification and requesting verification that the information contained on the certification form was completed and/or authorized by the health care provider who signed the document; no additional medical information may be requested and the employee's permission is not required. ''Clarification'' means contacting the health care provider to understand the handwriting on the medical certification or to understand the meaning of a response. Employers may not ask health care providers for additional information beyond that

required by the certification form. Contact between the employer and the employee's health care provider for purposes of clarification must comply with the requirements of the Health Insurance Portability and Accountability Act (''HIPAA'') Privacy Rule (*see* 45 CFR parts 160 and 164). If an employee chooses not to provide the employer with authorization allowing the employer to clarify the certification with the employee's health care provider, and does not otherwise clarify the certification, the employer may deny the taking of FMLA leave if the certification is unclear. *See* § 825.305(d). It is the employee's responsibility to provide the employer with a complete and sufficient certification or to provide the health care provider with sufficient authorization from the employee or the employee's family member to clarify the certification so that it is complete and sufficient.

(b) *Second opinion*. (1) An employer who has reason to doubt the validity of a medical certification may require the employee to obtain a second opinion at the employer's expense. Pending receipt of the second (or third) medical opinion, the employee is provisionally entitled to the benefits of the Act, including maintenance of group health benefits. If the certifications do not ultimately establish the employee's entitlement to FMLA leave, the leave shall not be designated as FMLA leave and may be treated as paid or unpaid leave under the employer's established leave policies. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a second opinion in order to render a sufficient and complete second opinion.

(2) The employer is permitted to designate the health care provider to furnish the second opinion, but the selected health care provider may not be employed on a regular basis by the employer. The employer may not regularly contract with or otherwise regularly utilize the services of the health care provider furnishing the second opinion unless the employer is located in an area where access to health care is extremely limited (*e.g.*, a rural area where no more than one or two doctors practice in the relevant specialty in the vicinity).

(c) *Third opinion*. If the opinions of the employee's and the employer's designated health care providers differ, the employer may require the employee to obtain certification from a third health care provider, again at the employer's expense. This third opinion shall be final and binding. The third health care provider must be designated or approved jointly by the employer and the employee. The employer and the employee must each act in good faith to attempt to reach agreement on whom to select for the third opinion provider. If the employer does not attempt in good faith to reach agreement, the employer will be bound by the first certification. If the employee does not attempt in good faith to reach agreement, the employee will be bound by the second certification. For example, an employee who refuses to agree to see a doctor in the specialty in question may be failing to act in good faith. On the other hand, an employer that refuses to agree to any doctor on a list of specialists in the appropriate field provided by the employee and whom the employee has not previously consulted may be failing to act in good faith. In addition, the consequences set forth in § 825.305(d) will apply if the employee or the employee's family member fails to authorize his or her health care provider to release all relevant medical information pertaining to the serious health condition at issue if requested by the health care provider designated to provide a third opinion in order to render a sufficient and complete third opinion.

(d) *Copies of opinions*. The employer is required to provide the employee with a copy of the second and third medical opinions, where applicable, upon request by the employee. Requested copies are to be provided within five business days unless extenuating circumstances prevent such action.

(e) *Travel expenses*. If the employer requires the employee to obtain either a second or third opinion, the employer must reimburse an employee or family member for any reasonable ''out of pocket'' travel expenses incurred to obtain the second and third medical opinions. The employer may not require the employee or family member to travel outside normal commuting distance for purposes of obtaining the second or third medical opinions except in very unusual circumstances.

(f) *Medical certification abroad*. In circumstances when the employee or a family member is visiting in another country, or a family member resides in another country, and a serious health condition develops, the employer shall accept a medical certification as well as second and third opinions from a health care provider who practices in that country.

§ 825.308 Recertifications.

(a) *30-day rule*. Generally, an employer may request recertification no more often than every 30 days and only in connection with an absence by the employee.

(b) *More than 30 days*. If the medical certification indicates that the minimum duration of incapacity is more than 30 days, an employer must wait until that minimum duration expires before requesting a recertification, unless paragraph (c) applies. For example, if the medical certification states that an employee will be unable to work, whether continuously or on an intermittent basis, for 40 days, the employer must wait 40 days before requesting a recertification. In all cases, an employer may request a recertification every six months in connection with an absence by the employee.

(c) *Less than 30 days*. An employer may request recertification in less than 30 days if:

(1) The employee requests an extension of leave;

(2) Circumstances described by the previous certification have changed significantly (*e.g.*, the duration or frequency of the absence, the nature or severity of the illness, complications). For example, if a medical certification stated that an employee would need leave for one to two days when the employee suffered a migraine headache and the employee's absences for his/her last two migraines lasted four days each, then the increased duration of absence might constitute a significant change in circumstances allowing the employer to request a recertification in less than 30 days. Likewise, if an employee had a pattern of using unscheduled FMLA leave for migraines in conjunction with his/her scheduled days off, then the timing of the absences also might constitute a significant change in circumstances sufficient for an employer to request a recertification more frequently than every 30 days; or

(3) The employer receives information that casts doubt upon the employee's stated reason for the absence or the continuing validity of the certification. For example, if an employee is on FMLA leave for four weeks due to the employee's knee surgery, including recuperation, and the employee plays in company softball league games during the employee's third week of FMLA leave, such information might be sufficient to cast doubt upon the continuing validity of the certification allowing the employer to request a recertification in less than 30 days.

(d) *Timing*. The employee must provide the requested recertification to

the employer within the time frame requested by the employer (which must allow at least 15 calendar days after the employer's request), unless it is not practicable under the particular circumstances to do so despite the employee's diligent, good faith efforts.

(e) *Content.* The employer may ask for the same information when obtaining recertification as that permitted for the original certification as set forth in § 825.306. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or adequate authorization to the health care provider) in the recertification process as in the initial certification process. *See* § 825.305(d). As part of the information allowed to be obtained on recertification, the employer may provide the health care provider with a record of the employee's absence pattern and ask the health care provider if the serious health condition and need for leave is consistent with such a pattern.

(f) Any recertification requested by the employer shall be at the employee's expense unless the employer provides otherwise. No second or third opinion on recertification may be required.

§ 825.309 Intent to return to work.

(a) An employer may require an employee on FMLA leave to report periodically on the employee's status and intent to return to work. The employer's policy regarding such reports may not be discriminatory and must take into account all of the relevant facts and circumstances related to the individual employee's leave situation.

(b) If an employee gives unequivocal notice of intent not to return to work, the employer's obligations under FMLA to maintain health benefits (subject to COBRA requirements) and to restore the employee cease. However, these obligations continue if an employee indicates he or she may be unable to return to work but expresses a continuing desire to do so.

(c) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may not be required to take more FMLA leave than necessary to resolve the circumstance that precipitated the need for leave. In both of these situations, the employer may require that the employee provide the employer reasonable notice (*i.e.*, within two business days) of the changed circumstances where foreseeable. The employer may also obtain information on such changed circumstances through requested status reports.

§ 825.310 Fitness-for-duty certification.

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (*i.e.*, same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work. The employee has the same obligations to participate and cooperate (including providing a complete and sufficient certification or providing sufficient authorization to the health care provider to provide the information directly to the employer) in the fitness-for-duty certification process as in the initial certification process. *See* § 825.305(d).

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply. For example, an attorney could not be required to submit to a medical examination or inquiry just because her leg had been amputated. The essential functions of an attorney's job do not require use of both legs; therefore such an inquiry would not be job related. An employer may require a warehouse laborer, whose back impairment affects the ability to lift, to be examined by an orthopedist, but may not require this employee to submit to an HIV test where the test is not related to either the essential functions of his/her job or to his/her impairment.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification from the employee's health care provider must certify that the employee is able to resume work. An employer may require that the certification address the employee's ability to perform the essential functions of the employee's job by providing a list of essential functions with the eligibility notice required by § 825.300(b). If the employer timely provides such a list, the employee's health care provider must certify that the employee can perform the identified essential functions of his or her job. Following the procedures set forth in § 825.307(a), the employer may contact the employee's health care provider for purposes of clarifying and authenticating the fitness-for-duty certification. Clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the employee's return to work while contact with the health care provider is being made.

(d) The cost of the certification shall be borne by the employee, and the employee is not entitled to be paid for the time or travel costs spent in acquiring the certification.

(e) The eligibility notice required in § 825.300(b) shall advise the employee if the employer will require fitness-for-duty certification to return to work. No second or third fitness-for-duty certification may be required.

(f) An employer may delay restoration to employment until an employee submits a required fitness-for-duty certification unless the employer has failed to provide the notice required in paragraph (e) of this section. If an employer provides the notice required, an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA. *See* § 825.311(d).

(g) An employer is not entitled to certification of fitness to return to duty for each absence taken on an intermittent or reduced leave schedule as set forth in §§ 825.203 through 825.205. However, an employer is entitled to a certification of fitness to return to duty for such absences up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave. The employer may not terminate the employment of the employee while awaiting such a certification of fitness to return to duty for an intermittent or reduced schedule leave absence.

§ 825.311 Failure to provide medical certification.

(a) *Foreseeable leave.* In the case of foreseeable leave, if an employee fails to provide certification in a timely manner as required by § 825.305, then an employer may deny FMLA coverage until the required certification is provided. For example, if an employee has 15 days to provide a certification and does not provide the certification for 45 days without sufficient reason for the delay, the employer can deny FMLA

protections for the 30 day period following the expiration of the 15 day time period, if the employee takes leave during such period.

(b) *Unforeseeable leave.* In the case of unforeseeable leave, an employer may deny FMLA coverage for the requested leave if the employee fails to provide a medical certification within 15 calendar days from receipt of the request for certification unless not practicable due to extenuating circumstances. For example, in the case of a medical emergency, it may not be practicable for an employee to provide the required certification within 15 calendar days. Absent such extenuating circumstances, if the employee fails to timely return the certification, the employer can deny FMLA protections for the leave following the expiration of the 15-day time period until a sufficient certification is provided. If the employee never produces the certification, the leave is not FMLA leave.

(c) *Recertification.* An employee must provide recertification within the time requested by the employer (which must allow at least 15 calendar days after the request) or as soon as practicable under the particular facts and circumstances. If an employee fails to provide a recertification within a reasonable time under the particular facts and circumstances, then the employer may deny continuation of the FMLA leave protections until the employee produces a sufficient recertification. If the employee never produces the recertification, the leave is not FMLA leave.

(d) *Fitness-for-duty certification.* When requested by the employer pursuant to a uniformly applied policy for similarly-situated employees, the employee must provide medical certification at the time the employee seeks reinstatement at the end of FMLA leave taken for the employee's serious health condition, that the employee is fit for duty and able to return to work (*see* § 825.310(a)) if the employer has provided the required notice (*see* § 825.300(c)); the employer may delay restoration until the certification is provided. In this situation, unless the employee provides either a fitness-for-duty certification or a new medical certification for a serious health condition at the time FMLA leave is concluded, the employee may be terminated. *See also* § 825.213(a)(3).

Subpart D—Enforcement Mechanisms

§ 825.400 Enforcement, general rules.

(a) The employee has the choice of:

(1) Filing, or having another person file on his or her behalf, a complaint with the Secretary of Labor, or

(2) Filing a private lawsuit pursuant to section 107 of FMLA.

(b) If the employee files a private lawsuit, it must be filed within two years after the last action which the employee contends was in violation of the Act, or three years if the violation was willful.

(c) If an employer has violated one or more provisions of FMLA, and if justified by the facts of a particular case, an employee may receive one or more of the following: wages, employment benefits, or other compensation denied or lost to such employee by reason of the violation; or, where no such tangible loss has occurred, such as when FMLA leave was unlawfully denied, any actual monetary loss sustained by the employee as a direct result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages for the employee. In addition, the employee may be entitled to interest on such sum, calculated at the prevailing rate. An amount equaling the preceding sums may also be awarded as liquidated damages unless such amount is reduced by the court because the violation was in good faith and the employer had reasonable grounds for believing the employer had not violated the Act. When appropriate, the employee may also obtain appropriate equitable relief, such as employment, reinstatement and promotion. When the employer is found in violation, the employee may recover a reasonable attorney's fee, reasonable expert witness fees, and other costs of the action from the employer in addition to any judgment awarded by the court.

§ 825.401 Filing a complaint with the Federal Government.

(a) A complaint may be filed in person, by mail or by telephone, with the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A complaint may be filed at any local office of the Wage and Hour Division; the address and telephone number of local offices may be found in telephone directories or on the Department's website.

(b) A complaint filed with the Secretary of Labor should be filed within a reasonable time of when the employee discovers that his or her FMLA rights have been violated. In no event may a complaint be filed more than two years after the action which is alleged to be a violation of FMLA occurred, or three years in the case of a willful violation.

(c) No particular form of complaint is required, except that a complaint must be reduced to writing and should include a full statement of the acts and/or omissions, with pertinent dates, which are believed to constitute the violation.

§ 825.402 Violations of the posting requirement.

Section 825.300 describes the requirements for covered employers to post a notice for employees that explains the Act's provisions. If a representative of the Department of Labor determines that an employer has committed a willful violation of this posting requirement, and that the imposition of a civil money penalty for such violation is appropriate, the representative may issue and serve a notice of penalty on such employer in person or by certified mail. Where service by certified mail is not accepted, notice shall be deemed received on the date of attempted delivery. Where service is not accepted, the notice may be served by regular mail.

§ 825.403 Appealing the assessment of a penalty for willful violation of the posting requirement.

(a) An employer may obtain a review of the assessment of penalty from the Wage and Hour Regional Administrator for the region in which the alleged violation(s) occurred. If the employer does not seek such a review or fails to do so in a timely manner, the notice of the penalty constitutes the final ruling of the Secretary of Labor.

(b) To obtain review, an employer may file a petition with the Wage and Hour Regional Administrator for the region in which the alleged violations occurred. No particular form of petition for review is required, except that the petition must be in writing, should contain the legal and factual bases for the petition, and must be mailed to the Regional Administrator within 15 days of receipt of the notice of penalty. The employer may request an oral hearing which may be conducted by telephone.

(c) The decision of the Regional Administrator constitutes the final order of the Secretary.

§ 825.404 Consequences for an employer when not paying the penalty assessment after a final order is issued.

The Regional Administrator may seek to recover the unpaid penalty pursuant to the Debt Collection Act (DCA), 31 U.S.C. 3711 *et seq.*, and, in addition to seeking recovery of the unpaid final order, may seek interest and penalties as provided under the DCA. The final order may also be referred to the Solicitor of Labor for collection. The

Secretary may file suit in any court of competent jurisdiction to recover the monies due as a result of the unpaid final order, interest, and penalties.

Subpart E—Recordkeeping Requirements

§ 825.500 Recordkeeping requirements.

(a) FMLA provides that covered employers shall make, keep, and preserve records pertaining to their obligations under the Act in accordance with the recordkeeping requirements of section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with these regulations. FMLA also restricts the authority of the Department of Labor to require any employer or plan, fund or program to submit books or records more than once during any 12-month period unless the Department has reasonable cause to believe a violation of the FMLA exists or the DOL is investigating a complaint. These regulations establish no requirement for the submission of any records unless specifically requested by a Departmental official.

(b) No particular order or form of records is required. These regulations establish no requirement that any employer revise its computerized payroll or personnel records systems to comply. However, employers must keep the records specified by these regulations for no less than three years and make them available for inspection, copying, and transcription by representatives of the Department of Labor upon request. The records may be maintained and preserved on microfilm or other basic source document of an automated data processing memory provided that adequate projection or viewing equipment is available, that the reproductions are clear and identifiable by date or pay period, and that extensions or transcriptions of the information required herein can be and are made available upon request. Records kept in computer form must be made available for transcription or copying.

(c) Covered employers who have eligible employees must maintain records that must disclose the following:

(1) Basic payroll and identifying employee data, including name, address, and occupation; rate or basis of pay and terms of compensation; daily and weekly hours worked per pay period; additions to or deductions from wages; and total compensation paid.

(2) Dates FMLA leave is taken by FMLA eligible employees (*e.g.*, available from time records, requests for leave, *etc.*, if so designated). Leave must be designated in records as FMLA leave; leave so designated may not include leave required under State law or an employer plan which is not also covered by FMLA.

(3) If FMLA leave is taken by eligible employees in increments of less than one full day, the hours of the leave.

(4) Copies of employee notices of leave furnished to the employer under FMLA, if in writing, and copies of all eligibility notices given to employees as required under FMLA and these regulations (*see* § 825.300(b)). Copies may be maintained in employee personnel files.

(5) Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

(6) Premium payments of employee benefits.

(7) Records of any dispute between the employer and an eligible employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and for the disagreement.

(d) Covered employers with no eligible employees must maintain the records set forth in paragraph (c)(1) of this section.

(e) Covered employers in a joint employment situation (*see* § 825.106) must keep all the records required by paragraph (c) of this section with respect to any primary employees, and must keep the records required by paragraph (c)(1) with respect to any secondary employees.

(f) If FMLA-eligible employees are not subject to FLSA's recordkeeping regulations for purposes of minimum wage or overtime compliance (*i.e.*, not covered by or exempt from FLSA), an employer need not keep a record of actual hours worked (as otherwise required under FLSA, 29 CFR 516.2(a)(7)), provided that:

(1) Eligibility for FMLA leave is presumed for any employee who has been employed for at least 12 months; and

(2) With respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written record maintained in accordance with paragraph (b) of this section.

(g) Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (*see* 29 CFR 1630.14(c)(1)), except that:

(1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;

(2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and

(3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

Subpart F—Special Rules Applicable to Employees of Schools

§ 825.600 Special rules for school employees, definitions.

(a) Certain special rules apply to employees of ''local educational agencies,'' including public school boards and elementary and secondary schools under their jurisdiction, and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools, and preschools.

(b) Educational institutions are covered by FMLA (and these special rules) and the Act's 50-employee coverage test does not apply. The usual requirements for employees to be ''eligible'' do apply, however, including employment at a worksite where at least 50 employees are employed within 75 miles. For example, employees of a rural school would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually, a school board) within 75 miles.

(c) The special rules affect the taking of intermittent leave or leave on a reduced leave schedule, or leave near the end of an academic term (semester), by instructional employees. ''Instructional employees'' are those whose principal function is to teach and instruct students in a class, a small group, or an individual setting. This term includes not only teachers, but also athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. It does not include, and the special rules do not apply to, teacher assistants or aides who do not have as their principal job actual teaching or instructing, nor does it

include auxiliary personnel such as counselors, psychologists, or curriculum specialists. It also does not include cafeteria workers, maintenance workers, or bus drivers.

(d) Special rules which apply to restoration to an equivalent position apply to all employees of local educational agencies.

§ 825.601 Special rules for school employees, limitations on intermittent leave.

(a) Leave taken for a period that ends with the school year and begins the next semester is leave taken consecutively rather than intermittently. The period during the summer vacation when the employee would not have been required to report for duty is not counted against the employee's FMLA leave entitlement. An instructional employee who is on FMLA leave at the end of the school year must be provided with any benefits over the summer vacation that employees would normally receive if they had been working at the end of the school year.

(1) If an eligible instructional employee needs intermittent leave or leave on a reduced leave schedule to care for a family member, or for the employee's own serious health condition, which is foreseeable based on planned medical treatment, and the employee would be on leave for more than 20 percent of the total number of working days over the period the leave would extend, the employer may require the employee to choose either to:

(i) Take leave for a period or periods of a particular duration, not greater than the duration of the planned treatment; or

(ii) Transfer temporarily to an available alternative position for which the employee is qualified, which has equivalent pay and benefits and which better accommodates recurring periods of leave than does the employee's regular position.

(2) These rules apply only to a leave involving more than 20 percent of the working days during the period over which the leave extends. For example, if an instructional employee who normally works five days each week needs to take two days of FMLA leave per week over a period of several weeks, the special rules would apply. Employees taking leave which constitutes 20 percent or less of the working days during the leave period would not be subject to transfer to an alternative position. ''Periods of a particular duration'' means a block, or blocks, of time beginning no earlier than the first day for which leave is needed and ending no later than the last day on which leave is needed, and may include one uninterrupted period of leave.

(b) If an instructional employee does not give required notice of foreseeable FMLA leave (*see* § 825.302) to be taken intermittently or on a reduced leave schedule, the employer may require the employee to take leave of a particular duration, or to transfer temporarily to an alternative position. Alternatively, the employer may require the employee to delay the taking of leave until the notice provision is met.

§ 825.602 Special rules for school employees, limitations on leave near the end of an academic term.

(a) There are also different rules for instructional employees who begin leave more than five weeks before the end of a term, less than five weeks before the end of a term, and less than three weeks before the end of a term. Regular rules apply except in circumstances when:

(1) An instructional employee begins leave more than five weeks before the end of a term. The employer may require the employee to continue taking leave until the end of the term if—

(i) The leave will last at least three weeks, and

(ii) The employee would return to work during the three-week period before the end of the term.

(2) The employee begins leave for a purpose other than the employee's own serious health condition during the five-week period before the end of a term. The employer may require the employee to continue taking leave until the end of the term if —

(i) The leave will last more than two weeks, and

(ii) The employee would return to work during the two-week period before the end of the term.

(3) The employee begins leave for a purpose other than the employee's own serious health condition during the three-week period before the end of a term, and the leave will last more than five working days. The employer may require the employee to continue taking leave until the end of the term.

(b) For purposes of these provisions, ''academic term'' means the school semester, which typically ends near the end of the calendar year and the end of spring each school year. In no case may a school have more than two academic terms or semesters each year for purposes of FMLA. An example of leave falling within these provisions would be where an employee plans two weeks of leave to care for a family member which will begin three weeks before the end of the term. In that situation, the employer could require the employee to stay out on leave until the end of the term.

§ 825.603 Special rules for school employees, duration of FMLA leave.

(a) If an employee chooses to take leave for ''periods of a particular duration'' in the case of intermittent or reduced schedule leave, the entire period of leave taken will count as FMLA leave.

(b) In the case of an employee who is required to take leave until the end of an academic term, only the period of leave until the employee is ready and able to return to work shall be charged against the employee's FMLA leave entitlement. The employer has the option not to require the employee to stay on leave until the end of the school term. Therefore, any additional leave required by the employer to the end of the school term is not counted as FMLA leave; however, the employer shall be required to maintain the employee's group health insurance and restore the employee to the same or equivalent job including other benefits at the conclusion of the leave.

§ 825.604 Special rules for school employees, restoration to ''an equivalent position.''

The determination of how an employee is to be restored to ''an equivalent position'' upon return from FMLA leave will be made on the basis of ''established school board policies and practices, private school policies and practices, and collective bargaining agreements.'' The ''established policies'' and collective bargaining agreements used as a basis for restoration must be in writing, must be made known to the employee prior to the taking of FMLA leave, and must clearly explain the employee's restoration rights upon return from leave. Any established policy which is used as the basis for restoration of an employee to ''an equivalent position'' must provide substantially the same protections as provided in the Act for reinstated employees. *See* § 825.215. In other words, the policy or collective bargaining agreement must provide for restoration to an ''equivalent position'' with equivalent employment benefits, pay, and other terms and conditions of employment. For example, an employee may not be restored to a position requiring additional licensure or certification.

Subpart G—Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements on Employee Rights Under FMLA

§ 825.700 Interaction with employer's policies.

(a) An employer must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA. Conversely, the rights established by the Act may not be diminished by any employment benefit program or plan. For example, a provision of a CBA which provides for reinstatement to a position that is not equivalent because of seniority (*e.g.*, provides lesser pay) is superseded by FMLA. If an employer provides greater unpaid family leave rights than are afforded by FMLA, the employer is not required to extend additional rights afforded by FMLA, such as maintenance of health benefits (other than through COBRA), to the additional leave period not covered by FMLA.

(b) Nothing in this Act prevents an employer from amending existing leave and employee benefit programs, provided they comply with FMLA. However, nothing in the Act is intended to discourage employers from adopting or retaining more generous leave policies.

§ 825.701 Interaction with State laws.

(a) Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA. The Department of Labor will not, however, enforce State family or medical leave laws, and States may not enforce the FMLA. Employees are not required to designate whether the leave they are taking is FMLA leave or leave under State law, and an employer must comply with the appropriate (applicable) provisions of both. An employer covered by one law and not the other has to comply only with the law under which it is covered. Similarly, an employee eligible under only one law must receive benefits in accordance with that law. If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws. Examples of the interaction between FMLA and State laws include:

(1) If State law provides 16 weeks of leave entitlement over two years, an employee would be entitled to take 16 weeks one year under State law and 12 weeks the next year under FMLA. Health benefits maintenance under FMLA would be applicable only to the first 12 weeks of leave entitlement each year. If the employee took 12 weeks the first year, the employee would be entitled to a maximum of 12 weeks the second year under FMLA (not 16 weeks). An employee would not be entitled to 28 weeks in one year.

(2) If State law provides half-pay for employees temporarily disabled because of pregnancy for six weeks, the employee would be entitled to an additional six weeks of unpaid FMLA leave (or accrued paid leave).

(3) A shorter notice period under State law must be allowed by the employer unless an employer has already provided, or the employee is requesting, more leave than required under State law.

(4) If State law provides for only one medical certification, no additional certifications may be required by the employer unless the employer has already provided, or the employee is requesting, more leave than required under State law.

(5) If State law provides six weeks of leave, which may include leave to care for a seriously-ill grandparent or a ''spouse equivalent,'' and leave was used for that purpose, the employee is still entitled to 12 weeks of FMLA leave, as the leave used was provided for a purpose not covered by FMLA. If FMLA leave is used first for a purpose also provided under State law, and State leave has thereby been exhausted, the employer would not be required to provide additional leave to care for the grandparent or ''spouse equivalent.''

(6) If State law prohibits mandatory leave beyond the actual period of pregnancy disability, an instructional employee of an educational agency subject to special FMLA rules may not be required to remain on leave until the end of the academic term, as permitted by FMLA under certain circumstances. (*See* Subpart F of this part.)

(b) [Reserved]

§ 825.702 Interaction with Federal and State anti-discrimination laws.

(a) Nothing in FMLA modifies or affects any Federal or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability (*e.g.*, Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act). FMLA's legislative history explains that FMLA is ''not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the [FMLA] are wholly distinct from the reasonable accommodation obligations of employers covered under the [ADA], employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.'' S. Rep. No. 103–3, at 38 (1993). An employer must therefore provide leave under whichever statutory provision provides the greater rights to employees. When an employer violates both FMLA and a discrimination law, an employee may be able to recover under either or both statutes (double relief may not be awarded for the same loss; when remedies coincide a claimant may be allowed to utilize whichever avenue of relief is desired (*Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978))).

(b) If an employee is a qualified individual with a disability within the meaning of the Americans with Disabilities Act (ADA), the employer must make reasonable accommodations, *etc.*, barring undue hardship, in accordance with the ADA. At the same time, the employer must afford an employee his or her FMLA rights. ADA's ''disability'' and FMLA's ''serious health condition'' are different concepts, and must be analyzed separately. FMLA entitles eligible employees to 12 weeks of leave in any 12-month period, whereas the ADA allows an indeterminate amount of leave, barring undue hardship, as a reasonable accommodation. FMLA requires employers to maintain employees' group health plan coverage during FMLA leave on the same conditions as coverage would have been provided if the employee had been continuously employed during the leave period, whereas ADA does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

(c)(1) A reasonable accommodation under the ADA might be accomplished by providing an individual with a disability with a part-time job with no health benefits, assuming the employer did not ordinarily provide health insurance for part-time employees. However, FMLA would permit an employee to work a reduced leave schedule until the equivalent of 12 workweeks of leave were used, with group health benefits maintained during this period. FMLA permits an employer to temporarily transfer an employee

who is taking leave intermittently or on a reduced leave schedule for planned medical treatment to an alternative position, whereas the ADA allows an accommodation of reassignment to an equivalent, vacant position only if the employee cannot perform the essential functions of the employee's present position and an accommodation is not possible in the employee's present position, or an accommodation in the employee's present position would cause an undue hardship. The examples in the following paragraphs of this section demonstrate how the two laws would interact with respect to a qualified individual with a disability.

(2) A qualified individual with a disability who is also an ''eligible employee'' entitled to FMLA leave requests 10 weeks of medical leave as a reasonable accommodation, which the employer grants because it is not an undue hardship. The employer advises the employee that the 10 weeks of leave is also being designated as FMLA leave and will count towards the employee's FMLA leave entitlement. This designation does not prevent the parties from also treating the leave as a reasonable accommodation and reinstating the employee into the *same* job, as required by the ADA, rather than an equivalent position under FMLA, if that is the greater right available to the employee. At the same time, the employee would be entitled under FMLA to have the employer maintain group health plan coverage during the leave, as that requirement provides the greater right to the employee.

(3) If the same employee needed to work part-time (a reduced leave schedule) after returning to his or her same job, the employee would still be entitled under FMLA to have group health plan coverage maintained for the remainder of the two-week equivalent of FMLA leave entitlement, notwithstanding an employer policy that part-time employees do not receive health insurance. This employee would be entitled under the ADA to reasonable accommodations to enable the employee to perform the essential functions of the part-time position. In addition, because the employee is working a part-time schedule as a reasonable accommodation, the FMLA's provision for temporary assignment to a different alternative position would not apply. Once the employee has exhausted his or her remaining FMLA leave entitlement while working the reduced (part-time) schedule, if the employee is a qualified individual with a disability, and if the employee is unable to return to the same full-time position at that time, the employee might continue to work part-time as a reasonable accommodation, barring undue hardship; the employee would then be entitled to only those employment benefits ordinarily provided by the employer to part-time employees.

(4) At the end of the FMLA leave entitlement, an employer is required under FMLA to reinstate the employee in the same or an equivalent position, with equivalent pay and benefits, to that which the employee held when leave commenced. The employer's FMLA obligations would be satisfied if the employer offered the employee an equivalent full-time position. If the employee were unable to perform the essential functions of that equivalent position even with reasonable accommodation, because of a disability, the ADA may require the employer to make a reasonable accommodation at that time by allowing the employee to work part-time or by reassigning the employee to a vacant position, barring undue hardship.

(d)(1) If FMLA entitles an employee to leave, an employer may not, in lieu of FMLA leave entitlement, *require* an employee to take a job with a reasonable accommodation. However, ADA may require that an employer offer an employee the opportunity to take such a position. An employer may not change the essential functions of the job in order to deny FMLA leave. *See* § 825.220(b).

(2) An employee may be on a workers' compensation absence due to an on-the-job injury or illness which also qualifies as a serious health condition under FMLA. The workers' compensation absence and FMLA leave may run concurrently (subject to proper notice and designation by the employer). At some point the health care provider providing medical care pursuant to the workers' compensation injury may certify the employee is able to return to work in a ''light duty'' position. If the employer offers such a position, the employee is permitted but not required to accept the position (*see* § 825.220(d)). As a result, the employee may no longer qualify for payments from the workers' compensation benefit plan, but the employee is entitled to continue on unpaid FMLA leave either until the employee is able to return to the same or equivalent job the employee left or until the 12-week FMLA leave entitlement is exhausted. *See* § 825.207(e). If the employee returning from the workers' compensation injury is a qualified individual with a disability, he or she will have rights under the ADA.

(e) If an employer requires certifications of an employee's fitness for duty to return to work, as permitted by FMLA under a uniform policy, it must comply with the ADA requirement that a fitness for duty physical be job-related and consistent with business necessity.

(f) Under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, an employer should provide the same benefits for women who are pregnant as the employer provides to other employees with short-term disabilities. Because Title VII does not require employees to be employed for a certain period of time to be protected, an employee employed for less than 12 months by the employer (and, therefore, not an ''eligible'' employee under FMLA) may not be denied maternity leave if the employer normally provides short-term disability benefits to employees with the same tenure who are experiencing other short-term disabilities.

(g) Under the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301–4333 (USERRA), veterans are entitled to receive all rights and benefits of employment that they would have obtained if they had been continuously employed. Therefore, under USERRA, a returning service member would be eligible for FMLA leave if the months and hours that he or she would have worked for the civilian employer during the period of military service, combined with the months employed and the hours actually worked, meet the FMLA eligibility threshold of 12 months and 1,250 hours of employment. *See* § 825.110(b)(2)(i) and .110(c)(2).

(h) For further information on Federal antidiscrimination laws, including Title VII and the ADA, individuals are encouraged to contact the nearest office of the U.S. Equal Employment Opportunity Commission.

Subpart H—Definitions

§ 825.800 Definitions.

For purposes of this part:

Act or *FMLA* means the Family and Medical Leave Act of 1993, Public Law 103–3 (February 5, 1993), 107 Stat. 6 (29 U.S.C. 2601 *et seq.*)

ADA means the Americans With Disabilities Act (42 U.S.C. 12101 *et seq.*)

Administrator means the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and includes any official of the Wage and Hour Division authorized to perform any of the functions of the Administrator under this part.

COBRA means the continuation coverage requirements of Title X of the Consolidated Omnibus Budget Reconciliation Act of 1986, As Amended (Pub. L. 99–272, title X, section 10002; 100 Stat 227; 29 U.S.C. 1161–1168).

Commerce and *industry or activity affecting commerce* mean any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and include ''commerce'' and any ''industry affecting commerce'' as defined in sections 501(1) and 501(3) of the Labor Management Relations Act of 1947, 29 U.S.C. 142(1) and (3).

Continuing treatment by a health care provider means any one of the following:

(1) *Incapacity and treatment.* A period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) Treatment two or more times, within a 30-day period unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (*e.g.*, physical therapist) under orders of, or on referral by, a health care provider; or

(ii) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(2) *Pregnancy or prenatal care.* Any period of incapacity due to pregnancy, or for prenatal care. *See also* § 825.120.

(3) *Chronic conditions.* Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(i) Requires periodic visits (defined as at least twice a year) for treatment by a health care provider, or by a nurse under direct supervision of a health care provider;

(ii) Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(iii) May cause episodic rather than a continuing period of incapacity (*e.g.*, asthma, diabetes, epilepsy, *etc.*).

(4) *Permanent or long-term conditions.* A period of incapacity which is permanent or long-term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

(5) *Conditions requiring multiple treatments.* Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, for:

(i) Restorative surgery after an accident or other injury; or

(ii) A condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, *etc.*), severe arthritis (physical therapy), kidney disease (dialysis).

(6) Absences attributable to incapacity under paragraphs (2) or (3) of this definition qualify for FMLA leave even though the employee or the covered family member does not receive treatment from a health care provider during the absence, and even if the absence does not last more than three consecutive calendar days. For example, an employee with asthma may be unable to report for work due to the onset of an asthma attack or because the employee's health care provider has advised the employee to stay home when the pollen count exceeds a certain level. An employee who is pregnant may be unable to report to work because of severe morning sickness.

Eligible employee means:

(1) An employee who has been employed for a total of at least 12 months by the employer on the date on which any FMLA leave is to commence, except that an employer need not consider any period of previous employment that occurred more than five years before the date of the most recent hiring of the employee, *unless:*

(i) The break in service is occasioned by the fulfillment of the employee's National Guard or Reserve military service obligation (the time served performing the military service must be also counted in determining whether the employee has been employed for at least 12 months by the employer, but this section does not provide any greater entitlement to the employee than would be available under the Uniformed Services Employment and Reemployment Rights Act (USERRA)); or

(ii) A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (*e.g.*, for purposes of the employee furthering his or her education or for childrearing purposes); and

(2) Who, on the date on which any FMLA leave is to commence, has been employed for at least 1,250 hours of service with such employer during the previous 12-month period; and

(3) Who is employed in any State of the United States, the District of Columbia or any Territories or possession of the United States.

(4) Excludes any Federal officer or employee covered under subchapter V of chapter 63 of title 5, United States Code.

(5) Excludes any employee of the United States House of Representatives or the United States Senate covered by the Congressional Accountability Act of 1995, 2 U.S.C. 1301.

(6) Excludes any employee who is employed at a worksite at which the employer employs fewer than 50 employees if the total number of employees employed by that employer within 75 miles of that worksite is also fewer than 50.

(7) Excludes any employee employed in any country other than the United States or any Territory or possession of the United States.

Employ means to suffer or permit to work.

Employee has the meaning given the same term as defined in section 3(e) of the Fair Labor Standards Act, 29 U.S.C. 203(e), as follows:

(1) The term ''employee'' means any individual employed by an employer;

(2) In the case of an individual employed by a public agency, ''employee'' means—

(i) Any individual employed by the Government of the United States—

(A) As a civilian in the military departments (as defined in section 102 of Title 5, United States Code),

(B) In any executive agency (as defined in section 105 of Title 5, United States Code), excluding any Federal officer or employee covered under subchapter V of chapter 63 of Title 5, United States Code,

(C) In any unit of the legislative or judicial branch of the Government which has positions in the competitive service, excluding any employee of the United States House of Representatives or the United States Senate who is covered by the Congressional Accountability Act of 1995,

(D) In a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces, or

(ii) Any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(iii) Any individual employed by a State, political subdivision of a State, or

an interstate governmental agency, other than such an individual—

(A) Who is not subject to the civil service laws of the State, political subdivision, or agency which employs the employee; and

(B) Who—

(*1*) Holds a public elective office of that State, political subdivision, or agency,

(*2*) Is selected by the holder of such an office to be a member of his personal staff,

(*3*) Is appointed by such an officeholder to serve on a policymaking level,

(*4*) Is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of the office of such officeholder, or

(*5*) Is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

Employee employed in an instructional capacity. See the definition of *Teacher* in this section.

Employer means any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year, and includes—

(1) Any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer;

(2) Any successor in interest of an employer; and

(3) Any public agency.

Employment benefits means all benefits provided or made available to employees by an employer, including group life insurance, health insurance, disability insurance, sick leave, annual leave, educational benefits, and pensions, regardless of whether such benefits are provided by a practice or written policy of an employer or through an ''employee benefit plan'' as defined in section 3(3) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(3). The term does not include non-employment related obligations paid by employees through voluntary deductions such as supplemental insurance coverage. (*See* § 825.209(a)).

FLSA means the Fair Labor Standards Act (29 U.S.C. 201 *et seq.*).

Group health plan means any plan of, or contributed to by, an employer (including a self-insured plan) to provide health care (directly or otherwise) to the employer's employees, former employees, or the families of such employees or former employees. For purposes of FMLA the term ''group health plan'' shall not include an insurance program providing health coverage under which employees purchase individual policies from insurers provided that:

(1) No contributions are made by the employer;

(2) Participation in the program is completely voluntary for employees;

(3) The sole functions of the employer with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees, to collect premiums through payroll deductions and to remit them to the insurer;

(4) The employer receives no consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deduction; and,

(5) The premium charged with respect to such coverage does not increase in the event the employment relationship terminates.

Health care provider means:

(1) The Act defines ''health care provider'' as:

(i) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or

(ii) Any other person determined by the Secretary to be capable of providing health care services.

(2) Others ''capable of providing health care services'' include only:

(i) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;

(ii) Nurse practitioners, nurse-midwives, clinical social workers and physician assistants who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;

(iii) Christian Science Practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.

(iv) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and

(v) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.

(3) The phrase ''authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions.

Incapable of self-care means that the individual requires active assistance or supervision to provide daily self-care in several of the ''activities of daily living'' (ADLs) or ''instrumental activities of daily living'' (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one's grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

Instructional employee: See the definition of *Teacher* in this section.

Intermittent leave means leave taken in separate periods of time due to a single illness or injury, rather than for one continuous period of time, and may include leave of periods from an hour or more to several weeks. Examples of intermittent leave would include leave taken on an occasional basis for medical appointments, or leave taken several days at a time spread over a period of six months, such as for chemotherapy.

Mental disability: See the definition of *Physical or mental disability* in this section.

Parent means a biological, adoptive, step or foster father or mother, or any other individual who stood in loco parentis to the employee when the employee was a son or daughter as defined below. This term does not include parents ''in law.''

Person means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons, and includes a public agency for purposes of this part.

Physical or mental disability means a physical or mental impairment that substantially limits one or more of the major life activities of an individual.

Regulations at 29 CFR part 1630.2(h), (i), and (j), issued by the Equal Employment Opportunity Commission under the Americans with Disabilities Act (ADA), 42 U.S.C. 12101 *et seq.*, define these terms.

Public agency means the government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State, or any interstate governmental agency. Under section 101(5)(B) of the Act, a public agency is considered to be a ''person'' engaged in commerce or in an industry or activity affecting commerce within the meaning of the Act.

Reduced leave schedule means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee.

Secretary means the Secretary of Labor or authorized representative.

Serious health condition means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not ''serious health conditions'' unless inpatient hospital care is required or unless complications develop. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met. Mental illness resulting from stress, or allergies may be serious health conditions, but only if all the conditions of § 825.113 are met.

Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and ''incapable of self-care because of a mental or physical disability'' at the time that FMLA leave is to commence.

Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

State means any State of the United States or the District of Columbia or any Territory or possession of the United States.

Teacher (or employee employed in an instructional capacity, or instructional employee) means an employee employed principally in an instructional capacity by an educational agency or school whose principal function is to teach and instruct students in a class, a small group, or an individual setting, and includes athletic coaches, driving instructors, and special education assistants such as signers for the hearing impaired. The term does not include teacher assistants or aides who do not have as their principal function actual teaching or instructing, nor auxiliary personnel such as counselors, psychologists, curriculum specialists, cafeteria workers, maintenance workers, bus drivers, or other primarily noninstructional employees.

Appendix A to Part 825—Index [Reserved]

BILLING CODE 4510–27–P

Appendix B to Part 825 - Certification of Health Care Provider (Form WH-380)

Appendix B

Certification of Health Care Provider
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

DRAFT FOR COMMENT—NOT APPROVED FOR USE

OMB Control Number: 1215-0181
Expires: XX/XX/XXX

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious health condition to submit a medical certification issued by the health care provider of the eligible employee or of the ill family member. Please complete Section I before giving this form to your employee. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. § 825.306-.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies. Employers must retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Employer name and contact:

Employee's job title: _____ Regular work schedule: _____

Essential job functions (if for employee's own serious health condition): _____

_____

Check if job description is attached: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition or that of a qualified member of your family. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

If you are seeking leave to care for a family member, name of family member:

Family Member's Name: _____
First Middle Last

Relationship of family member to you: _____

Describe care you will provide to your family member and estimate leave needed to provide care: _____

_____

If family member is your son or daughter, date of birth: _____

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 1 has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime", "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Page 4 provides space for additional information, should you need it.

Provider's Name and Business Address:_____

Type of practice: _____ Medical Specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

_____ _____

Signature of Health Care Provider Date

PART A: MEDICAL FACTS

1(a) Approximate date condition commenced: _____

(b) Probable duration of condition: _____

(c) Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility? ___No ___Yes. If so, dates of admission: _____

(d) Date(s) you treated the patient for condition: _____.

(e) Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

(f) Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)? ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment: _____

_____

_____

_____

2. Is the medical condition "pregnancy?" ___No ___Yes.

3. Describe any other relevant medical facts (e.g., symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment) related to the condition for which the employee seeks leave:

_____

_____

_____

_____

_____

CONTINUED ON NEXT PAGE

PART B: AMOUNT OF LEAVE NEEDED

4. Will the employee need to be absent from work for a single continuous period of time due to his/her own medical condition or the need to care for the family member, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of absence: _____.

5. Will the employee need to be absent from work periodically to attend his/her own or the family member's follow-up treatment appointments or because the employee only will be able to work part-time or on a reduced schedule because of the employee's own condition or need to care for the family member? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, including the dates of any scheduled appointments: _____

   _____

   How long will the employee need to be absent for each appointment, including any necessary recovery period: _____ hour(s) _____ day(s)

   Estimate the part-time or reduced work schedule the employee needs, if any: _____ hour(s) per day; _____ days per week from _____ through _____

6. Will the condition cause episodic flare-ups periodically preventing the employee from performing the job duties or the family member from participating in normal daily activities? _____No _____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups?

   _____ No _____ Yes. If so, explain _____

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (i.e., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours ___ day(s) per episode

PART C: ANSWER ONLY IF PATIENT IS THE EMPLOYEE

7(a) Based upon the brief description of the essential functions in Section I, or job description if attached, indicate whether the employee is unable to perform any of the functions of his/her job during the leave period stated in Part B: _____ No _____ Yes.

7(b) If so, identify the essential functions the employee is unable to perform: _____

_____

CONTINUED ON NEXT PAGE

PART D: ANSWER ONLY IF PATIENT IS THE EMPLOYEE'S FAMILY MEMBER

8(a) If the patient is a family member, indicate whether the employee is needed to participate in the on-going treatment, including the provision of physical or psychological care or assistance with basic personal safety or transportation needs, of the family member? ____No ____Yes

(b) Describe the patient's need for care: _____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Form WH-380 Rev. XX-XXXX

Appendix C to Part 825- Notice to Employees of Rights under FMLA (WH Publication 1420)

Appendix C

EMPLOYEE RIGHTS AND RESPONSIBILITIES

UNDER THE FAMILY AND MEDICAL LEAVE ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave during any 12-month period to eligible employees for certain family and medical reasons.

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work.

Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least one year, for 1,250 hours over the previous 12 months, and if at least 50 employees are employed by the employer within 75 miles.

Qualifying Reasons for Taking Leave

- For pregnancy, prenatal visits or child birth;
- To care for the employee's child after birth, or placement for adoption or foster care;
- To care for the employee's spouse, son or daughter, or parent, who has a serious health condition; or
- For a serious health condition that makes the employee unable to perform the employee's job.

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either (1) an overnight stay in a hospital, hospice or residential medical care facility, or (2) continuing treatment by a health care provider for a condition that also causes incapacity, meaning that it either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive days combined with medical treatment including at least two visits to a health care provider for treatment within a 30-day period, unless extenuating circumstances exist, or one visit and a regimen of continuing treatment, incapacity due to pregnancy, or incapacity due to a chronic condition. Other medical conditions may also meet the definition of continuing treatment.

Limitations on Leave

An employee does not need to use the annual 12-week leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary.

Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations.

Leave to be with a healthy child or for placement for adoption or foster care must conclude within 12 months of the birth or placement. An employer's consent is required to take such leave intermittently or on a reduced schedule basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. Use of paid leave is governed by the employer's normal paid leave policies.

Employee Obligations

Employees must provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's standard call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the expected start date and duration of the leave.

Employees also may be required to provide:

- a medical certification supporting the need for leave due to a serious health condition;
- second or third medical opinions (at the employer's expense) and periodic recertification;
- periodic reports regarding the employee's status and intent to return to work; and
- a fitness for duty report to return to work.

Employer Obligations

Covered employers must inform employees of their rights and responsibilities under the FMLA through the poster and in either an employee handbook or an annual distribution to employees.

Covered employers also must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide the reason for the ineligibility.

Covered employers must inform employees of any leave designated as FMLA-protected. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- Interfere with, restrain, or deny the exercise of any right provided under FMLA;
- Discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulations 29 C.F.R. § 825.300(a) may require additional disclosures.

DRAFT FOR COMMENT—NOT APPROVED FOR USE

For Additional Information:
(1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Employment Standards Administration | Wage and Hour Division

WHD Publication 1420 (Rev. XX-XXXX)

Appendix D to Part 825 - Eligibility Notice to Employees Under FMLA (Form WH-381)

Appendix D

Eligibility Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181

DRAFT FOR COMMENT—NOT APPROVED FOR USE

Expires: XX/XX/XXX

Instructions and use: Employers must provide employees with notice of their eligibility for FMLA protection. In general, to be eligible an employee must have worked for an employer for at least 12 months, have worked at least 1,250 hours in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides an easy method of providing employees with the written information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. An employee who is eligible for FMLA leave may need to provide additional information in order for the employer to determine whether the FMLA applies to the leave. (See Part B). A separate notice informs employees whether their specific leave request is determined to be FMLA-protected. Employers must retain a copy of this disclosure in their records for three years in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

[Part A]

TO: _____
Employee

FROM: _____
Employer Representative

DATE: _____

On _____, you informed us that you needed leave for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition; or

_____ You are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

You notified us that you need leave beginning on _____ for this reason.

You further notified us that you need:

_____ A single period of leave and your expected return to work date is _____; or

_____ Leave intermittently or on a reduced leave schedule. If your need for leave is due to planned medical treatment, you have indicated that you will need the following leave: _____. If your leave is for flare-ups, the expected frequency (times per week, month, or year) and duration (hours or days per occurrence) is _____.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because:

_____ You have not met the FMLA's 12-month length of service requirement. As of today's date, you have worked ___ months towards this requirement.

- _____ You have not met the FMLA's 1,250 hours worked requirement. As of today's date, you have worked _____ hours in the past 12-month period.
- _____ You do not work and/or report to a site with 50 or more employees within 75-miles.
- _____ You have exhausted your 12-week FMLA leave entitlement in the current 12-month period. Assuming the other eligibility requirements are met, you will once again be eligible for FMLA leave on _____.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the current 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (Employers must allow at least 15 calendar days from receipt of this notice. An exception to the timely submission requirement applies when it is not practicable under the particular circumstances for the employee to do so despite the diligent, good faith efforts.) If sufficient information is not provided in a timely manner, the FMLA protections attached to your leave may be denied.

____ Sufficient medical certification to establish that you or your family member has a serious health condition. A medical certification form that sets forth the information necessary from your health care provider to support your request ____**is**/____ **is not** enclosed.

____ Sufficient documentation to establish that the family member is a parent, spouse, or child

____ Other information needed: _____.

____ No additional information requested

CONTINUED ON NEXT PAGE

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick,** _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your 12 weeks of FMLA protection.

____ You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

____ Due to your status within the company, you are considered a "key employee" under the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your 12 week FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; or 2) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have ____ **sick,** ____**vacation**, and/or ___ **other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Any applicable conditions related to the substitution of paid leave are set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

_____

_____

_____

_____

_____

_____

_____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your 12-week leave entitlement. If you have any questions, please do not hesitate to contact

_____ at _____.

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-381 Revised XX/XXXX

Appendix E to Part 825- Designation Notice Under FMLA (Form WH-382)

Appendix E

Designation Notice
(Family and Medical Leave Act)

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

OMB Control Number: 1215-0181

DRAFT FOR COMMENT—NOT APPROVED FOR USE

Expires: XX/XX/XXX

Instructions and use: Employers must inform employees in writing of whether a Family and Medical Leave Act (FMLA) leave will be designated as counting against the 12-week entitlement and the number of hours, days, or weeks to be counted as FMLA leave. In addition, when an employee provides a medical certification that is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), -.301, and -.305(c), which must be provided within five business days of the employer receiving sufficient information to determine the leave is covered by the FMLA. Employers must retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

To: _____

Date: _____

We have reviewed your request for leave under the Family and Medical Leave Act (FMLA) and any supporting documentation that you have provided.

We received your most recent documents on _____, and decided:

Approved:

_____ To designate your leave as "FMLA leave;" consequently,

► We will charge _____ against your FMLA entitlement, provided there is no deviation from your
Number of hours, days, or weeks
anticipated leave schedule. The FMLA generally provides that an employee may take up to 12 weeks of unpaid job protected leave within a 12-month period. We will notify you of any changes to the time charged.

Or

► We will notify you at least once in every 30-day period during which you take FMLA leave of how much leave you have used. The FMLA provides that you must notify us promptly of a need for FMLA leave and that you must adhere to our internal notification requirements that would not otherwise violate the FMLA.

Or

► Within the past thirty days you have used _____ of your FMLA entitlement.
Number of hours, days, or weeks

Or

► _____ This leave will count against your FMLA entitlement.

And (check if applicable):

_____ We are requiring you to substitute or use paid leave during you FMLA leave.

_____ You have requested to use paid leave during your FMLA leave. The leave will count against your leave entitlement unless we have notified you to the contrary.

Additional information needed to determine that the FMLA definition of a "serious health condition" is met:

_____ The medical certification you have provided is not complete and sufficient to make a designation of whether, or not, the FMLA applies to your leave request. You must provide the following information no later than _____,
Provide at least seven calendar days
unless it is not practicable under the particular circumstances despite your diligent good faith efforts, or we may deny your FMLA leave.

_____
Specify information needed to make the certification complete and sufficient

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

Not approved:

_____ Not to designate your leave as FMLA leave; consequently, the FMLA does not apply to the absences for which you have requested leave.

PUBLIC BURDEN STATEMENT

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division,

U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Form WH-382 XX-XXXX

[FR Doc. E8–2062 Filed 2–8–08; 8:45 am]
BILLING CODE 4510–27–C